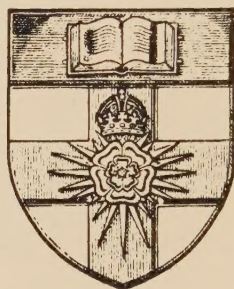


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unlimited, since the customers would be governments of countries all over the world, and so the covenant was reasonable and not wider than the protection of the company required.

**Notes.** Considered: *Underwood v. Barker*, [1899] 1 Ch. 300; *Haynes v. Doman*, [1899] 2 Ch. 13; *Lamson Pneumatic Tyre Co. v. Phillips* (1904), 91 L.T. 363. Applied: *Tivoli Manchester v. Colley* (1904), 52 W.R. 632. Considered: *Leng v. Andrews*, [1909] 1 Ch. 763; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506. Applied: *Morris v. Ryle* (1910), 103 L.T. 545; *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co.*, [1911-13] All E.R.Rep. 1120. Considered: *Mason v. Provident Clothing and Supply Co.*, [1911-13] All E.R.Rep. 400; *North Western Salt Co., Ltd. v. Electrolytic Alkali Co.*, [1914-15] All E.R.Rep. 752; *Eastes v. Russ*, [1914] 1 Ch. 468; *Millers v. Steedman* (1915), 84 L.J.K.B. 2057; *Morris v. Saxelby*, [1916-17] All E.R.Rep. 305; *Rodriguez v. Speyer Bros.*, [1918-19] All E.R.Rep. 884; *Hepworth Manufacturing Co. v. Ryott*, [1918-19] All E.R.Rep. 1019; *Attwood v. Lamont*, [1920] All E.R.Rep. 55; *British Concrete Co. v. Schelff*, [1921] 2 Ch. 563; *Palmolive Co. (of England) v. Freedman*, [1928] Ch. 264; *Empire Meat Co. v. Patrick*, [1939] 2 All E.R. 85; *Kores Manufacturing Co. v. Kolok Manufacturing Co.*, [1957] 3 All E.R. 158. Referred to: *Dubowski v. Goldstein*, [1896] 1 Q.B. 478; *Robinson v. Heuer* (1898), 67 L.J.Ch. 644; *Re Hollis' Hospital Trustees and Hague's Contract*, [1895-99] All E.R.Rep. 643; *Elliman v. Carrington* (1901), 84 L.T. 858; *Hooper and Ashby v. Willis* (1906), 94 L.T. 624; *Mouchell v. Cubitt* (1907), 24 R.P.C. 194; *Re Beard, Reversionary and General Securities Co. v. Hall, Re Beard, Beard v. Hall*, [1908] 1 Ch. 383; *Wilson v. Carnley*, [1908-10] All E.R.Rep. 120; *Bromley v. Smith*, [1908-10] All E.R.Rep. 384; *United Shoe Co. of Canada v. Brunet*, [1909] A.C. 330; *Stuart and Simpson v. Halstead* (1911), 55 Sol. Jo. 598; *Continental Tyre and Rubber (Great Britain) Co. v. Heath* (1913), 29 T.L.R. 308; *Goldsoil v. Goldman*, [1914] 2 Ch. 603; *Evans v. Heathcote*, [1917] 2 K.B. 336; *Horwood v. Millar's Timber and Trading Co.*, [1916-17] All E.R.Rep. 847; *Naylor, Benzon v. Krainische Industrie Gesellschaft* (1918), 87 L.J.K.B. 1066; *Whitmore v. King*, [1918-19] All E.R.Rep. 1063; *Ropeways v. Hoyle* (1919), 120 L.T. 538; *Denny's Trustee v. Denny and Warr*, [1919] 1 K.B. 583; *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104; *Dewes v. Fitch*, [1920] 2 Ch. 159; *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635; *English Hop Growers, Ltd. v. Dering*, [1928] All E.R.Rep. 396; *Gilford Motor Co., Ltd. v. Horne*, [1933] All E.R.Rep. 109; *Wyatt v. Kreglinger and Fernau*, [1933] All E.R.Rep. 349; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *Connors Bros. v. Connors*, [1940] 4 All E.R. 179; *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] 1 All E.R. 76; *Routh v. Jones*, [1947] 1 All E.R. 758; *Jenkins v. Reid*, [1948] 1 All E.R. 471; *Baylis v. Blackwell*, [1952] 1 All E.R. 74; *Kores Manufacturing Co. v. Kolok Manufacturing Co.*, [1958] 2 All E.R. 65.

As to contracts in restraint of trade, see 38 HALSBURY'S LAWS (3rd Edn.) 15 et seq.; and for cases see 43 DIGEST 19 et seq.

Cases referred to:

- (1) *Mitchel v. Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 180; 24 E.R. 347; 43 Digest 11, 59.
- (2) *Master, etc., of Gunmakers v. Fell* (1742), Willes, 384; 125 E.R. 1227; 43 Digest 37, 338.
- (3) *Horne v. Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, 181.
- (4) *Hinde v. Gray* (1840), 1 Man. & G. 195; 1 Scott, N.R. 123; 9 L.J.C.P. 253; 4 Jur. 392; 133 E.R. 302; 43 Digest 59, 610.
- (5) *Ward v. Byrne* (1839), 5 M. & W. 548; 9 L.J.Ex. 14; 3 J.P. 724; 3 Jur. 1175; 151 E.R. 232; 43 Digest 26, 183.



- A** (6) *Whittaker v. Howe* (1841), 3 Beav. 383; 49 E.R. 150; 43 Digest 68, 722.  
 (7) *Davis v. Mason* (1793), 5 Term Rep. 118; 101 E.R. 69; 43 Digest 64, 661.  
 (8) *Leather Cloth Co. v. Lonsont* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 18 W.R. 572; 43 Digest 23, 147.  
 (9) *Rousillon v. Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 43 Digest 21, 138.
- B** (10) *Bunn v. Guy* (1803), 4 East, 190; 1 Smith, K.B. 1; 102 E.R. 803; 43 Digest 68, 721.  
 (11) *Nicholls v. Stretton* (1847), 10 Q.B. 346; 11 Jur. 1008; 116 E.R. 134; 43 Digest 69, 725.  
 (12) *Colgate v. Bacheler* (1602), Cro. Eliz. 872; 78 E.R. 1097; sub nom. *Claygate v. Batchelor*, Owen, 143; 43 Digest 65, 677.
- C** (13) *Homer v. Ashford* (1825), 3 Bing. 322; 11 Moore, C.P. 91; 4 L.J.O.S.C.P. 62; 130 E.R. 537; 43 Digest 31, 250.  
 (14) *Tallis v. Tallis* (1853), 1 E. & B. 391; 22 L.J.Q.B. 185; 21 L.T.O.S. 43; 17 Jur. 1149; 1 W.R. 114; 118 E.R. 482; 43 Digest 30, 240.  
 (15) *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; 1 Nev. & P.K.B. 796; 2 Har. & W. 464; 6 L.J.Ex 266; 1 J.P. 215; 112 E.R. 167, Ex. Ch.; 43 Digest 36, 326.
- D** (16) *Rannie v. Irvine* (1844), 7 Man. & G. 969; 8 Scott, N.R. 674; 14 L.J.C.P. 10; 4 L.T.O.S. 133 a; 8 Jur. 1051; 135 E.R. 393; 43 Digest 36, 321.

Also referred to in argument:

- Davies v. Davies* (1887), 36 Ch.D. 359; 56 L.J.Ch. 962; 58 L.T. 209; 36 W.R. 86; 3 T.L.R. 839, C.A.; 43 Digest 41, 406.
- E** *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 39 W.R. 289; 7 T.L.R. 238, C.A.; 43 Digest 62, 641.  
*Gravelly v. Barnard* (1874), L.R. 18 Eq. 518; 43 L.J.Ch. 659; 30 L.T. 863; 39 J.P. 20; 22 W.R. 891; 43 Digest 29, 226.  
*Evanturel v. Evanturel* (1874), L.R. 6 P.C. 1; 43 L.J.P.C. 58; 31 L.T. 105; 23 W.R. 32, P.C.; 12 Digest (Repl.) 270, 2073.

**F** **Appeal** from a decision of the Court of Appeal (LINDLEY, BOWEN and A. L. SMITH, L.JJ.), reported [1893] 1 Ch. 630, reversing a decision of ROMER, J., in an action brought by the respondent company against the appellant claiming an injunction to restrain him from breaking a covenant entered into by him in a contract between the parties, specific performance of the covenant, and damages. The appellant **G** contended that the covenant was void as being in restraint of trade and against public policy, oppressive, or going beyond what was reasonably necessary for the protection of the respondent company.

The appellant in person.

*Sir Richard Webster, Q.C.*, and *W. F. Hamilton* for the company.

Their Lordships took time for consideration.

**H** July 31, 1894. The following opinions were read.

**LORD HERSCHELL, L.C.**—The question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade. The covenant in question was contained in an agreement of Sept. 12, 1888, and was in these terms:

**I** “The said Thorsten Nordenfelt shall not during the term of twenty-five years from the date of the incorporation of the company [July 17, 1888], if the company shall so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings, or carriages, gunpowder, explosives, or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder, or to subaqueous

or submarine boats, or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company, so long as such other company taking a transfer thereof shall continue to carry on the same."

The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2,000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time that the agreement was entered into. The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, among other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On Mar. 5, 1886, an agreement was made between the appellant and the Nordenfelt Gun and Ammunition Co., by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt company should continue to carry on business

"not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price was paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Guns and Ammunition Co., Ltd., and the Maxim Gun Co., Ltd., and for the transfer of their businesses and assets to a new company, to be called the Maxim Nordenfelt Guns and Ammunition Co., Ltd. By an agreement for the amalgamation of the two companies, dated July 3, 1888, and made between the Maxim Gun company, the Nordenfelt company, and P. Thane, on behalf of the new company, the Nordenfelt company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of Sept. 12, 1888. The respondent company was incorporated on July 17, 1888, and on Aug. 8 the agreement of July 3 was adopted by the company.

It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of July 3, but also

"to acquire, undertake, and carry on as successors to the Maxim Gun Co. and the Nordenfelt Guns and Ammunition Co., the goodwill of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the goodwill of the appellant's business, and was designed for the protection of the goodwill so sold, and he contended that this was an error, inasmuch as there was no sale by him of the goodwill on that occasion, he having already parted with it to the Nordenfelt company, the later sale being by that company and not by him.



A I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt company, the goodwill was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it, therefore, necessarily ceased when the Nordenfelt Guns and Ammunition Co. and the Maxim Co. were absorbed by the new company.

B But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company, the object was, as I have shown, stated to the world to be

C the acquisition of the goodwill of the Nordenfelt company. In view of these facts, I think that the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is

D to say, unlimited in respect of area, and argued that it was, therefore, void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported. In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade, and those where the restraint was only

E partial. The distinction was recognised and given effect to by PARKER, C.J., in his celebrated judgment in *Mitchel v. Reynolds* (1). That was a particular restraint, and the covenant was held good, the Chief Justice saying (1 P.Wms. at p. 182):

"Wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained. But with this constant diversity, namely,

F where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by."

At a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or, secondly, particular, as to places, or persons,

G he formulates with regard to the former, the following proposition (*ibid.* at p. 185):

"General restraints are all void, whether by bond, covenant, or promise, etc., with or without consideration, and whether it be of the party's own trade or not."

In *Master, etc., of Gunmakers v. Fell* (2) (Willes at p. 388), WILLES, C.J., said

H the general rule was

"that all restraints of trade which the law so much favours, if nothing more appear, are bad . . . but to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained."

I As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad. In *Horner v. Graves* (3), TINDAL, C.J., said (7 Bing. at p. 741):

"The law upon this subject [i.e. restraint of trade] has been laid down with so much authority and precision by PARKER, C.J., in giving the judgment of the Court of B.R. [King's Bench] in the case of *Mitchel v. Reynolds* (1), which has been the leading case on the subject from that time to the present, that

little more remains than to apply the principle of that case to the present. Now the rule laid down by the court in that case is, 'that voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration, but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'

After stating that the case then before the court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one. It is true that in a later part of his judgment the following passage occurs (*ibid.* at p. 743):

"In the case above referred to, PARKER, C.J., says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case."

But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of TINDAL, C.J., that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by PARKER, C.J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner.

I am confirmed in this view of TINDAL, C.J.'s opinion by his judgment in the subsequent case of *Hinde v. Gray* (4). In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach, and judgment was given for the defendant, TINDAL, C.J., saying that it was "assigned on a covenant which according to a case of *Ward v. Byrne* (5) was void in law." This is, to my mind, only intelligible if *Ward v. Byrne* (5), which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void. Unless it were so, I do not see how it could be regarded as determining that the covenant in question in *Hinde v. Gray* (4) was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the court should not be regarded as governed by *Ward v. Byrne* (5); but TINDAL, C.J., did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde v. Gray* (4), the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward v. Byrne* (5), except to say that, although the learned judges in that case did express an opinion that the covenant exceeded what

A was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made unsuccessfully to maintain that a covenant otherwise general might be regarded as a particular restraint if limited in point of time—a contention for which some colour was afforded by the language used in earlier cases. The views which

B I have expressed appear to me to have been entertained by that very learned lawyer Mr. JOHN WILLIAM SMITH, as shown by his notes to *Mitchel v. Reynolds* (1) (1 Smith, L.C. (9th Edn.) 430). He lays down the law thus :

C “In order, therefore, that a contract in restraint of trade may be valid at law the restraint must be, first, partial, secondly, upon an adequate or, as the rule now seems to be, not on a mere colourable consideration; and there is a third requisite, that it should be reasonable.”

This exposition of the law has further the very weighty sanction of WILLES, J., and KEATING, J., who, after the death of Mr. J. W. SMITH, edited the notes to his collection of leading cases.

D In the year after the decision of *Hinde v. Gray* (4), *Whittaker v. Howe* (6) came before LORD LANGDALE, M.R. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London where he had previously carried on business. On an application for an interlocutory injunction it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was of course clear that

E a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour in the eyes of the court. But the question was whether so extensive a covenant as that entered into could be supported. *Mitchel v. Reynolds* (1) was cited in argument; but neither *Ward v. Byrne* (5) nor *Hinde v. Gray* (4) appear to have been brought to the notice of the court. LORD LANGDALE expressed himself thus (*Whittaker v. Howe* (6) (3

F Beav. at p. 394) :

“Agreeing with the Court of Common Pleas, that in such cases ‘no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive’; having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as LORD KENYON said in *Davis v. Mason* (7) (5 Term Rep. at p. 120), ‘I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.’ ”

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The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion for he added :

H “In the progress of the case it may become necessary to consider further the points which have been raised, but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is to say the least so doubtful, that he cannot be permitted to take the law into his own hands.”

I It is not necessary to consider whether the decision can be supported, though it was regarded by WILLES, J., and KEATING, J., as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde v. Gray* (4) should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities to which I have already referred. There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only mention two of these in which the existence of the rule I have been considering



has been questioned. In *Leather Cloth Co. v. Lorsche* (8), JAMES, V.-C., said (L.R. 9 Eq. at pp. 353, 354):

"I do not read the cases as having laid down that un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

Again, in *Rousillon v. Rousillon* (9), FRY, J., thus expressed himself (14 Ch.D. at p. 369):

"I have, therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule, and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid. The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed condition of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the cities in few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee. When LORD MACCLESFIELD [formerly PARKER, C.J.] in *Mitchel v. Reynolds* (1) (1 P.Wms. at p. 182) emphasised the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms (ibid. at pp. 190, 191):

"Thirdly, because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action: see PUFFENDORF, lib. 5, c. 2, s. 3; 21 H. 7, 20."

There are other passages in the judgment where this view is enforced. There is no doubt that, with regard to some professions and commercial occupations, it is as true today as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered

A circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases. It appears to me that a study of LORD MACCLESFIELD'S judgment in *Mitchel v. Reynolds* (1) will show that, if the conditions which prevail at the present day had existed in his time, he would not have laid down a hard and fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact. Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view.

When once it is admitted that, whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law. I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling. These were cases of partial restraint. But it seems to me that, if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable. I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner v. Graves* (3) in considering whether the agreement was reasonable. TINDAL, C.J., said (7 Bing. at p. 743):

"We do not see how a better test could be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public; whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable."

The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable. I must, however, guard myself against being supposed to lay down that, if this can be shown, the covenant will in all cases be held to be valid. It may be, as pointed out by BOWEN, L.J., that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found among the governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another. So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to



concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that, in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that, if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant. When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees. I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

**LORD WATSON.**—The order appealed from directs that, for twenty-five years from July 17, 1888, the appellant shall, if and so long as the respondent company or any company taking a transfer of its business shall continue to carry on business during that period, be restrained from engaging,

“either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder, explosives, or ammunition (except explosives other than gunpowder) or subaqueous boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper.”

The prohibition is not confined to English, or even to British soil; it extends to every part of the surface of the globe available for the purpose of carrying on the process of manufacture. The order does nothing more than enforce, according to its terms, an undertaking given to the respondent company by the appellant, upon the occasion of their taking over in the year 1888, from the Nordenfelt company, the extensive business which had been established by the appellant, and had been transferred by him to the latter company in March, 1886. At the Bar of the House, the appellant, for the first time, pleaded that the undertaking given by him to the respondent company was without adequate consideration, and could not warrant the injunction of which he complains. I have all along been satisfied, for the reasons explained by the Lord Chancellor, which I shall not repeat, that the plea is groundless, and that, for the purposes of this appeal, the appellant stands in the same position as if his undertaking had been given to the Nordenfelt company, in consideration of the full price which was paid to him by that company for the stock and goodwill of his business.

The main question discussed in the courts below, and the only question which, in my opinion, it is necessary for your Lordships to decide, is raised by the appellant's contention that the personal restraint to which he has agreed to submit, being unlimited in space, is contrary to the recognised policy of English law, and is, therefore, incapable of being enforced by an English court. The decisions at common law and in equity, which bear more or less directly upon the question thus arising, are very numerous. They have been reviewed by the learned judges of the Court of Appeal, who all arrived at the same conclusion by independent lines of reasoning, which are occasionally divergent. Some of the more important of those cases have been noticed by the Lord Chancellor, and will be criticised by my noble and learned friend, LORD MACNAGHTEN. I have, as in duty bound, read and considered all the cases cited, but I do not propose to refer to them in detail. I shall simply endeavour to indicate the considerations which have led me to concur with your Lordships in affirming the order of the Court of Appeal.

With regard to the facts of this case, I have only to observe that they are, from a legal point of view, exceptional. Their parallel is not to be found in any of the reported cases; but they are such as may naturally be expected to occur, in the

- A** altered and daily altering conditions under which trade is conducted in modern times. The manufacturing department of the business, which the appellant sold in 1886 was, and still is, carried on at extensive works in England and in Sweden. The business might be said to be local in that sense, but in that sense only. The area which it supplies was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily
- B** a limited class, but they are to be found all over the world. They include, or strictly speaking, consist of governments and potentates, great and small, civilised and savage, who, for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition. It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action, which are injurious to the interests of the State
- C** or community. Nor is it doubtful that courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.

- I think it is now generally conceded, that it is to the advantage of the public to allow a trader, who has established a lucrative business, to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and undefeasible right to start a rival concern the day after he sold.
- E** Accordingly, it has been determined judicially that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable, and are limited in respect of space, the obligation is not obnoxious to public policy, and is, therefore, capable of being enforced. Whether, when the circumstances of the case are such that a restraint unlimited in space becomes
- F** reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold, a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal.

- The earlier decisions which were chiefly, if not exclusively, by the courts of common law contain abundant dicta, which, if literally followed, would sustain
- G** the plea upon which the appellant relies. These dicta broadly state the rule to be that a general restraint of trade, or in other words a restraint unlimited as to space, is void, because it is contrary to the commercial policy of England. The same proposition is frequently to be found in the later common law cases. To me it seems very natural that the law should have been laid down in these broad terms. The rule of policy, as originally understood and administered, struck at all
- H** restraints, whether partial or general. It was relaxed, by these decisions, in the case of partial restrictions which were held to be reasonable. I feel that, had I occupied the seat of the learned judges who pronounced them, I should probably have used the same language which they employed with reference to unlimited restraints. They never imagined that any business should attain such wide dimensions that it could not be reasonably protected from the invasion of the seller,
- I** except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule might have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case.

A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country, in relation to and for promoting the interest of its commerce, must, as time advances, and as its commerce thrives,

undergo change and development from various causes which are altogether independent of the action of its courts. In England at least it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function when a case like the present is brought before them is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community. A  
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No one of the noble and learned lords before whom this appeal was heard has had the least difficulty in holding that the injunction granted was reasonably necessary in order to protect the respondent company's business from the aggressive acts threatened and commenced by the appellant. Nor, so far as I understand, have noble and learned Lords had any hesitation in coming to the conclusion, with the learned judges of the Court of Appeal, that there is no existing rule of public policy which can be effectively pleaded in bar of the injunction. For my own part I am very clearly of opinion that no violence is done to the canon laid down by the common law courts in affirming that a restraint which is absolutely necessary in order to protect a transaction which the law permits in the interest of the public ought to be regarded as reasonable, and cannot in deference to political ideas which are now obsolete, be regarded as in contravention of public policy. Were it necessary I should be prepared to affirm that, in the year 1888 there was not, and there does not now exist, any imperial rule of policy which requires that a restraint, having that effect only, shall be treated as a nullity because it is unlimited in space in circumstances such as occur in the present case. I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether, at any period of time, an English court would have allowed a foreigner to break his contract with an English subject in order to foster such competition. C  
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When the series of cases from the earliest to the present time are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade, on the other. In my opinion, it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the courts. I do not think that between the courts of common law and equity there has been much, if any, real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law courts. I purposely say some of those dicta, because I find in the opinions of many common law judges of the highest eminence, a clear and liberal recognition of the wider views of policy, which I suspect have influenced your Lordships in the decision of this appeal. F  
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The lords justices were agreed, and I understand that your Lordships are also agreed, as to the result of this case. A controversy has arisen as to the principle upon which that result ought to be reached. To my mind, it is not a matter of practical importance whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints. I have no desire to interfere with anybody's freedom of choice between these alternatives. I am content to state that, in my opinion, the judgment which your Lordships are about to pronounce goes no farther than to adopt to new circumstances an old and sound exception to the general rule. I

**LORD ASHBOURNE.**—I concur in the judgment moved by the Lord Chancellor. The sole question is whether the covenant referred to is void, or whether it is



**A** capable of being enforced against the appellant. I think it is quite clear that the covenant must be taken as entered into in connection with the sale of the goodwill of the appellant's business, and that it was entered into with the plain and bona fide object of protecting that business.

The appellant has argued that he is not bound by the covenant, and that it is void, as being opposed to public policy, and, being general, unrestricted as to area.

**B** The cases that have been referred to are interesting and important as showing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy,

**C** rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas, or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live. The appellant practically seeks to ignore the altered conditions of today, and to rely upon a rigid application

**D** of what he conceives to be the meaning of some decisions given in other generations, and this without taking note of the facts of the cases, or of the conditions of the time when they occurred. His argument practically is, that his covenant is in general restraint of trade, and that, if it be so, regardless of whether it is reasonable, whether it only affords a fair protection to his covenantees, it must be held to be void. In the early times all agreements in restraint of trade were dis-

**E** countenanced; but by degrees, as the exigencies of an advancing civilisation demanded, this was found to be too rigid, and our judges considered in each case what was reasonable and necessary to afford fair protection.

This is apparent in the important judgment of LORD MACCLESFIELD [then PARKER, C.J.] in *Mitchel v. Reynolds* (1). That was the case of a partial restraint of trade, and the judgment referred to the great distinction between a covenant in general

**F** restraint of trade and such a covenant as he was then dealing with. According to the then state of English life it would be hard to conceive that a covenant in general restraint of trade could ever be reasonable, and no imagination could then conceive that it could ever be needed for the fair protection of anyone. It is easy to understand how a distinction for convenience came to be thus expressly noted between general and partial restraints of trade. TINDAL, C.J., in *Horner v. Graves* (3), points out in reference to this judgment of LORD MACCLESFIELD (7 Bing. at p. 743):

"PARKER, C.J., says 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

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Reference to this judgment of LORD MACCLESFIELD, and to this distinction between covenants in general and partial restraint of trade, is found naturally in numerous cases. It appeared to afford a convenient nomenclature, and to be probably suited for some cases, but I respectfully concur with TINDAL, C.J., in the words already

**I** quoted, that the covenants were not

"limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

I do not know that there is a single reported case whose facts are clearly known, where a covenant in general restraint of trade clearly reasonable in itself, and only affording a fair protection to the parties, has been held to be void. One can readily see that such covenants might be extravagant and unnecessary, quite unreasonable, and not at all required for fair protection, and then the fact that they were general



and not partial would be a distinction entitled to great weight. Thus I can well understand the existence of the distinction being kept alive and noted in so many cases, though this would not at all imply or require that the reasonableness of a covenant and the fact that it only afforded fair protection should ever be put aside or ignored. In former days the arguments used showed how different were the circumstances of those times. Discussions are to be found as to ten-mile limits, and fifty miles, and as to the distances of one English town from another—then considerable topics; but now often trivial having regard to present means of locomotion. A  
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The cases show a great variety of circumstances—different professions and trades—cases of apprenticeship, and sales of goodwill. Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade requiring distinct treatment, and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times, and must advance and develop with the growth of our national life and institutions. Whether there ever was an effective and acknowledged rule, requiring all covenants in restraint of trade to be divided into two broad categories of general or partial restraint with the test of reasonableness openly and expressly applied to partial restraints, while it was ostensibly denied to general restraints though in reality applied under the guise of an exception whenever the exigencies of life and business required it; or whether, assuming the rule to have been once known and recognised, it can now be accepted as applicable to the conditions of our present life; or whether all restraints upon trade have been always really governed by the one test: What is a fair protection and what is reasonable?, are inquiries of interest on which legal minds may differ. I do not regard the distinction as of any practical importance, because as in the present case the inquiry as to the validity of all covenants in respect of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees. There may be differences of opinion as to the history of covenants in restraint of trade, as to distinctions from time to time taken in nomenclature; but I believe in the result there is no real difference of opinion, and that all your Lordships hold the covenant in the present case to be good and valid for reasons which do not very seriously differ. C  
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I do not pursue the controversy suggested by BOWEN, L.J., as to the judgments of LORD LANGDALE, JAMES, V.-C., and SIR EDWARD FRY, in the three cases so often referred to, but, as will appear from what I have already said, I should find much difficulty in accepting all his criticisms, much as I respect his ability and research. LINDLEY, L.J., clearly in his judgment recognised the tendency of modern decisions, and said expressly that the opinion G

“that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee [was] the doctrine to which the modern authorities have been gradually approximating.” H

Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable, and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of. I concur in the suggested judgment. I

**LORD MACNAGHTEN.**—The appellant, Thorsten Nordenfelt, a Swedish gentleman, a person of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the manufacture of

**A** quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company, which was formed for the purpose of purchasing it. At the same time, and as part of the same transaction, he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have been made at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which, of course, would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement.

**D** In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case. The stipulation was that Mr. Nordenfelt should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business,

**E** "engage, except on behalf of the company, either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings, or carriages, gun-powder, explosives, or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company."

**F** A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats, or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. The latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant.

**G** Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade—unlimited in space. And the only point which your Lordships have to decide is whether that part of the covenant which the appellant has broken is valid. For **H** it cannot be disputed that the covenant is severable, and that part may be good though part may be void. The learned judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view. LINDLEY, L.J., expressed his opinion that the doctrine

**I** "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee [was] the doctrine to which the modern authorities have been gradually approximating."

But he could not, he said, "regard it as finally settled, nor indeed as quite correct." He thought it ignored

"the law which forbids monopolies, and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can."

In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was "reasonably necessary for the protection of the interests of the covenantee." BOWEN, L.J., considered that it was the established common law doctrine—a rule to be gathered from the books "with perfect ease," though certain equity judges had ignored the rule, or misunderstood the law—that in the case of contracts in general restraint of trade the courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as "those by which a person restrains himself from all exercise of his trade in any part of England." He added:

"Scores of cases have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges."

But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions, and, treating the present case as an exception, he, too, thought the agreement limited to the first part of the covenant reasonable in itself, and not contrary to public policy. A. L. SMITH, L.J., came to the same conclusion, thinking that there was no hard and fast rule "that every covenant in restraint of trade is ipso facto void if it is unlimited as to space," and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades or branches of trade in which the appellant had been engaged were reserved to him by the proviso attached to the covenant.

No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is: What is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories—partial restraints, and general restraints—that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions, and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints. There is a distinction certainly; but whether there is a substantial difference, it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded.

Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal has arrived if it had not been for certain passages in the very able and elaborate judgment of BOWEN, L.J., from which I respectfully dissent. Having laid down what he considered to be the common law rule, BOWEN, L.J., proceeds to observe that

"the first cloud upon the clear sky of the common law narrative comes in the equity decision of LORD LANGDALE, M.R., in *Whittaker v. Howe* (6), in 1841,"

a decision to which he applies the word "inexplicable." BOWEN, L.J., says:

"Everything appears clear in the case except the judgment of the court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction; LORD LANGDALE, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of TINDAL, C.J., in *Horner v. Graves* (3)."



**A** After pointing out that *Horner v. Graves* (3) was a case of limited restraint, BOWEN, L.J., adds:

"LORD LANGDALE thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category."

**B** Dealing with the judgment of JAMES, V.-C., in *Leather Cloth Co. v. Lorrison* (8), BOWEN, L.J., says that his "language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine." He observes:

"The Vice-Chancellor's expressions are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of LORD LANGDALE in *Whittaker v. Howe* (6)."

**C** Observations of a similar kind are made in reference to the judgment of SIR EDWARD FRY, in *Rousillon v. Rousillon* (9).

This appears to me to be a very grave censure—graver, I think, than BOWEN, L.J., could have supposed or intended—because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the court was to give effect to common law rights. If the covenant was void at common law, a court of equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful it would have been the duty of the court, at least in the time of LORD LANGDALE, to leave the parties to their common law rights, or to take the opinion of a court of common law, as was done in *Bunn v. Guy* (10), and by LORD LANGDALE himself in *Nicholls v. Stretton* (11). Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step.

**E** I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to BOWEN, L.J.'s opinion, that I cannot help thinking that LORD LANGDALE, and JAMES, V.-C., and SIR EDWARD FRY, have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times. In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and, therefore, void: *Colgate v. Bachelier* (12). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of everyday occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints extending throughout the kingdom must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any interest or essential distinction between the two cases. LORD MACCLESFIELD, in *Mitchel v. Reynolds* (1), said (1 P.Wms. at p. 182):

"Where the restraint is general not to exercise a trade throughout the kingdom [the restraint] must be void, being of no benefit to either party, and very oppressive, as shall be shown by and by."

**I** Later on he gives his reason, when he says (*ibid.* at p. 191):

"What does it signify to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other."

BEST, C.J., in *Homer v. Ashford* (13), says:

"Any deed by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the Kingdom, would be



void, because no good reason could be imagined for any person's imposing such a restraint on himself." A

The true view at the present time, I think, is this. The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. B C

But it is not to be supposed that that result was reached all at once. The law has changed much, even since *Mitchel v. Reynolds* (1). It has become simpler and broader too. It was laid down in *Mitchel v. Reynolds* (1) that the court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the court, and it was held to be sufficient if there was a legal consideration of value; though, of course, the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable: *Davis v. Mason* (7). It was said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half a mile. But LORD KENYON, in his judgment, observed that he did not see that the limits in question were necessarily unreasonable. "Nor do I know," he added, "how to draw the line." D E

The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to show that the restriction sought to be enforced was neither excessive nor contrary to public policy. The better opinion is that the court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed," if the proposed restraint were upheld: *Tallis v. Tallis* (14). To a certain extent different considerations must apply in cases of apprenticeship, and cases of that sort, on the one hand, and cases of a sale of a business or dissolution of partnership, on the other. A man is bound an apprentice because he wishes to learn a trade, and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant, or an employer and a person seeking employment. F G H

When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large, and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged, and that trade should be free, but a fetter is placed on trade and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general, "the whole of the public is restrained," a phrase not, I think, particularly accurate, or perhaps, particularly intelligible. It has been said that I

**A** when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area.

That is, perhaps, a just observation in a case of apprenticeship, and cases of that sort. But it is, I think, rather a fanciful way of looking at the matter in the case of a sale of goodwill. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business, meaning to trade no more? Is it likely that he will begin the struggle of life again, working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Nowadays, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When LORD KENYON was pressed with an argument as to the injury to the public in Thetford that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. "Every other person," he added, "is at liberty to practise as a surgeon in this town": *Davis v. Mason* (7).

**B** I cannot help thinking that there is a good deal of common sense in the way in which LORD CAMPBELL looked at this question. A retired partner in the canvassing trade of a publishing business being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. LORD CAMPBELL said (*Tallis v. Tallis* (14), 1 E. & B. at p. 413):

"It is clear there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff."

**F** That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to circumstances. But LORD CAMPBELL's observation seems to bring into contrast two principles which have to be adjusted in all these cases; freedom of trade, and freedom of contract. SIR EDWARD FRY's view was that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. BOWEN, L.J., cites this passage, and meets it with the following question:

**G** "Is it not a truer view that the courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?"

That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel v. Reynolds* (1) how many cases have there been in which a general prohibition has come before a court of common law for discussion or decision? So far as I can discover there are two, and two only—*Ward v. Byrne* (5) and *Hinde v. Gray* (4). In *Hinde v. Gray* (4) the point was disposed of during the argument, on the presiding judge observing that the particular covenant under consideration had been held invalid in *Ward v. Byrne* (5). That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though, perhaps, not quite so absurd, as the covenant in *Ward v. Byrne* (5). *Hinde v. Gray* (4), therefore, does not help one much.

**I** There remains *Ward v. Byrne* (5). In that case an unlimited restraint was imposed on a coal merchant's clerk; when once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant, or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant—an absurd and unreasonable stipulation if ever there was one. The only wonder is that when the case first came before the court on an argument as

to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the court abstain from entering on the consideration of the particular circumstances? Why, the main if not the only ground of objection was the unreasonableness of such a restriction in the particular circumstances of the case. LORD ABINGER, C.B., observes (5 M. & W. at p. 560):

"This restriction extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation which the defendant undertakes by his bond is, that he shall neither be nor serve a coal merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require that it is an unreasonable restriction: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade, and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands."

Nothing can be plainer than the view of the Chief Baron: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of PARKE, B., is, I think, substantially to the same effect, but it is so important that I shall reserve it for separate consideration presently. GURNEY, B., followed the same line of argument. He asks (*ibid.* at p. 563):

"What is there in the trade of a coal merchant in London, whose interest could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York?"

All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints.

There is no higher authority upon this subject in modern times than TINDAL, C.J. He had more to do with moulding the law on this head, and bringing it into harmony with common sense than all the judges since LORD MACCLESFIELD's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any court in England or America during the last sixty years, in which some passage is not cited from some judgment of TINDAL, C.J. In *Horner v. Graves* (3), TINDAL, C.J., delivered the considered judgment of the court. In the course of it he had occasion to refer to the passage in *Mitchel v. Reynolds* (1), which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints. He observes (7 Bing. at p. 748):

"PARKER, C.J., says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at least what is a reasonable restraint with reference to the particular cases."

It is quite true that *Horner v. Graves* (3) was a case of partial restraint; but here we have TINDAL, C.J., dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is: What is a reasonable restraint with reference to the particular case.

I do not find that this passage has ever been questioned, nor is there in the books so far as I can discover any authority conflicting with it, except the judgment of



- A** BOWEN, L.J., in the present case. It may, perhaps, be objected that passages are to be found in the judgments of TINDAL, C.J., as well as in the judgment of other judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that TINDAL, C.J., thought general restraints bad, not because there was an arbitrary law to that effect
- B** —a hard and fast rule which judges had learned by rote, and the origin of which it was forbidden to explore, but because a general restraint was an example, a typical example if you will, of an unreasonable contract. It does not seem to me to affect the question in the very least how often the dictum may be found repeated, if, on the one hand, it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had
- C** become a rule which was neither to be questioned nor explained. It is merely a dictum after all, because there is no reported case, except, perhaps, *Ward v. Byrne* (5), in which it could have had any bearing upon the decision. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science, with their practical results, might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate develop-
- D** ment—it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule.

I would now turn to the judgment of PARKE, B., in *Ward v. Byrne* (5), which was decided in 1839, eight years after the decision in *Horner v. Graves* (3). The learned judge begins by stating the circumstances of the case, and the leading principle

**E** laid down in *Mitchel v. Reynolds* (1), that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of TINDAL, C.J., in a case of limited restraint; the very thing for which LORD LANGDALE is so much blamed. He could not, he said, express the rule more clearly than it had been done by TINDAL, C.J., in *Hitchcock v. Coker* (15), where he says:

- F** “We agree in the general principle adopted by the Court of Queen’s Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with which the contract is made can possibly require such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.”

Oddly enough, that is a reproduction of the very passage which LORD LANGDALE selected as his guide; only he took it from *Horner v. Graves* (3) directly, while

**G** PARKE, B., took it from the judgment on appeal in *Hitchcock v. Coker* (15). There it is attributed to LORD DENMAN, who does no more than quote the passage which LORD LANGDALE cites from *Horner v. Graves* (3). Then PARKE, B., observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general restriction limited only as to time. He

**H** might, I think, have said with equal truth, that there was no case since *Mitchel v. Reynolds* (1), in which the question had come before the court for consideration. In conclusion, he says (5 M. & W. at pp. 562, 563):

“This case falls within the rule laid down by TINDAL, C.J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require.

- I** On that ground I think the judgment ought to be arrested.”

What did PARKE, B., mean there by the rule laid down by TINDAL, C.J.? There is no rule to be found laid down by TINDAL, C.J., in those words or to that effect, except in the passage I have cited from *Horner v. Graves* (3). PARKE, B., may have been referring to *Horner v. Graves* (3), or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible



if PARKE, B., thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint. A

With regard to LORD LANGDALE's judgment in *Whittaker v. Howe* (6), I have some difficulty in understanding what the objection to it is, even on the view which BOWEN, L.J., takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited seems to indicate, that a restraint limited to England is to be considered as a general restraint nowadays, when England is only part of the United Kingdom as much as it was when the three kingdoms were separate. I cannot think that *Whittaker v. Howe* (6) requires much explanation. There is a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk." That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order to hold the business together his name was kept in the firm, and he remained in the office drawing a handsome salary. Then there was a quarrel, and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price; that he kept in his pocket. B  
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LORD LANGDALE evidently thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act. Would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. LORD LANGDALE thought on the evidence before him that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of restriction unreasonable. I venture to think that the decision in *Whittaker v. Howe* (6) was right. Further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of TINDAL, C.J., and PARKE, B. Nor can I, with all deference to PATTESON, J., understand how anybody could suppose that *Whittaker v. Howe* (6), in which the restraint was held to be reasonable, conflicts with *Ward v. Byrne* (5), where the restraint was plainly unreasonable and held to be so. E  
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In the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. It enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is the British public, that a person is prevented from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has "committed industrial suicide," and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. This seems to me to be H  
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very far fetched. Mr. Nordenfelt received over £200,000 for what he sold. He may have got rid of the money, I do not know how that is. But even so I would answer the argument in the words of TINDAL, C.J., in *Rennie v. Irvine* (16) (7 Man. & G. at pp. 976, 977):

“If the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbable and extravagant contingencies in order to make it void.”

For the reasons which I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by TINDAL, C.J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore, I agree that the appeal should be dismissed.

**LORD MORRIS.**—I entirely concur in the judgment and the reasons for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your Lordships, the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations I consider are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered *prima facie* void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself, but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently, there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not *per se* a decisive test. If the consideration of reasonableness or of public interest is the rule the appellant, in my opinion, has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives, was one which would almost altogether be with governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents, nor does the substitution of a company for the appellant in the manufacture of guns and ammunition appear to me to injuriously affect the public interest.

*Appeal dismissed.*

Solicitors: *Munns & Longden; Wilson, Bristows & Carpmael.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

# MAKIN v. ATTORNEY-GENERAL FOR NEW SOUTH WALES

[PRIVY COUNCIL (Lord Herschell, L.C., Lord Watson, Lord Halsbury, Lord Ashbourne, Lord Macnaghten, Lord Morris and Lord Shand), July 17, 18, 20, 21, December 12, 1893]

[Reported [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373]

*Criminal Law—Evidence—Evidence of similar offences—Relevance to issue before jury—Rebuttal of defence of accident or defence otherwise open to accused—Baby farming—Charge of murder of infant—Evidence of deaths of other infants.*

It is undoubtedly not competent for the prosecution in a criminal case to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

On the trial of the appellants for the murder of an infant the mother of the child gave evidence that the appellants told her that, if she would pay them £3, they would adopt the child and bring it up as their own.

**Held:** it was relevant to the issue to be tried by the jury that several other infants had been received by the appellants from their mothers on like representations and on payment of a sum inadequate for the support of the child for more than a very limited period, and that the bodies of infants had been found buried in a manner similar to that in which the body of the child the subject of the charge had been found in the gardens of houses occupied by the appellants, and, therefore, evidence of those matters was rightly admitted at the trial.

**Notes.** Considered: *R. v. Wyatt*, [1904] 1 K.B. 188. Applied: *R. v. Smith* (1905), 92 L.T. 208. Considered: *R. v. Bond*, [1904-7] All E.R.Rep. 24. Applied: *R. v. Ball*, [1911] A.C. 47. Considered: *R. v. Rodley*, [1911-13] All E.R.Rep. 688; *Ibrahim v. R.*, [1914-15] All E.R.Rep. 874; *R. v. Boyle and Merchant*, [1914-15] All E.R.Rep. 553; *R. v. Smith*, [1914-15] All E.R.Rep. 262; *Thompson v. D.P.P.*, [1918-19] All E.R.Rep. 521. Distinguished: *R. v. Lovegrove*, [1920] 3 K.B. 643. Considered: *R. v. Armstrong*, [1922] All E.R.Rep. 153. Applied: *R. v. Hobday* (1933), 77 Sol. Jo. 915. Considered: *R. v. Mortimer* (1936), 25 Cr. App. Rep. 150; *R. v. Yuille* (1948), V.L.R. 41. Applied: *Noor Mohamed v. R.*, [1949] 1 All E.R. 365. Considered: *Fendick v. Downard* (1950), V.L.R. 271. Applied: *Harris v. D.P.P.*, [1952] 1 All E.R. 1044; *R. v. Straffen*, [1952] 2 All E.R. 657. Followed: *R. v. Grills* (1954), 73 W.N. (N.S.W.) 303; *R. v. Chandler* (1956), S.R. (N.S.W.) 335. Referred to: *R. v. Ollis*, [1900-3] All E.R.Rep. 733; *R. v. Mean* (1904), 69 J.P. 27; *R. v. Chitson*, [1909] 2 K.B. 945; *R. v. Seham Yousey* (1914), 84 L.J.K.B. 1272; *Perkins v. Jeffery*, [1914-15] All E.R.Rep. 172; *Godman v. Times Publishing Co.*, [1926] 2 K.B. 273; *Maxwell v. D.P.P.*, [1934] All E.R.Rep. 168; *Sodeman v. R.* (1936), 55 C.L.R. 192; *Martin v. Osborne* (1936), 55 C.L.R. 367; *R. v. Hulton* (1936), 36 S.R. (N.S.W.) 534; *McClintock v. Noffke*, *Ex parte Noffke* (1936), Q.S.R. 73; *Berry v. Tottenham Hotspur Football and Athletic Co.*, [1936] 3 All E.R. 554; *Burrows v. R.* (1937), 58 C.L.R. 249; *R. v. Allen* (1937), Q.S.R. 32; *R. v. Helton* (1939), Q.S.R. 1; *R. v. Sullivan* (1939), Q.S.R. 285; *R. v. Cole* (1941), 165 L.T. 125; *Abdul Rahim v. King-Emperor* (1946),



- A** 62 T.L.R. 267; *R. v. Sims*, [1946] 1 All E.R. 697; *R. v. Miller* (1951), V.L.R. 346; *R. v. Fletcher* (1953), 53 S.R. (N.S.W.) 303; *Honnery v. Smith* (1957), S.R. (N.S.W.) 598; *Balenzuela v. De Gail* (1959), 101 C.L.R. 226; *R. v. May* (1959), V.R. 683; *Bowyer v. McLellan* (1960), 77 W.N. (N.S.W.) 861.

As to the admissibility of evidence of similar offences, see 10 HALSBURY'S LAWS (3rd Edn.) 442-445; and for cases see 14 DIGEST (Repl.) 420 et seq.

**B** Cases referred to:

(1) *R. v. Geering* (1849), 18 L.J.M.C. 215; 8 Cox, C.C. 450, n.; 14 Digest (Repl.) 422, 4112.

(2) *R. v. Dossett* (1846), 2 Car. & Kir. 306; 2 Cox, C.C. 243; 14 Digest (Repl.) 442, 4293.

(3) *R. v. Gray* (1866), 4 F. & F. 1102; 14 Digest (Repl.) 442, 4296.

**C** (4) *R. v. Winslow* (1860), 8 Cox, C.C. 397, N.P.; 14 Digest (Repl.) 429, 4164.

(5) *R. v. Oddy* (1851), 2 Den. 264; T. & M. 593; 4 New Sess. Cas. 602; 20 L.J.M.C. 198; 17 L.T.O.S. 136; 15 J.P. 308; 15 Jur. 517; 5 Cox, C.C. 210, C.C.R.; 14 Digest (Repl.) 502, 4851.

**Appeal** by special leave from a decision of the Supreme Court of New South Wales affirming the convictions of the appellants, John Makin and Sarah Makin, husband and wife, for the murder of an infant, Horace Amber Murray, on their trial before STEPHEN, J., who stated a Case for the opinion of the Supreme Court.

**D** Fullarton, Q.C., and Cunningham for the appellants admitted that the child for the murder of which they were convicted was Murray's child, but contended that the evidence as to all the other cases was inadmissible.

**E** Sir Edward Clarke, Q.C., Poland, Q.C., Cluer and R. H. Long Innes for the respondent, argued that the evidence was admissible to negative the theory that the death was caused by accident.

Dec. 12, 1893. **LORD HERSCHELL, L.C.**—The appellants were tried and found Guilty at the Sydney Gaol Delivery held at Darlinghurst, of the murder of

**F** the infant child of one Amber Murray. The learned judge before whom the case was tried deferred passing sentence until after the argument of the Special Case, which he stated for the opinion of the Supreme Court of New South Wales. The points reserved by the learned judge were (i) whether he was wrong in admitting evidence of the finding of other bodies than the body of the child alleged to be Horace Amber Murray; (ii) whether he was wrong in admitting the evidence of

**G** Florence Risby, Mary Stacey, Agnes Todd, Agnes Ward, and Mrs. Sutherland; (iii) whether there was evidence to prove the identity of the body marked D. with that of Horace Amber Murray; (iv) whether there was evidence of the death or cause of death of Horace Amber Murray, or that he was murdered. The questions for the court were, whether the evidence objected to was admissible, and, if not: Were the prisoners rightly convicted? and, even if inadmissible: Was there evidence sufficient to sustain the conviction? On the argument of the Special Case the third point was abandoned by the learned counsel for the prisoners. On the other points the judgment was in favour of the Crown. Special leave was granted to appeal to this Board from the judgment of the Supreme Court of New South Wales, some of the questions raised being of grave and general importance.

**H** There can be no doubt in their Lordships' opinion that there was ample evidence

**I** to go to the jury that the infant was murdered. Indeed that point was scarcely contested in the argument of the learned counsel for the appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of other bodies and to the fact that other children had been entrusted to the appellants. In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the



conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord. The leading authority relied on by the Crown was *R. v. Geering* (1) where on the trial of a prisoner for the murder of her husband by administering arsenic evidence was tendered, with the view of showing that the two sons of the prisoner who had formed part of the same family, and for whom the prisoner had cooked food as well as for her husband, had died of poison, the symptoms in all these cases being the same. The evidence was admitted by POLLOCK, C.B., who tried the case; he held that it was admissible, inasmuch as its tendency was to prove that the death of the husband was occasioned by arsenic, and was relevant to the question whether such taking was accidental or not. The Chief Baron refused to reserve the point for the consideration of the judges, intimating that ALDERSON, B., and TALFOURD, J., concurred with him in his opinion. This authority has been followed in several subsequent cases.

In *R. v. Dossett* (2), which was tried a few years previously, the same view was acted upon by MAULE, J., on a trial for arson, where it appeared that a rick of wheat-straw was set on fire by the prisoner having fired a gun near to it. Evidence was admitted to show that the rick had been on fire the previous day and that the prisoner was then close to it with a gun in his hand. MAULE, J., said:

"Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully."

The only subsequent case to which their Lordships think it necessary to refer specifically is that of *R. v. Gray* (3), where, on a trial for arson with intent to defraud an insurance company, WILLES, J., admitted evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. The learned judge, after consulting MARTIN, B., refused to reserve the point for the consideration of the Court for Crown Cases Reserved. The fact that the learned judge took this course after consulting MARTIN, B., is important, because a decision of that learned judge was mainly relied on in opposition to the authorities to which attention has been drawn. The case referred to is that of *R. v. Winslow* (4), which it certainly seems difficult to reconcile with *R. v. Geering* (1); but, in view of the circumstance to which attention has been called, it cannot be regarded as certain that MARTIN, B., deliberately dissented from the view which was adopted in *R. v. Geering* (1) and other cases.

The learned counsel for the appellants placed much reliance on *R. v. Oddy* (5), the only one which has been considered by the Court for Crown Cases Reserved. It was there held that on the trial of an indictment containing counts for stealing, and for receiving the property knowing it to be stolen evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge, in respect of

**A** which alone it had been admitted by the recorder. LORD CAMPBELL said that, in his opinion, there was no more ground for admitting the evidence under the third count (for receiving) than under the first or second (for stealing). Under the two latter, it would have been evidence of the prisoner being a bad man, and likely to commit the offence there charged. So under the third count the evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. **B** ALDERSON, B., in his judgment said that the evidence merely went to show that the prisoner was *in possession* of other property which had been stolen in the previous December, and not that he had *received such property knowing it to be stolen*; that the mere possession of stolen property was evidence *prima facie*, not of receiving, but of stealing, and to admit such evidence in the case before him would be to allow a prosecutor, in order to make out that a prisoner had *received* **C** property with a guilty knowledge which had been stolen in March, to show that the prisoner had in the December previously *stolen* some other property from another place, and belonging to other persons. In other words, they were asked to say that, in order to show that the prisoner had committed one felony, the prosecutor might prove that he committed a totally different felony some time before. Their Lordships do not think that the judgments in *R. v. Oddy* (5) at all conflict with the **D** judgments in *R. v. Geering* (1) and the other cases referred to.

Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to nurse; that they had received 10s. a week while it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the appellants were charged was received from the **E** mother she stated that she had a child for them to adopt. Mrs. Makin said that she would take the child, and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs. Makin had lost a child of her own two years old. Makin said that he did not want any clothing; they had plenty of their own. The mother said that she did not mind his getting £3 premium so long as he took care of the child. The representation was that the prisoners were **F** willing to take the child on payment of the small sum of £3, inasmuch as they desired to adopt it as their own. Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar **G** manner in the gardens of several houses occupied by the prisoners.

Solicitors: *Yeilding, Piper & Tallack; Want & Co.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

## INCOME TAX SPECIAL PURPOSES COMMISSIONERS v. PEMSEL

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Herschell, Lord Macnaghten and Lord Morris), March 20, 21, 24, 1890, July 20, 1891]

[Reported [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621;  
55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53]

*Charity—Defined—Religion—Support of missionary establishments among heathen nations.*

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community: per LORD MACNAGHTEN.

By indentures executed in 1813 and 1815 a settlor settled real estate in England on trust to apply the income "for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church known by the name of Unitas Fratrum or United Brethren," commonly known as Moravians.

**Held** (LORD HALSBURY, L.C., and LORD BRAMWELL dissenting): the words "charitable purposes" in the Income Tax Act, 1842, s. 61, Sched. A, No. VI [now the Income Tax Act, 1952, s. 447 (1) (a)], must be construed in their technical meaning according to English law, and, therefore, they were not to be construed as being confined to the relief of poverty; the purposes of the trusts in question were charitable purposes within the provision in the Act of 1842; and the rents and profits of the trust property were exempt from tax under Sched. A.

*Statute—Construction—Statute applying to England and another country—Taxing Act—Construction to make operation of statute and incidence of taxation alike in each country—Repetition in later statute after practice in application of Act established—Assumption that legislature makes no mistakes—Contemporanea expositio—Words to be given legal meaning.*

Where a statute applies to both England and another country, e.g., Scotland, that construction should, if possible, be adopted which makes the operation and effect of the statute the same in both countries. This is more particularly so in the case of taxing Acts which it is desirable should be construed so as to make the incidence of taxation alike in each country.

Per LORD HALSBURY, L.C.: I cannot agree that the construction of the statute (the Income Tax Act, 1842) can be affected by the course which has been followed by the executive officers of the Crown in the Inland Revenue Department. But, per LORD MACNAGHTEN: Where you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may, perhaps, fairly be inferred that the legislature, in re-enacting the statute, used those words in their received meaning. And, perhaps, it might be argued that the inference grows stronger with every successive re-enactment.

Per LORD HALSBURY, L.C.: A court of law, in construing a statute, is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes.

Per LORD HALSBURY, L.C.: In construing a statute it would be impossible to give an adequate exposition of what would presumably be in the mind of the legislature without regarding the circumstances of the time and the state of public feeling when the legislation in question was under debate.

Per LORD MACNAGHTEN: In construing an Act of Parliament it is a general



**A** rule that words must be taken in their legal sense unless a contrary intention appears.

**Notes.** The Income Tax Act, 1842, was repealed by the Income Tax Act, 1918. The provisions relating to the exemption of charities from taxation are now to be found in ss. 447 and 448 of the Income Tax Act, 1952. Section 447 (1) (a) exempts from the taxes therein mentioned "tax chargeable . . . in respect of the rents and profits of any lands . . . vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only," thus repeating the wording of the Act of 1842 considered by the House in the present case.

**B** Considered: *I.R.Comrs. v. Scott, Re Bootham Ward Strays, York*, [1892] 2 Q.B. 152. Distinguished: *Maughan v. Free Church of Scotland* (1893), 3 Tax Cas. 207. Considered: *Southwell v. Royal Holloway College, Egham, Governors*, [1895] 2 Q.B. 487; *Re MacDuff, MacDuff v. MacDuff*, [1895-99] All E.R.Rep. 154; *Re Perry Almshouses, Re Ross' Charity*, [1899] 1 Ch. 21. Approved: *Blair v. Duncan*, [1902] A.C. 37. Considered: *L.C.C. v. South Metropolitan Gas Co.*, [1903] 2 Ch. 532; *Grimond v. Grimond* (1904), [1905] A.C. 603; *Re Good, Harington v. Watts*, [1904-7] All E.R.Rep. 476. Applied: *R. v. Income Tax Special Comrs., Ex parte University College of North Wales* (1909), 78 L.J.K.B. 576; *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1914-15] All E.R.Rep. 540. Considered: *Great Western Rail. Co. and Midland Rail. Co. v. Bristol Corpn.* (1918), 87 L.J.Ch. 414; *R. v. Income Tax Special Purposes Comrs., Ex parte Dr. Barnardo's Homes National Incorporated Association*, [1920] 1 K.B. 26; *A.-G. v. National Provincial and Union Bank of England*, [1923] All E.R.Rep. 123; *Verge v. Somerville*, [1924] All E.R.Rep. 121; *Chesterman v. Federal Tax Comr.* (1925), 42 T.L.R. 121; *R. v. Income Tax Special Comrs., Ex parte Headmasters' Conference, Same v. Same, Ex parte Incorporated Association of Preparatory Schools* (1925), 41 T.L.R. 651; *Jackson's Trustees v. Lord Advocate* (1926), 10 Tax Cas. 460; *I.R.Comrs. v. Yorkshire Agricultural Society*, [1927] All E.R.Rep. 536. Followed: *Re Williams, Public Trustee v. Williams*, [1927] 2 Ch. 283. Applied: *General Medical Council v. I.R.Comrs., English Branch Council of General Medical Council v. Same*, [1928] All E.R.Rep. 252. Distinguished: *Geologists' Association v. I.R.Comrs.* (1928), 14 Tax Cas. 271; *Re Grove-Grady, Plowden v. Lawrence*, [1929] All E.R.Rep. 158; *Sir G. B. Hunter* (1922) "C" Trust, *Trustees v. I.R.Comrs.* (1929), 14 Tax Cas. 427. Considered: *Girls' Public Day School Trust v. Ereaut* (1930), 99 L.J.K.B. 643. Distinguished: *Keren Kayemeth Le Jisroel, Ltd. v. I.R.Comrs.*, [1931] 2 K.B. 465. Considered: *Honourable Co. of Master Mariners v. I.R.Comrs.* (1932), 17 Tax Cas. 298; *Scottish Flying Club, Ltd. v. I.R.Comrs.* (1935), 20 Tax Cas. 1; *Peterborough Royal Foxhound Show Society v. I.R.Comrs.*, [1936] 1 All E.R. 813; *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan v. Forrest*, [1946] 1 All E.R. 501; *Williams' Trusts Trustees v. I.R.Comrs.*, [1947] 1 All E.R. 513; *Re Strakosch, Temperley v. A.-G.*, [1949] 2 All E.R. 6; *Gibson v. South American Stores, Ltd.*, [1949] 2 All E.R. 18. Applied: *Crystal Palace Trustees v. Minister of Town and Country Planning*, [1950] 2 All E.R. 857. Considered: *Oppenheim v. Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31; *I.R.Comrs. v. City of Glasgow Police Athletic Association*, [1953] 1 All E.R. 747; *Re Cox, Baker v. National Trust Co., Public Trustee for Ontario Province v. National Trust Co.*, [1955] 2 All E.R. 550; *I.R.Comrs. v. Baddeley*, [1955] 1 All E.R. 525; *Abdul Gaffoor Trustees v. Income Tax Comrs.*, [1961] 2 All E.R. 436. Referred to: *Re Nottage, Jones v. Palmer*, [1895] 2 Ch. 649; *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; *Cunnack v. Edwards*, [1896] 2 Ch. 679; *Re Buck, Bruty v. Mackey*, [1895-99] All E.R.Rep. 366; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643; *Re Manser, A.-G. v. Lucas*, [1905] 1 Ch. 68; *Lord Advocate v. Moray*, [1905] A.C. 531; *Re Sidney, Hingeston v. Sidney* (1908), 98 L.T. 625; *R. v. Income Tax Special Comrs., Ex parte Essex Hall* (1911), 5 Tax Cas. 636; *R. v. Income Tax Comrs.* (1911), 80 L.J.K.B. 788; *Re Wedgwood, Allen v. Wedgwood*, [1914-15] All E.R.Rep. 322;



*Houston v. Burns*, [1918-19] All E.R.Rep. 817; *Bourne v. Keane*, [1918-19] All E.R.Rep. 167; *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517; *Re Bennett, Gibson v. A.-G.*, [1920] All E.R.Rep. 624; *Barber v. Chudley* (1922), 92 L.J.K.B. 711; *R. v. Income Tax Special Comrs., Ex parte Rank's Trustees* (1922), 127 L.T. 651; *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance*, [1923] All E.R.Rep. 49; *Jackson v. Voss*, [1923] 2 K.B. 357; *Re Ludlow, Bence-Jones v. A.-G.* (1923), 93 L.J.Ch. 30; *Re Shakespeare Memorial Trust, Earl of Lytton v. A.-G.*, [1923] All E.R.Rep. 106; *Brighton College v. Marriott* (1924), 69 Sol. Jo. 229; *Re Gray, Todd v. Taylor*, [1925] All E.R.Rep. 250; *I.R.Comrs. v. Glasgow Musical Festival Association* (1926), 11 Tax Cas. 154; *I.R.Comrs. v. Falkirk Temperance Café Trust* (1926), 11 Tax Cas. 353; *I.R.Comrs. v. Peeblesshire Nursing Association* (1926), 11 Tax Cas. 335; *Scottish Woollen Technical College, Galashiels v. I.R.Comrs.* (1926), 11 Tax Cas. 139; *Adamson v. Melbourne and Metropolitan Board of Works*, [1929] A.C. 142; *Re Hood, Public Trustee v. Hood*, [1930] All E.R.Rep. 215; *Luipard's Vlei Estate and Gold Mining Co. v. I.R.Comrs.*, [1930] 1 K.B. 593; *Re Smith, Public Trustee v. Smith*, [1931] All E.R.Rep. 617; *Re Spence's Estate, Barclays Bank, Ltd. v. Stockton-on-Tees Corpn.*, [1937] 3 All E.R. 684; *Re Ashton's Estate, Westminster Bank v. Farley*, [1937] 3 All E.R. 279; *Ellerker v. Union Cold Storage Co., Ltd.*, [1939] 1 All E.R. 23; *Swami (Pakala Narayane) v. King-Emperor*, [1939] 1 All E.R. 396; *Tribune Press, Lahore (Trustees) v. Tax Comrs., Punjab, Lahore*, [1939] 3 All E.R. 469; *Re Corbyn, Midland Bank Executor and Trustee Co. v. A.-G.*, [1941] 2 All E.R. 160; *Re Ward, Public Trustee v. Berry*, [1941] 2 All E.R. 125; *Roll of Voluntary Workers Trustees v. I.R.Comrs.* (1941), 24 Tax Cas. 320; *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; *Re Price, Midland Bank Executor and Trustee Co. v. Harwood*, [1943] 2 All E.R. 505; *Royal Choral Society v. I.R.Comrs.*, [1943] 2 All E.R. 101; *Re Baynes, Public Trustee v. Leven Corpn.*, [1944] 2 All E.R. 597; *Chichester Diocesan Fund (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; *Foreign Bondholders Corpn. v. I.R.Comrs.*, [1944] K.B. 63; *Re Hillier, Dauncey v. Finch and A.-G.*, [1944] 1 All E.R. 480; *Re Osmund, Midland Bank Executor and Trustee Co. v. Mason*, [1944] 1 All E.R. 12; *Re Compton, Powell v. Compton*, [1945] 1 All E.R. 198; *Lord Nuffield v. I.R.Comrs.* (1946), 175 L.T. 465; *Countess of Berkeley v. Berkeley*, [1946] 2 All E.R. 154; *National Anti-Vivisection Society v. I.R.Comrs.*, [1947] 2 All E.R. 217; *Re Coats' Trusts, Coats v. Gilmour*, [1948] 1 All E.R. 521; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital Medical School Council*, [1950] 2 All E.R. 466; *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; *Re British School of Egyptian Archaeology, Murray v. Public Trustee*, [1954] 1 All E.R. 887; *Re Spensley's Will Trusts, Barclays Bank, Ltd. v. Staughton*, [1954] 1 All E.R. 178; *Dreyfus Foundation, Inc. v. I.R.Comrs.*, [1954] 2 All E.R. 466; *Re Levien, Lloyds Bank, Ltd. v. Worshipful Co. of Musicians*, [1955] 3 All E.R. 35; *Re Fletcher, Ex parte Fletcher v. Official Receiver*, [1955] 2 All E.R. 592; *Berry v. St. Marylebone Corpn.*, [1957] 1 All E.R. 681; *Re Shaw, Public Trustee v. Day*, [1957] 1 All E.R. 745; *Derbyshire Miners' Welfare Committee v. Skegness U.D.C.*, [1957] 2 All E.R. 405.

As to what is a "charity" and what are legal purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 206 et seq.; as to exemptions from income tax generally, see *ibid.*, vol. 20, p. 71 et seq.; as to construction of statutes, see *ibid.*, vol. 36, p. 382 et seq. For cases see 8 DIGEST (Repl.) 312 et seq.; 28 DIGEST (Repl.) 13-18; 42 DIGEST 609 et seq. For the Income Tax Act, 1952, s. 447, see 31 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to :

- (1) *Baird's Trustees v. Lord Advocate* (1888), 15 R. (Ct. of Sess.) 682; 25 Sc.L.R. 533; 28 Digest (Repl.) 323, \*756.
- (2) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 42 Digest 650, 569.

- A** (3) *Stowcl v. Lord Zouch* (1569), 1 Plowd. 353; 75 E.R. 536; 42 Digest 635, 378.  
 (4) *Jones v. Williams* (1767), Amb. 651; 27 E.R. 422, L.C.; 8 Digest (Repl.) 322, 64.  
 (5) *Thomson v. Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.JJ.; 8 Digest (Repl.) 358, 364.
- B** (6) *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; 2 L.J.O.S.Ch. 189; 57 E.R. 270; 8 Digest (Repl.) 343, 246.  
 (7) *Nightingale v. Goulbourn* (1848), 2 Ph. 594; 17 L.J.Ch. 296; 11 L.T.O.S. 169; 12 Jur. 317; 41 E.R. 1072, L.C.; 8 Digest (Repl.) 315, 8.  
 (8) *Thellusson v. Woodford* (1799), 4 Ves. 227; 31 E.R. 117, L.C.; on appeal (1805), 11 Ves. 112, H.L.; 17 Digest (Repl.) 296, 1010.
- C** (9) *Incorporated Society v. Richards* (1841), 4 I.Eq.R. 177; 1 Dr. & War. 258; 1 Con. & Law. 58; 8 Digest (Repl.) 380, \*217.  
 (10) *Feather v. R.* (1865), 6 B. & S. 257; 35 L.J.Q.B. 200; 12 L.T. 114; 29 J.P. 709; 122 E.R. 1191; 17 Digest (Repl.) 300, 1055.  
 (11) *Re Pettit Smith's Patent* (1850), 7 Moo.P.C.C. 133; 13 E.R. 830, P.C.; 36 Digest (Repl.) 846, 1946.
- D** (12) *Clare v. R.* (1865), cited in 6 B. & S. at p. 290; 122 E.R. 1203; 36 Digest (Repl.) 843, 1924.  
 (13) *Re Carpenter's Patent* (1854), 2 Moo.P.C.C.N.S. 191, n.; 15 E.R. 873; 36 Digest (Repl.) 871, 2229.  
 (14) *Re Lancaster's Patent* (1864), 2 Moo.P.C.C.N.S. 189; 15 E.R. 872; 36 Digest (Repl.) 871, 2228.
- E** (15) *Isherwood v. Oldknow* (1815), 3 M. & S. 382; 105 E.R. 654; 31 Digest (Repl.) 468, 5941.  
 (16) *R. v. Hogg* (1787), Cald. Mag. Cas. 266; 1 Term Rep. 721; 1 Bott. 159; 99 E.R. 1341; 38 Digest (Repl.) 626, 926.  
 (17) *Lord Saltoun v. Advocate-General* (1860), 3 Macq. 659; 3 L.T. 40; 8 W.R. 505, H.L.; 42 Digest 675, 868.
- F** (18) *Gordon of Park*, 1 Cr. & St. 558.  
 (19) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.  
 (20) *Clyde Navigation Trustees v. Adamson* (1865), 4 Macq. 931, H.L.; 38 Digest (Repl.) 565, 520.
- G** (21) *Leith Harbour and Docks Comrs. v. Inspector of the Poor* (1866), L.R. 1 Sc. & Div. 17, H.L.; 38 Digest (Repl.) 562, 502.  
 (22) *Lord Saltoun v. Lady Pittsligo*, Mor. Dict. 9948.  
 (23) *Ferguson v. Marjoribanks* (1853), 15 Dunl. (Ct. of Sess.) 637; 1 W.R. 420; 44 Digest 939, o.
- H** (24) *Hill v. Burns* (1826), 2 Wils. & S. 80; 8 Digest (Repl.) 399, \*304.  
 (25) *Aberdeen University v. Irvine* (1868), L.R. 1 Sc. & Div. 289, H.L.; 8 Digest (Repl.) 402, 939.  
 (26) *Dundee Magistrates v. Dundee Presbytery* (1861), 4 Macq. 228, H.L.; 8 Digest (Repl.) 485, \*576.  
 (27) *Clephane v. Edinburgh Corpn.* (1869), L.R. 1 Sc. & Div. 417, H.L.; 8 Digest (Repl.) 459, 1595.
- I** (28) *Turner v. Ogden* (1787), 1 Cox, Eq. Cas. 316; 29 E.R. 1183; 8 Digest (Repl.) 334, 145.  
 (29) *Townsend v. Carus* (1844), 3 Hare, 257; 13 L.J.Ch. 169; 8 Jur. 104; 67 E.R. 378; 8 Digest (Repl.) 334, 148.  
 (30) *R. v. I.R.Comrs., Re Nathan* (1884), 12 Q.B.D. 461; 53 L.J.Q.B. 229; 51 L.T. 46; 48 J.P. 452; 32 W.R. 543, C.A.; 21 Digest (Repl.) 190, 1119.  
 (31) *Stephenson v. Higginson* (1851), 3 H.L.Cas. 638; 10 E.R. 252, H.L.; 42 Digest 631, 330.

- (32) *London University v. Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.J.J.; 8 Digest (Repl.) 348, 285. A
- (33) *Ewan v. Morgan* (1858), 32 L.T.O.S. 19; 22 J.P. 607; 6 W.R. 556; sub nom. *Dundee Magistrates v. Morris*, 3 Macq. 134, H.L.; 8 Digest (Repl.) 400, 915.
- (34) *Andrews v. McGuffog* (1886), 11 App. Cas. 313, H.L.; 8 Digest (Repl.) 474, B 1766.

Also referred to in argument:

*Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest (Repl.) 390, 836.

*A.-G. v. Hope*, I.R. 2 C.L. 368.

*Partington v. A.-G.* (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370, H.L.; 42 Digest 736, 1603. C

*Coltness Iron Co. v. Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 143, 546.

*Blake v. London Corpn.* (1887), 19 Q.B.D. 79; 56 L.J.Q.B. 424; 35 W.R. 791; 3 T.L.R. 646; 2 Tax Cas. 209, C.A.; 28 Digest (Repl.) 16, 57.

*British Museum Trustees v. White* (1826), 2 Sim. & St. 594; 4 L.J.O.S.Ch. 206; 57 E.R. 473; 8 Digest (Repl.) 346, 266. D

*A.-G. v. Bagot*, 13 I.C.L.R. 48.

*R. v. Treasury Lords Comrs.* (1872), L.R. 7 Q.B. 387; 41 L.J.Q.B. 178; 26 L.T. 64; 36 J.P. 661; 20 W.R. 336; 12 Cox, C.C. 277; 16 Digest (Repl.) 343, 1214.

*R. v. Income Tax Special Purposes Comrs.* (1888), 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776; sub nom. *R. v. Income Tax Special Comrs., Ex parte Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 4 T.L.R. 636; 2 Tax Cas. 332, C.A.; 28 Digest (Repl.) 403, 1792. E

*R. v. Treasury Lords Comrs.* (1835), 4 Ad. & El. 286; 1 Har. & W. 533; 5 Nev. & M.K.B. 589; 5 L.J.K.B. 20; 111 E.R. 794; 16 Digest (Repl.) 344, 1218. F

**Appeal** by the Special Commissioners of Income Tax from a decision of the Court of Appeal (LORD ESHER, M.R., FRY and LOPES, L.J.J.), reported 22 Q.B.D. 296, reversing a decision of the Divisional Court (LORD COLERIDGE, C.J., GRANTHAM, J., dissenting).

The following statement of the facts is taken from the opinion of LORD WATSON. By indentures executed in 1813 and 1815, Mrs. Mary Elizabeth Bates settled real estate in England upon trust for purposes connected with the church of the United Brethren, commonly known as Moravians. The larger share of the trust income is appropriated to the support of the missionary establishment of the church among heathen nations. The other objects of the trust are (i) the maintenance and the education of children of ministers and missionaries, special regard being had to the children of those ministers who are least able to bear the expense, and (ii) the "choir houses" of the church, which provide homes for female teachers who have become incapacitated for work, for widows of ministers, missionaries, and poor members, and also for single men engaged in attending to the young and assisting in their education. G H

Down to the year 1886, income tax upon the annual value of the trust estate was paid in the first instance by their tenants, and was then repaid to the trustees, under the enactments of Sched. A, r. VI, of the Income Tax Act, 1842, which provides that, in charging duty, allowances shall be granted in respect of I

"the rents and profits of lands, tenements, and hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied for charitable purposes."

An application made to the appellants for allowance of the tax for the year ending April 5, 1886, which had been paid by the tenants, was rejected upon the ground



A that the purposes to which the trust income is appropriated and applied do not bring it within the scope of these exemptions. In consequence of their refusal, the respondent, who is treasurer of the Church of the United Brethren, upon April 12, 1888, obtained an order nisi for a writ of mandamus to compel the appellants to grant the allowance, and, with that view, to give a certificate with an order for repayment in the terms of the statute. It does not seem to admit of serious dispute B that, if the purposes of Mrs. Bates' trust are "charitable purposes" within the meaning of the Act of 1842, the appellants have declined to perform their statutory duty, and a mandamus must issue.

Had the Income Tax Act, 1842, been only an English statute the present controversy would, in all probability, never have arisen. The expression "charitable purposes" is commonly, if not invariably, used, both in English law and English C legislation, in a sense wide enough to include the missionary enterprises and the choir houses of the Unitas Fratrum, as well as the maintenance and education of the children of its ministers and missionaries. But the Act applies to Scotland as well as to England; and the argument of the appellants in the courts below, and at your Lordships' Bar, has been founded on the assumption that in Scottish law the expression cannot, according to any legitimate construction, include the objects D of Mrs. Bates' trust settlements. That proposition is not without some authority to support it, and hence the difficulty which the courts below have experienced in dealing with the present case.

The statutory words of exemption upon which the result of this appeal depends were, for the first time, made the subject of judicial interpretation in *Baird's Trustees v. Lord Advocate* (1), which was decided by the First Division of the E Court of Session in 1888. The testator in that case had directed that the funds settled by him, amounting to half a million sterling, should be expended for the support of objects and purposes in connection with the Established Church of Scotland, all of a religious character and for the aid of institutions having the promotion of such purposes in view, his desire being to mitigate spiritual destitution among the poor and working population of Scotland, through efforts for securing the godly upbringing of the young, the establishing of parochial pastoral work, F and the stimulating of ministers and agencies of the church to sustained devotion in the work of carrying the Gospel to the homes and hearts of all. The Inner House, affirming the judgment of the Lord Ordinary (LORD FRASER), held that the income of heritable estate vested in the trustees for these purposes was not within the statutory exemption. The learned judges of the Court of Session refused to attach to "charitable purposes" the comprehensive meaning which the words G admittedly bear in English law, being of opinion that they have no technical significance in the law language of Scotland. Accordingly, they held that in the Act of 1842, which is an Imperial statute, the words must be read in their ordinary and popular acceptance. The meaning of the words, when interpreted in that sense, was thus defined by the Lord President (LORD INGLIS):

H "Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity' as it occurs in this statute."

LORD SHAND, adopting a still narrower definition, said:

I "I think it [the statutory exemption] relates to funds dedicated to the relief of physical necessity or want; to funds given as alms, or as a provision for the relief of poor persons from physical privations, or suffering arising from poverty, and that it goes no farther."

LORD ADAM, in agreeing with his brethren, observed:

"It appears to me to be quite impossible to extend the term 'charitable purposes,' used in this Act, so as to cover religious purposes."

In the present case LORD COLERIDGE, C.J., adopted the same construction of "charitable purposes" which had commended itself to the Court of Session.



GRANTHAM, J., dissented, upon the ground apparently that the government by which the Act was introduced, and its successors in office, had, for more than forty years, invariably construed the words in the sense of English law, and allowed the exemptions which are now in dispute. In these circumstances the opinion of the senior judge prevailed, and the order nisi of April 12, 1888, was discharged by the Divisional Court; but in the Court of Appeal that judgment was unanimously reversed, and it was decreed that a peremptory mandamus should issue to the effect specified in the respondent's original application. LORD ESHER, M.R., and LOPES, L.J., recognised the authority of *Baird's Trustees v. Lord Advocate* (1) as settling that, in Scotland, the term "charitable purposes" has not the meaning which is attributed to it by English courts. They, therefore, discarded that meaning; but in determining what, in a popular sense, constitutes a "charitable purpose," they adopted a much more liberal definition than the learned judges of the Court of Session. They held that, in its ordinary acceptation, "charity" comprehends all benefits, whether religious, intellectual, or physical, bestowed upon persons who, by reason of their poverty, are unable to obtain such benefits for themselves without assistance. FRY, L.J., did not accept the authority of the decision in *Baird's Trustees v. Lord Advocate* (1), and came to the conclusion that the words "trusts for charitable purposes" have, for all practical purposes, the same legal significance in Scotland as in England or Ireland.

*The Solicitor-General (Sir Edward Clarke, Q.C.) and Dicey, Q.C. (the Attorney-General, Sir Richard Webster, Q.C., with them), for the appellants.*

*Crackanthorpe, Q.C., and Russell Roberts for the respondent.*

Their Lordships took time for consideration.

July 20, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—In this case the Income Tax Commissioners have appealed against an order of the Court of Appeal, whereby a peremptory mandamus was awarded against them, commanding them to make an allowance and to grant a certificate of such allowance. If upon the merits of this case an allowance ought to be made, and a certificate granted, I cannot doubt that the order of the Court of Appeal was right. The statute under which the commissioners are acting is peremptory in its terms to the commissioners to make the allowance, and to give the certificates in cases where they are commanded to be given. If, therefore, the case is made out that the facts show a case where the allowance ought to be made, and the certificate, which is merely consequential, should be given, there is a plain duty imposed by the statute on these executive officers, the neglect of which is properly enforceable by mandamus. But the far more difficult question remains, whether the facts proved here establish the proposition that the case for the allowance is made out. That depends upon the true construction of the Income Tax Act, 1842, s. 61, No. VI, Sched. A, which is in these words:

"No. VI. Allowances to be made in respect of the said duties in Sched. A. For the duties charged on any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, walks, and grounds for recreation repaired and maintained by the funds of such college or hall. . . . Or on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed £150 per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and main-

- A** tained by the funds of such hospital, school, or almshouse, or on any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded, by lectures or otherwise; provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same. . . . The said allowances to be granted by the commissioners for general purposes in their respective districts. . . . Or on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes so far as the same are applied to charitable purposes. . . . The said last-mentioned allowances to be granted upon proof before the commissioners for special purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only. . . . The said last-mentioned allowances to be claimed and proved by any steward, agent, or factor, acting for such school, hospital, or almshouse, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any commissioner for executing this Act in the district where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the commissioners for special purposes, and, according to the powers vested in such commissioners, without vacating, altering, or impeaching the assessments on or in respect of such properties; which assessments shall be in force and levied notwithstanding such allowances."
- E** The main debate turns upon whether the lands here are vested in trustees for charitable purposes, though the whole enactment is not without its importance in considering what is the extent of its application. The particular dispositions which gave rise to the dispute are as follows. Under an indenture, dated Feb. 11, 1813: "Certain lands, tenements, and hereditaments (hereinafter referred to as lands) in the county of Middlesex" are conveyed by one Elizabeth Mary Bates to certain trustees
- F** "upon trust, after payment of costs and outgoings, to apply the annuities, rent-charges, yearly issues, and profits (all of which are hereinafter referred to as rents and profits) of the said lands as follows:—that is to say: (1) As to two equal fourth parts thereof for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of *Unitas Fratrum*, or *United Brethren* (which Protestant Episcopal Church is hereinafter referred to as the said Church). (2) As to another equal fourth part towards the maintenance, support, and education of the children of ministers and missionaries educated at the school and academy at Fulner, near Leeds, special regard being had to the children of such ministers as are least able to support the expense of their children's education, or for the benefit and purposes of any similar school, academy, or establishment elsewhere within the United Kingdom. (3) As to the remaining equal fourth part or residue for the maintenance and support of certain establishments appertaining to the said Church, for single persons, called choir-houses, within the United Kingdom."
- I** Under another indenture, dated July 25, 1815, certain freehold estates (also thereinafter referred to as lands) in the county of Middlesex are conveyed by the said Elizabeth Mary Bates to certain trustees
- "upon trust, after the payment of costs and outgoings, to apply the residue or surplus of the rents and profits of the said lands for the benefit and general purposes of a certain settlement or establishment of the said Church, existing at Gracehill, Ballymena, in the county of Antrim, and the dependencies of the said settlement or establishment as long as the same shall exist as a Congregational settlement of the said Church."

Whether these dispositions, or any of them, are charitable purposes, within the meaning of the exemption I have quoted above, must be determined upon a consideration of what those words "charitable purposes" mean in the exemption in question. Before proceeding to discuss the words themselves, I somewhat protest against the assumption that the alternative is to be between a popular and what is called a technical meaning, unless the word "technical" itself receives a construction different from that which is its ordinary use. There are, doubtless, some words to which the law had attached in the stricter sense a technical meaning; but the word "charitable" is not one of those words, though I do not deny that the old Court of Chancery, in enforcing the performance of charitable trusts, included in that phrase a number of subjects which undoubtedly no one outside the Court of Chancery would have supposed to be comprehended within that term. The alternative, therefore, to my mind, may be more accurately stated as lying between the popular and ordinary interpretation of the word "charitable" and the interpretation given by the Court of Chancery to the use of those words in the statute of 43 Eliz., c. 4 [Charitable Gifts Act, 1601].

To quote from the language of TINDAL, C.J., when delivering the opinion of the judges in the *Sussex Peerage Case* (2) (11 Cl. & Fin. at p. 115):

"The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to DYER, C.J. (*Stowel v. Lord Zouch* (3), Plowd. at p. 369), is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress."

I think it is very material to consider what was the intent of Parliament in passing 43 Eliz., c. 4. That Act itself is intituled, "An Acte to redresse the mis-employment of landes, goodes, and stokes of money heretofore given to charitable uses." And after reciting the objects with which certain lands and stocks had been limited, appointed, and assigned, it recites that the said lands, tenements, rents, and so forth, nevertheless had not been employed according to the charitable intent of the givers and founders thereof by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same. For redress and remedy whereof, be it enacted, etc. It then proceeds to create the tribunal and machinery for the restoration of the property so misemployed. It is very intelligible to my mind that the Court of Chancery or any court should have given the widest possible interpretation to an Act intended to remedy such abuses. The enumeration of charitable objects in the preamble of the statute was very soon interpreted not to be limited to the exact charities therein referred to. Where a purpose by analogy was deemed by the Court of Chancery to be within its spirit and intendment it was held to be "charitable" within the meaning of the statute.

In *Jones v. Williams* (4) "charity" is defined to be "a general public use": see also *Thomson v. Shakespear* (5), where LORD CAMPBELL, KNIGHT-BRUCE and TURNER, L.JJ. (though in the particular case, and for reasons beside the present controversy, they decide against the validity of the gift), show what width of interpretation in their view may be applied to the words "charitable use." Thus also "paving, lighting, cleansing, and improving a town" have been held to be within the equity of the statute of Elizabeth and "charitable." To build a house of correction or sessions-house is a charitable purpose: DUKE ON CHARITABLE USES, 109, 136; *A.-G. v. Heelis* (6); also to found a botanical garden. A fund for the establishment of lectures against cruelty to animals is a "charitable use." A gift "to the Queen's Chancellor of the Exchequer for the time being, and to be by him



A appropriated for the benefit and advantage of my beloved country, Great Britain": *Nightingale v. Goulbourn* (7), is a "charitable purpose"; see also *Theellusson v. Woodford* (8).

In these and many like cases it appears to me that the distinction between that which is charitable in any reasonable sense and that to which trustees for any lawful and public purpose may be compelled to apply funds committed to their care, has been—I will not say confused—but so mixed that where it becomes necessary to define what is in its ordinary and natural sense "charitable" what is merely public or useful is lost sight of. And, indeed, for the purposes for which the court was then enforcing the performance of the trusts it is intelligible that such distinctions should be disregarded. If it is never necessary to distinguish between such heads as "religious," "parochial," "educational," but if all public purposes whatsoever which the law would support and the Court of Chancery enforce are in all statutes to be comprehended within the phrase "charitable," then the question is easily solved; but I do not think any statute or any decision has ever countenanced such a proposition. It is argued that the phrases "charitable trusts" and "charitable purposes" have always received the same construction in Ireland, to which the Act 43 Eliz., c. 4, did not extend, and that, therefore, apart from the particular statute, it has, so to speak, a technical and legal meaning in the law. I think the argument is not sound; the statement of fact on which it rests is literally accurate, but misleading, inasmuch as between 43 Eliz. (1601) and 10 Car. 1 (1634) there is very little authority obtainable as to what the views of the Irish courts were during that interval; and from that date the Irish Act, 10 Car. 1, certainly established what I will call the statutable meaning of those words as applicable to the subject-matter with which it dealt just as much as 43 Eliz.

To show that I am not overstating the identity of the statutes in question in their scope and object, it may be worth while to quote the language of Lord St. LEONARDS in *Incorporated Society v. Richards* (9). In delivering judgment as Lord Chancellor of Ireland, he observed (1 Dr. & War. at pp. 324, 325):

"I minutely compared the two Acts; placing the charitable uses enumerated in one in juxtaposition with those to be found in the other; and I find very little difference between them. Thus, the statute of Elizabeth speaks of relief to 'aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners'; it enumerates a list of such cases, whilst that of Charles has those comprehensive words 'or for the relief or maintenance of any manner of poor, succourless, distressed, or impotent persons.' It would be difficult to show that any one of the particular charities set forth in the Act of Elizabeth is not included within those general words. Again, the statute of Elizabeth speaks of 'schools of learning, free schools and scholars of universities'; whilst that of Charles is thus expressed: 'for the erection, maintenance, or support of any college, school, lecture in divinity, or in any of the liberal arts or sciences.' The Act of Charles in this respect goes beyond that of Elizabeth, for the latter does not comprise in words 'the liberal arts and sciences.' Then, the Act of Elizabeth recites those gifts which had been or might be made for the repair of bridges, &c.; 'some for repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways'; and I find in the statute of Charles mention made of similar gifts, not as in the other, collected all together, but in different parts; thus: 'for the building, re-edifying, or maintaining in repair of any church, college, school, or hospital'; and in another place, 'for the erection, building, maintenance, or repair of any bridges, causeways, cashes, paces, and highways within this realm.' The Act of Charles also provides 'for the maintenance of any minister and preacher of the Holy Word of God,' which was purposely omitted in the statute of Elizabeth (Duke, 125). After this the general words of the Act are, 'or for any other like lawful and charitable use and uses, warranted by the laws of this realm.' The statute of Charles seems, therefore, an almost exact pattern of the statute of Elizabeth, and I have but



little doubt that its framers had the latter Act before them at the time they were preparing it." A

It is said that these exemptions have been allowed for a long period; that is true, but I am not able to assent to the view that the course pursued by the executive officers of the Crown is one which, under the circumstances of this case, could afford any clue to the true construction of the statute. I do not deny that, in the language of COCKBURN, C.J. (*Fether v. R.* (10) 6 B. & S. at pp. 290, 291), B

"where there has been an exposition of the law by judicial decision or a settled course of practice or understanding of the law among legal practitioners, the language of an instrument [or of a statute] may, in certain cases, be interpreted according to such a standard."

Take the case there referred to. I quote from the statement of facts by the Chief Justice (*ibid.* at pp. 289, 290): C

"It certainly appears that, at the time this patent was granted, a general understanding prevailed, founded on the practice of a long series of years, that if patented inventions were used in any of the departments of the public service the patentees would be remunerated by the ministers or officers of the Crown administering such departments, as though the use had been by private individuals. There can be no doubt that in numerous instances payments had been made to patentees for the use of patented inventions in the public service without objection or difficulty; and not only does no question appear to have been raised as to the right of the patentees by the minister of the Crown, but the legal advisers of the Crown appear also to have considered the right whether arising from the terms of the patent or from the existing practice, as so well settled that we find SIR JOHN JERVIS, the then Attorney-General, on an application for the renewal of the patent of *Pettit v. Smith* (11) before the Judicial Committee of the Privy Council in the year 1852, two years only before the date of this patent, endeavouring to obtain the insertion of a condition that the Crown should have the use of the invention without payment; a course which obviously would have been unnecessary had the Crown been considered entitled to use the invention without such a provision. That the same view of the matter has prevailed until the present question was raised in this case, and that of *Clare v. R.* (12) which preceded it, is plain, as we find a similar application to that made by the Attorney-General in *Re Pettit Smith's Patent* (11), repeated in the subsequent cases of *Re Carpenter's Patent* (13) and *Re Lancaster's Patent* (14), the application for the renewal of the latter having occurred as late as in the last year. There can be little doubt that, on the faith of the understanding and practice referred to, many inventors have, at a great expense of time and money, perfected and matured inventions and taken out patents in the expectation of deriving a portion of their reward from the adoption of their inventions in the public service." D

Yet, notwithstanding this, they held that the patent could not be construed in pursuance of such a practice. Or, to put the limitation a little higher, as it is put by LORD ELLENBOROUGH in *Isherwood v. Oldknow* (15) (3 M. & S. at p. 396), E

"where the general understanding of the law has not been speculative and theoretical, but where it has been the groundwork and substratum of practice [as in the case with which he was dealing] upon which powers of the character now in debate have been erected and acted upon from the time of Henry VIII down to 1815." F

I think it would be impossible to say that anything in the history of the administration of the Income Tax Act comes up to the standard required, even apart from the history of how the practice of allowing the exemption in debate had grown up. As a matter of fact we know that the practice is directly in conflict with the opinion given by the law officers of the Crown, SIR ALEXANDER COCKBURN and LORD WESTBURY when respectively Attorney-General and Solicitor-General, in the year G

A 1856, who advised that "charitable purposes" were plainly distinguishable from "parochial purposes" in the Income Tax Acts, and, accordingly, advised against exemptions which certainly in the Court of Chancery would have been considered "charitable." We know also that the origin of the allowance was founded on the opinion of Mr. FULLER, to whom was assigned the duty of superintending the business relating to the claims of charities for exemption in the year 1843. The opinion  
B given in 1856 does not appear, however, to have been acted on, since by a letter from the Treasury to the Commissioners of Inland Revenue, dated Oct. 1, 1863, it was laid down that, notwithstanding the opinion of the law officers, the administration of the tax ought not to be altered by a purely administrative authority. All this appears from a return made to an order of the House of Lords, dated Aug. 3, 1888. But I confess I should regard with very great hesitation any inference  
C derivable from the parliamentary paper in question, except the inference which negatives a universal and adopted practice as expounding the law. I cannot, therefore, agree that the statute receives any exposition from the fact that the practice has been such as has been described.

I also think the view of the true construction of an Act which is to apply to England, Ireland, and Scotland alike, is that it ought to be construed according to  
D the canon of construction laid down by the Court of Session in *Baird's Trustees v. Lord Advocate* (1). It is a rule which has been acted on, not only in respect of taxing Acts, but of other enactments. Indeed, it is only part of a general principle of common sense which GROSE, J., laid down in a rating case (*R. v. Hogg* (16), 1 Term Rep. at p. 728), "a universal law cannot receive different constructions in different towns." And if (to quote the language of FRY, L.J.) words construed in  
E their technical sense would produce inequality, and construed in their popular sense would produce equality, you are to choose the latter. I should hesitate very much to qualify this rule of construction by pointing to instances in which inappropriate words had been used in a statute. That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any court to proceed upon  
F the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute would give authority for an interpretation of the language of an Act of Parliament which would be attended  
G with the most serious consequences.

I am not satisfied, after fully considering the statutes and decisions which the care of LORD WATSON has collected for our guidance, that the principle of the decision of the court in *Baird's Trustees v. Lord Advocate* (1) is not quite reconcilable with all of them. That "godly" and "pious" are convertible terms, and may be so treated, is true. With reference to the subject-matter of the decisions  
H to which my noble friend has referred, it is to be observed that the supply of education, or the relief of poverty, largely entered into the purpose referred to, and that the question then in debate did not raise the question now before your Lordships. In not one of them do I find such a latitude of interpretation of "charitable purposes," as those which I have quoted as being, within the contemplation of the English Court of Chancery. "charitable purposes," and they are also open to an  
I observation of a more general character, which I shall have to make presently when dealing with the particular donation now before your Lordships for consideration. In common with the Court of Appeal, I think that the principle laid down by the Court of Session in construing an Act which is to apply to the three kingdoms, is a sound one, though perhaps verbal criticisms may be applied to the language in which it is conveyed.

LORD CAMPBELL's observation in *Lord Saltoun v. Advocate-General* (17) I think is the true rule: though even there, perhaps, criticism might be applied to the exact language in which it is expressed. I cannot concur with the view which has

found favour with one of your Lordships, that the technicalities which LORD CAMPBELL thought were to be disregarded were not technical expressions in the Act. The word which was in debate was "predecessor," whether that word was to receive its meaning according to technical application in Scottish law or its more popular meaning was the turning point of the case, and it was with reference to the use of that word "predecessor" that LORD CAMPBELL's observations were made. Neither do I think one gets much light from *Gordon of Park* (18), where, by the Act of Union itself, it was ordained "that the law of treason should be administered as much as possible alike in the two countries." That Act, therefore, recognised that differences did exist, and enacted in somewhat loose phraseology that they were to be administered "as much as possible alike." I do not find that in any Scottish Act, or in any Scottish decision, "institutions for general public purposes," "protection of animals," "extension of knowledge," "museums," "libraries," or the like, "diffusion of geographical knowledge," "homes for lost dogs," or "anti-vivisection" societies, would be treated in Scotland as the objects of charitable donation, and the argument involves the necessity of establishing, not that there are points in which the English and Scottish use of that word may be similar, or even identical, but that generally, and in the Scottish and English law they must have practically the same meaning. I should hesitate very much to differ from the Court of Session on that subject, and certainly there is nothing which has been brought before your Lordships during the argument which, to my mind, justified the proposition that the use of the words "charitable purposes" in the Court of Chancery, which, as I have pointed out, comprehends all the above objects, has ever been adopted in the law of Scotland.

I admit the justice of the criticism which suggests that words are sometimes put into an Act *ex abundante cautela*, and would not, therefore, rely upon mere redundancy of expression, which I agree may be inserted for securing some particular institution which it is thought might otherwise be deprived of such statutable exemption; but I do not think that the same observation applies to a series of statutes in which "charitable" is distinguished from "public" purpose, or religious, or educational, as indeed is the case in the statute upon which most reliance is placed—the [repealed] Succession Duty Act, 1853 [see s. 16]—where the words are "charitable or public purposes." I do not deny the validity as an argument of the drafting of that clause, which having described the property as subject to a trust for "charitable" or "public" purposes, and having all through the clause spoken of "such" property, finally speaks of it as "the charity" property, a phrase in itself not quite accurate; but I agree that if a question were to arise whether there was the power of securing the amount of duty upon the property, the subject of a trust for "public" or for "charitable" purposes, any court would construe the words "charity property" as being comprehended within the intended power to charge; but it would be rather upon the construction of the whole section than that the words themselves import an identity between the words "charitable" and "public."

The fact, however, remains, that in various statutes the word "charitable" is distinguished by the legislature from "public," "educational," "religious"; and, in not one instance that I have been able to find, do the words run "or other charitable purpose," which one would think would be the natural mode of expressing the meaning now insisted on. One can understand the good sense of the effort to give the widest interpretation to such a phrase as "charitable uses," as in the English and Irish statutes, or the words "pious donations" of the Scottish statute of 1633. The evil was the same in all three countries, viz., the misapplication of donations made for the benefit of people who could not be represented by any particular litigant, and whose interests were neglected by the dishonest appropriation of gifts intended for useful, public, or charitable purposes. But such considerations have no application to a Taxing Act. There is no purpose in a Taxing Act but to raise money, and an exemption is just as much within this criticism as any other part of the Act, since every exemption throws an additional burden on the rest of the



A community. It is suggested, indeed, that the reason for an exemption may be that the public nature of the interest is that which may justify the exemption. I cannot find any trace of such a principle in the statute, and I do not think it is borne out by decisions where the incidence of rates has been in question. It was undoubtedly thought that property held for public purposes was not rateable; but this is now clearly not the law. It is settled that no such exemption applies: see *Mersey Docks v. Cameron* (19); *Clyde Navigation Trustees v. Adamson* (20); *Leith Harbour and Docks Comrs. v. Inspector of the Poor* (21). The construction of a taxing Act appears to me to present no analogy to the class of Acts, English, Irish, or Scottish, to which I have above referred, and I cannot apply to this Act the principle of construction which those Acts may very justly have received.

C To come now to the particular bequests before us, and to the use of the word "charitable" in the particular Act we are construing. I would say, without attempting an exhaustive definition or even description of what may be comprehended within the term "charitable purpose," I conceive that the real ordinary use of the word "charitable," as distinguished from any technicalities whatsoever, always does involve the relief of poverty. No one would doubt what was the meaning of a charity sermon, a charity school, or of a person giving service gratuitously because it was for a charity. And it seems to me that the Court of Appeal did not so much differ with the Lord Chief Justice as to the true exposition of the word involving the relief of poverty, as in the application of the proposition: What would be a relief of poverty? As to that, I think it would be impossible to give an adequate exposition of what would presumably be in the mind of the legislature, without regarding the circumstances of the time, and the state of public feeling when the legislation in question was under debate. At a time, for instance, when religious instruction was regarded as being as important as the maintenance of life, then if people were without the means of obtaining religious instruction, one can well understand the principle that to give them the necessary religious instruction, which the argument assumes they would not otherwise be able to obtain, would be in the sense which I have indicated "charitable." But the difficulty I have in reconciling the decision of the majority of the Court of Appeal with the principle they have laid down is that, in the particular gift under debate, purposes appear to be contemplated having no relation to poverty at all. Take the first case of foreign missions: I suppose the conversion of the wealthiest chieftain to the views of the Moravian Mission would be just as much within the object of the trust as any other purpose. The Master of the Rolls, while enlarging the purposes which may be described as charitable beyond the mere relief of physical necessities, as to which I do not disagree, adds these words:

H "You may desire to convert the richest people, and very often do. If you desire to convert them to your religious opinions, whatever they may be, not on account of their poverty, but because you think it is desirable that their religious views should be like yours, that does not come within this canon. A religious object is not necessarily a charitable object within the sense that I have put it."

I With that view I entirely concur, and, as I have said, the difficulty I have is in applying such a rule to justify the exemption here claimed. I do not understand how it can be said that this trust is only for a mission to convert simply poor heathens. It seems to me (to use the language of the Master of the Rolls himself) "a mission to convert heathens without regard to their poverty at all." And it is to be remembered that, so far as the property is entitled to exemption, it must not only be applicable to, but applied to the charitable purposes in favour of which the exemption is claimed. I think it would be a surprise to the Moravian body itself to find that their missions were either exclusively or substantially applied only to impoverished heathens, and that heathens well off in their own country were beyond the scheme of their missions. To my mind it is obvious that the object of the mission is the propagation of the Moravian tenets among persons

whom the Moravian brethren conceive to be in darkness and wish to enlighten by the views which they themselves profess, and that the element of poverty, as applicable necessarily to the objects of their efforts, is as much beside the Moravian view as the colour of the converts or the situation of their territory. That there are some objects which would be charitable objects under these trusts, I do not deny; but the question here argued is whether the funds are all applicable and applied to charitable purposes. For these reasons I am of opinion that the judgment appealed from ought to be reversed.

**LORD WATSON** stated the facts as set out above and continued.—If I could accept, without reserve, the opinions expressed in *Baird's Trustees v. Lord Advocate* (1) with respect to the meaning of the term "charitable," I should still entertain doubts as to the rule applied to its decision, which has been followed in this case by the majority of the English judges. The only principle derivable from *Lord Saltoun v. Advocate-General* (17), which can aid in the decision of this case, appears to me to be that the Act of 1842 must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries. In that case the language which the court had to construe, which was not technical, had, when read in the light of the context, the effect of producing the equality which the legislature presumably contemplated. But there existed outside the Act a technical rule of Scottish feudal conveyancing, which would, if permitted to qualify the language of the Act, have disturbed that equality; and this House held (reversing the judgment of the Court of Session), that an extrinsic technicality productive of that result ought to be disregarded. It does not, in my opinion, necessarily follow from that decision that the popular meaning of a word employed in a taxing statute must be adopted in cases where the word has a definite legal meaning in England and no definite popular meaning either in England or Scotland.

I have been unable to find that the word "charitable," taken by itself, has any well-defined popular meaning in Scotland or elsewhere. It is a relative term, and takes its colour from the specific objects to which it is applied. While it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence. In the latter sense the meaning of the term is practically, although not absolutely, co-extensive with that which has been attributed to it by the Court of Chancery. Assuming, as the Court of Session has decided, that the term has no technical meaning in Scottish law, ought "charitable," as it occurs in the Act of 1842, to receive that wide yet legitimate popular interpretation which practically harmonises with its import in English law, or must its narrowest conventional use be accepted as matter of fixed legal construction?

I have not found it necessary for the purposes of this case to determine these questions, because I am satisfied that, in legislative language, at least, the expression "charitable" has hitherto borne a comprehensive meaning according to Scottish as well as according to English law. On this point I have the less hesitation in differing from the learned judges of the Court of Session, because I do not find that the considerations which have led me to that conclusion were entertained by them, or were even submitted to them in argument. So far as I am able to discover, "godly" and "pious," as applied to trusts or uses, had, in early times, much the same significance in Scotland as in England. Their meaning was not limited to objects of a religious or eleemosynary character, but embraced all objects which a well-disposed person might promote from motives of philanthropy. For instance, the Scottish Act, 1592, c. 162, applies the epithet "godly" to a gift by Queen Mary of lands and annual rents for sustentation of the ministry within the burgh of Edinburgh and the "entertainment" of its hospitals. The extensive signification of "pious" may be illustrated by the terms of the Act 1685, c. 18, which deprived patrons of their right to stipend accruing during the vacancy of a cure, and enacted that it should in future be employed by them "on pious uses within the respective

**A** parishes." Of these pious uses three are "more particularly" specified, these being "the building and repairing of bridges, repairing of churches or entertainment of the poor." In *Lord Saltoun v. Lady Pittsligo* (22), the Court of Session held that the repair of a public harbour was a pious use within the meaning of the Act, although they disallowed the patron's outlay on the ground that the harbour was beyond the limits of the vacant parish.

**B** The expression "charitable," which is used in the Act of Elizabeth [Charitable Gifts Act, 1601] as a synonym of "godly," is employed in the same sense with "pious" in the Scottish statute 1633, c. 6, which is entitled an Act against "the inverting of pious donations." It proceeds on the preamble that certain gifts in lands, heritages, and sums of money, "in favour of colleges, schools, hospitals, and other pious uses," had been inverted to other purposes, "to the evil example of

**C** others and the hindrance of the like charitable works against all reason and conscience." It accordingly enacts that such inversions shall cease; and that action shall be competent to the "said kirks, colleges, and others," and to "the bishops and ordinaries within the dioceses where the said kirks, schools, and others lye," against the heirs, executors, or others entrusted with the administration of the gift; and also provides that, on application to the court, letters of horning shall issue

**D** without citation of parties. According to the plain language of the Act of 1633, all donations for pious purposes, including gifts made to the church for religious purposes, were regarded as charitable donations. I see no reason to doubt that the word "charitable" was so used in its ordinary and legal sense, or that Mr. Baird's trust would have been considered a trust for charitable purposes by the legislators who passed the Act. If the Income Tax Act, 1842, had been enacted by the

**E** Scottish Parliament in 1633, I do not think the Lords of Session would at that time have adopted the narrow construction put upon the word "charitable" by their successors in the year 1888.

The use of the word in the early law of Scotland, or in statutes of the Scottish Parliament, would, no doubt, be of little relevancy to the present question if it could be shown to have acquired a more restricted meaning in the modern law

**F** language of that country. The reported decisions of the Court of Session throw little, if any, light upon the question, for a reason which is sufficiently obvious. Ever since its institution the court has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purposes to which the estate or income of the trust may be appropriated, and there has consequently been no room for those numerous questions, as to a trust being

**G** charitable or not, which have arisen in England under the statute of Elizabeth.

While the Scottish cases cannot be said to afford any precise definition of what constitutes a charitable trust purpose, some of them do appear to point to a more liberal interpretation than that which was adopted by the court in the case of the Baird trust. In *Ferguson v. Marjoribanks* (23), which was decided in 1853, a testator had bequeathed a sum of money to trustees, with directions to apply the

**H** annual interest

"in the erection of a free school in such part of the parish of Bathgate, as my said trustees or the major part of them shall think fit and proper, for the education of the youth of the said parish."

The benefits of the foundation were not confined to the poor, nor could they reasonably be said to be in the main intended for the poor. Yet the Lord President McNEILL (afterwards LORD COLONSAY) describes the bequest as one "in perpetuity for a charitable purpose"; and, in the note appended to his judgment as Lord Ordinary, LORD RUTHERFORD, the most learned Scottish lawyer of the period, speaks of it as "the charity." In this House, noble and learned Lords, in disposing of appeals from Scotland, have expressed themselves in terms which point in the same direction. LORD GIFFARD, delivering judgment in *Hill v. Burns* (24), uses the expression "charitable" as equivalent to "charitable and benevolent." In *Aberdeen University v. Irvine* (25), a trust for college bursars, who did not necessarily

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in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours. A

But what is a "charitable purpose?" Whatever definition is given, if it is right as far as it goes, in my opinion, this trust is not within it. I will attempt one. I think a "charitable purpose" is where assistance is given to the bringing up, feeding, clothing, lodging, and education of those who from poverty, or comparative poverty, stand in need of such assistance (see per LORD COLERIDGE, 22 Q.B.D. at p. 301)—that a temporal benefit is meant, being money, or having a money value. This definition is probably insufficient. It very likely would not include some charitable purposes, though I cannot think what, and include some not charitable, though also I cannot think what, but I think it substantially correct, and that no well-founded amendment of it would include the purposes to which this fund is dedicated. TODD'S JOHNSON gives the meaning "kind in giving alms, liberal to the poor, kind in judging of others, disposed to tenderness, benevolent." But of course the word must be construed in the sentence where it is found, and the first meaning alone is applicable when the question is whether this trust is for charitable purposes within the Income Tax Act. Indeed, the word "benevolent" seems to me to have caused the difficulty. The purposes of this trust are doubtless "benevolent"; good was wished to others; but certainly every benevolent purpose is not charitable. I think there is some fund for providing oysters at one of the Inns of Court for the Benchers; this, however benevolent, would hardly be called charitable; so of a trust to provide a band of music on the village green. B  
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I cannot quite accept LORD ESHER's definition; he says,

"allowances are to be made when the rents and profits are given in trust to be expended in assisting people to something considered by the donor to be for their benefit." E

But that would include such cases as I have put, which I do not think his Lordship would consider charitable purposes. He proceeds, and I agree with him,

"and which assistance the donor intends shall be given to people who in his opinion cannot without such assistance by reason of poverty obtain that benefit." F

Be it so, but that excludes this trust; there is no poverty contemplated in those who are to be benefited, nor any notion that an addition to their means would procure them that benefit. What of a trust for the conversion of the Jews? Is that a charitable purpose? If so, what of a trust for their reconversion? It seems to me that the extended meaning of "charitable purposes" would include every case of amusement and pleasure that could be thought of. I cannot think this was the intention of the legislature. It is suggested that a fund for the saving of shipwrecked sailors would be for a charitable purpose. That is not this case. But would it? If so, would jumping into the sea to save a sailor be an act of charity? We say: "He takes a charitable view of his conduct," "kind in judging of others," using the word as equivalent to "benevolent." It is confounding the two words that seems to me to lead to the difficulty. G  
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What was the intention, and why the exemption is made in the Act, is, of course, very much guess-work. But something like a reasonable ground may be suggested in this: that when the gift is of such a character as I have suggested in my definition, to tax the charity is to tax the poor, or take from the poor who would otherwise get the amount of the tax. It is to be remembered, as has been mentioned, that to exempt any subject of taxation from a tax is to add to the burden on taxpayers generally, and a very large exemption must be made, if the respondent is right, for the benefit of so-called charities, many of which are simply mischievous. On these considerations I hold that the natural meaning of the words "charitable purposes" excludes one-half of the income of these funds. I

I now come to the other ground on which the exemption is claimed. It is said that, whether or not the natural meaning of "charitable purposes" includes the purposes of this trust, those words have an artificial meaning, or a meaning given

A by statute or use, and must be interpreted accordingly. The argument, as I understand it, is this: The Charitable Gifts Act, 1601, is entitled:

“An Act to redress the Misemployment of Lands, Goods, and Stocks of Money heretofore given to Charitable Uses.”

B It then enumerates a variety of uses or purposes, some of which are not charitable according to any ordinary definition of the word; therefore, “charitable uses” in the title means charitable uses, and more than those, benevolent uses, and uses for the public or general good, or that of portions of the public, or of individuals. Then it is said that this interpretation of “charitable uses” has been followed by other statutes, and by decisions from the passing of the statute hitherto, and so “charitable purposes,” when those words occur in any statute, must be understood  
C as including whatever would be held to be within the statute of Elizabeth, and that the purposes here would be so held.

I cannot follow this reasoning. It would fall to the ground if the title of the statute had been “charitable and other benevolent uses,” or some similar expression, as it ought to have been, in strictness. Because, as I have said, I think it is certain that some of the purposes mentioned in the preamble are in no sense charitable.  
D I cannot agree with FRY, L.J. It is a strange thing that the title should make things “charitable” which are not so, rather than that the preamble should be understood as going beyond the title, which compendiously and conveniently spoke of charitable uses only. I believe that all that has been done is what I have said, viz., that later decisions and statutes have spoken of cases as “charitable uses,” meaning cases within or dealt with as though within the statute of Elizabeth.  
E An example of this will be seen in s. 66 of the Charitable Trusts Act, 1853 [repealed with saving by the Charities Act, 1960], the interpretation clause of which says:

“charity shall mean every endowed foundation and institution taking or to take effect in England and Wales, and coming within the meaning, purview, and interpretation of the statute of 43 Eliz., c. 4, or as to which, or the administration of the revenues or property thereof, the Court of Chancery has or may exercise jurisdiction.”  
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I have said that some cases within the Act of 1601 could not, according to any reasonable definition of the words, be said to be “charitable purposes.” I take, for example, “schools of learning,” not limited to the poor, “repair of sea-banks,”  
G “relief, etc., for houses of correction,” which is in aid of rates not paid by the poor. So, also, a bequest for keeping chimes in repair has been held to be within the statute: *Turner v. Ogden* (28); perhaps, because causing a lessening of church rates, if, indeed, they could have been applied to such a purpose, which I do not know. So, also, a bequest upon trust to pay, divide, or dispose thereof for the benefit and advancement of such societies’ subscriptions or purposes having regard to the  
H glory of God in the spiritual welfare of his creatures: *Townsend v. Carus* (29). Let it not be supposed that I find any fault with courts of equity for calling every trust within the statute of Elizabeth a charity. It was not strictly accurate, but was concise, and saved a circumlocution.

There is a very difficult and embarrassing matter to be considered. Everyone admits, I believe, that the construction of the Income Tax Act ought to be the  
I same in Scotland as in England; but the Scottish courts say that the natural meaning of the words “charitable purposes” does not include such purposes as these, and that those words have not acquired a technical meaning to that effect. What answer is it to say that by English law it is so called for certain purposes? I do not agree it is so called; but, suppose it were, what answer would it be? Suppose the case arose in England, and we were asked to interpret a statute, not according to its ordinary meaning, but according to some mode of expression used in Scotland? On the other hand, your Lordships have the advice of LORD WATSON, who says the words ought to be interpreted in favour of the respondent in Scotland.

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"An Act to redress the Misemployment of Lands, Goods, and Stocks of Money heretofore given to Charitable Uses."

**B** It then enumerates a variety of uses or purposes, some of which are not charitable according to any ordinary definition of the word; therefore, "charitable uses" in the title means charitable uses, and more than those, benevolent uses, and uses for the public or general good, or that of portions of the public, or of individuals. Then it is said that this interpretation of "charitable uses" has been followed by other statutes, and by decisions from the passing of the statute hitherto, and so "charitable purposes," when those words occur in any statute, must be understood as including whatever would be held to be within the statute of Elizabeth, and that the purposes here would be so held.

**C** I cannot follow this reasoning. It would fall to the ground if the title of the statute had been "charitable and other benevolent uses," or some similar expression, as it ought to have been, in strictness. Because, as I have said, I think it is certain that some of the purposes mentioned in the preamble are in no sense charitable. I cannot agree with FRY, L.J. It is a strange thing that the title should make things "charitable" which are not so, rather than that the preamble should be understood as going beyond the title, which compendiously and conveniently spoke of charitable uses only. I believe that all that has been done is what I have said, viz., that later decisions and statutes have spoken of cases as "charitable uses," meaning cases within or dealt with as though within the statute of Elizabeth. An example of this will be seen in s. 66 of the Charitable Trusts Act, 1853 [repealed with saving by the Charities Act, 1960], the interpretation clause of which says:

**F** "charity shall mean every endowed foundation and institution taking or to take effect in England and Wales, and coming within the meaning, purview, and interpretation of the statute of 43 Eliz., c. 4, or as to which, or the administration of the revenues or property thereof, the Court of Chancery has or may exercise jurisdiction."

I have said that some cases within the Act of 1601 could not, according to any reasonable definition of the words, be said to be "charitable purposes." I take, for example, "schools of learning," not limited to the poor, "repair of sea-banks," **G** "relief, etc., for houses of correction," which is in aid of rates not paid by the poor. So, also, a bequest for keeping chimneys in repair has been held to be within the statute: *Turner v. Ogden* (28); perhaps, because causing a lessening of church rates, if, indeed, they could have been applied to such a purpose, which I do not know. So, also, a bequest upon trust to pay, divide, or dispose thereof for the benefit and advancement of such societies' subscriptions or purposes having regard to the **H** glory of God in the spiritual welfare of his creatures: *Townsend v. Carus* (29). Let it not be supposed that I find any fault with courts of equity for calling every trust within the statute of Elizabeth a charity. It was not strictly accurate, but was concise, and saved a circumlocution.

**I** There is a very difficult and embarrassing matter to be considered. Everyone admits, I believe, that the construction of the Income Tax Act ought to be the same in Scotland as in England; but the Scottish courts say that the natural meaning of the words "charitable purposes" does not include such purposes as these, and that those words have not acquired a technical meaning to that effect. What answer is it to say that by English law it is so called for certain purposes? I do not agree it is so called; but, suppose it were, what answer would it be? Suppose the case arose in England, and we were asked to interpret a statute, not according to its ordinary meaning, but according to some mode of expression used in Scotland? On the other hand, your Lordships have the advice of LORD WATSON, who says the words ought to be interpreted in favour of the respondent in Scotland.

I cannot think so. FRY, L.J., says the words are technical, and should be interpreted in Scotland as in England. I cannot see why. LORD ESHER and LOPES, L.J., do not agree. I do not know that they have a right to express an opinion on Scottish law, though we must. It seems to me that the argument shows that that has happened in Scotland which has happened in England, viz., that everything charitable, godly, pious, came to be compendiously called "charitable." I think this appears from the instances cited by LORD WATSON. Take *Aberdeen University v. Irvine* (25), where a "trust for college bursars who did not necessarily belong to the class of indigent persons" was dealt with as a charity. It was benevolent, doubtless, but not charitable. A

I think the judgment on this should be reversed. As the majority of your Lordships think otherwise, the State will be a subscriber of £17 a year to B

"supporting, maintaining, and subsidising the missionary establishment among heathen nations of the Protestant Episcopal Church known by the name of the Unitas Fratrum, or United Brethren." C

Whether this was meant by the authors of the Income Tax Act? If it was, why? And whether it will be continued? are questions not before us. D

**LORD HERSCHELL.**—Two points were made on behalf of the appellants, the Commissioners of Income Tax, at your Lordships' Bar. It was said, first, that the respondent was not entitled to the allowance which he claimed under s. 61 of the Income Tax Act, 1842, and it was next contended that, even if entitled to that allowance, mandamus was not the proper remedy for a refusal to grant it. At the close of the arguments on behalf of the appellants, all your Lordships were of opinion that the latter point had not been made good. I confess it appears to me very clearly to be a case for a mandamus if the commissioners have wrongly refused to grant the allowance and to give the certificate provided for by the statute. The duty of granting the allowance in certain specified cases is imposed upon the commissioners by the statute in unequivocal terms, and no reason was assigned why the ordinary remedy by mandamus was inapplicable in the case of a breach of this statutory duty, except the suggestion that the respondent should have proceeded by petition of right. *Re Nathan* (30) was relied on in support of this proposition. But that was a very different case. It was sought by that proceeding to compel the Commissioners of Inland Revenue to make payment of a certain sum of money to the applicant for the mandamus; and it was held that for such a purpose recourse must be had to a petition of right. Here the applicant does not ask that the appellants should be commanded to make any payment. He seeks only that they should be compelled to grant an allowance and certificate, which it is necessary for him to obtain before he is in a position to require payment of the sum which it is no doubt his ultimate object to recover. Until he obtains this allowance and certificate, he is not in a position to maintain a petition of right. E

The main, and indeed the only, question arising on this appeal, apart from the objection to the form of procedure with which I have already dealt, is, to my mind, one of very considerable difficulty. The Income Tax Act provides that allowances shall be granted by the commissioners "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." The question in controversy is: What is the scope of the term "charitable purposes" in this enactment? The respondent is the treasurer of the Church of the United Brethren, commonly called Moravians. He claimed an allowance in respect of certain lands vested in trustees for objects connected with that community. Two-fourths of the rent of these lands are by the trust deed directed to be applied to objects of an eleemosynary and educational character, which were admitted by the appellants at your Lordships' Bar to be "charitable purposes" within the statute. It is only necessary, therefore, to consider the F G H I

A application of the remaining moiety. The trust is in these terms :

"As to two equal fourth parts thereof for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of *Unitas Fratrum*, or *United Brethren*."

B The question at issue may be shortly stated thus : Are lands which are vested in trustees for the purpose of maintaining and advancing missions among the heathen, vested in them for "charitable purposes," within the meaning of the statute? This is all that your Lordships have to determine, but it is impossible to determine it without arriving at a conclusion as to the construction to be put upon the words "charitable purposes" in the statute with which we are concerned. The question  
C is consequently one of far-reaching importance. It is said by the respondent that the expression trust "for charitable purposes" is well known to the law of this country, and has acquired, by a current of decisions in the Court of Chancery, a clearly defined meaning which has been recognised and adopted by the legislature in numerous enactments and that the same meaning ought to be attributed to it in the Income Tax Act. There can be no doubt that the words in question have,  
D in the law of England, and of Ireland also, the well-defined meaning alleged. And if the Income Tax Acts applied to England and Ireland alone, I do not think there could be any ground for hesitation in adopting the construction contended for, and interpreting the words in the sense in which they have been again and again employed by the legislature. But it is said on behalf of the appellants that the Income Tax Acts extend to Scotland also, and that the suggested construction is on that account inadmissible, inasmuch as the words "charitable purposes" have, in Scot-  
E land, a much more limited meaning. The exemption, it is said, must have been intended to be co-extensive in the three countries, and, therefore, a meaning of the words must be sought for which obtains in all. If the words had a technical meaning in Scotland different from that prevailing in this country, I think the argument would be irresistible, and I should feel a difficulty in resisting it if they had a well-defined and recognised meaning, even though it were a popular and not a technical  
F one.

The construction to be put upon the enactment under consideration came before the Court of Session in *Baird's Trustees v. Lord Advocate* (1). The learned judges were of opinion that the words "charitable purposes" must be read in their popular signification, and could not have the comprehensive meaning attached to them in the English law. The Lord President said :

G "Charity is the relief of poverty, and a charitable act, or a charitable purpose, consists in relieving poverty; whatever goes beyond that is not within the meaning of the word 'charity,' as it occurs in this statute."

LORD SHAND took the same view, but apparently limited the application of the term to the relief of physical necessities resulting from poverty. He said :

H "I think the term 'charitable purposes only,' used in a modern statute, in the absence of any words indicating that a wider meaning is intended, is to be taken in its ordinary sense, as referring to fund given for the relief or pecuniary assistance of persons in poverty. I think it relates to funds dedicated to the relief of physical necessity or want, to funds given as alms, or as a provision  
I for the relief of persons from physical privation or suffering arising from poverty."

I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money. Take, for example, an





institution for saving the lives of shipwrecked mariners. Its object is to render assistance to those in dire want of it; to meet a form of human need which appeals to the benevolent feelings of mankind, but not one which has its origin in the lack of money. Nevertheless, I do not believe that anyone would hesitate to call it a charity, or to say that money expended in rescuing drowning men was applied to a charitable purpose. Or again, what of a society founded for the protection of children of tender years from cruelty? Would not this be commonly described as a charitable purpose? And yet it is not pecuniary destitution that creates the necessity which such a society is designed to relieve. It is the helplessness of those who are the objects of its care which evokes the assistance of the benevolent.

I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief. Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less as a charitable purpose than the ministering to physical needs; and I do not believe that the application of the word "charity" to the former of these purposes is confined to those who entertain the view which I have just indicated. It is, I think, constantly and generally used in the same sense quite irrespective of any belief or disbelief in the advantage or expediency of the expenditure of money on these objects. It is a mistake to suppose that men limit their use of the word "charity" to those forms of benevolent assistance which they deem to be wise, expedient, and for the public good. There is no common consent in this country as to the kind of assistance which it is to the public advantage that men should render to their fellows, or as to the relative importance of the different forms which this assistance takes. There are some who hold that even hospitals and almshouses, which are specially mentioned by the legislature, discourage thrift, and do, upon the whole, harm, rather than good. This may be an extreme view entertained by few, but there are many who are strongly convinced that doles, and other forms of beneficence, which must undoubtedly be included, however narrow the definition given to the term "charitable purpose," are contrary to the public interest; that they tend to pauperise and thus to perpetuate the evil they are intended to cure, and ought to be discouraged rather than stimulated. It is common enough to hear it said of a particular form of almsgiving that it is no real charity, or even that it is a mischievous form of charity.

I think, then, that a purpose may be regarded by common understanding as a charitable purpose, and so described in popular phraseology, even though opinions differ widely as to its expediency or utility. The truth is, that the word "charity" has no sharply-defined popular meaning. It is used at different times in varying senses, broader or narrower. Sometimes, no doubt, it is employed in the limited sense adopted by the Court of Session, but at others it serves to embrace all expenditure which motives of benevolence induce men to make for the benefit of their fellows. If, then, one were driven to interpret the words under construction according to their popular signification, I think the proper course would be to prefer the broadest sense in which they are employed, and that such an interpretation would embrace the case with which your Lordships have to deal. But an examination of the statutes referred to by LORD WATSON has satisfied me that in the language of Scottish legislation they have been employed in a sense practically co-extensive with that attributed to them by the law of England, and there are, so far as I know, no decisions of the courts of Scotland prior to *Baird's Trustees v. Lord Advocate* (1) which have put a narrower interpretation on them.

Under these circumstances, I think the proper course is to interpret the words in the Income Tax Act in the sense in which they have been used alike in the law of both countries. I ought, perhaps, to notice the argument presented to your Lordships, that some more limited meaning of these words is suggested by the

A provisions in connection with which they are found, and the specific exceptions contained in the statute. I think that an argument derived from the specific mention of certain subjects in the exemptions found in a taxing Act is of little weight. Such specific exemptions are often introduced *ex majori cautela* to quiet the fears of those whose interests are engaged or sympathies aroused in favour of some particular institution, and who are apprehensive that it may not be held to fall within a general exemption. I concur in thinking that the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN.—The circumstances which have given rise to the present question are peculiar. The question itself is important, but it does not, I think, involve serious difficulty. Income Tax Acts have been in force in this country without any intermission since 1842, and, with one long interval, ever since the close of the last century. Every act has contained an exemption in favour of property dedicated to charitable purposes. What are charitable purposes within the meaning of these Acts the legislature has nowhere defined; but from the very first it was assumed, as a matter not open to controversy, that the exemption applied to all trusts known to the law of England as charitable uses, or trusts for charitable purposes. On that principle, without inequality and apparently without difficulty, the law was administered in England and Scotland, and afterwards, when the tax extended to Ireland, throughout the whole of the United Kingdom. At length, about three or four years ago, the Board of Inland Revenue discovered that the meaning of the legislature was not to be ascertained from the legal definition of the expressions actually found in the statute, but to be gathered from the popular use of the word “charity.” Proceeding on this view they refused remissions in cases in which the remission had been claimed and allowed as a matter of right for more than forty years continuously.

The action of the Board was confirmed in Scotland by the Court of Session, in *Baird's Trustees v. Lord Advocate* (1). There it was held that, “in ordinary, familiar, and popular use,” charity had only one sense, the relief of poverty, and that the exemption related to funds given as alms, or as a provision for the relief of persons from physical privations or sufferings arising from poverty, and that it went no further. The opinion of the court was based on a proposition which I will state in these words of the Lord President:

“It appears to me that in the construction of taxing Acts the court must always take it for granted, where these Acts apply to the whole United Kingdom, that the words used by the legislature are used in their popular and ordinary signification, and are not technical legal terms belonging to one system of jurisprudence, which may exist in one part of the United Kingdom and not in another. The occurrence of such technical terms as these in a taxing Act would have the most disturbing and confusing effect, and it would be very difficult indeed to administer such a statute as applicable to the whole United Kingdom. And, accordingly, we always find in these taxing Acts that the words used are words of ordinary meaning, which are understood by everybody, whether in England, Scotland, or Ireland, in the same sense.”

In deciding the present case the Divisional Court (LORD COLERIDGE, C.J., GRANTHAM, J., dissenting) followed and approved the reasoning of the Court of Session. The decision was reversed on appeal, but the majority of the Court of Appeal agreed with the Lord Chief Justice so far as to hold that the legal meaning of the words in question must be rejected in favour of their popular signification. They thought, however, that the Lord Chief Justice had taken too narrow a view. LORD ESHER, M.R., with whom LOPES, L.J., concurred, by way of giving an explanation of practical use, paraphrased the enactment as follows:

“Allowances are to be made in respect of the duties on the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees when the rents and profits are given in trust to be expended in assisting people to

something considered by the donor to be for their benefit, and which assistance the donors intends shall be given to people who, in his opinion, cannot without such assistance, by reason of poverty, obtain that benefit, and where the intention of the donor is to assist such poverty as the substantial cause of his gift."

FRY, L.J., differing from the Court of Session, considered that the expression "charitable purposes" had acquired a technical meaning in Scotland as it undoubtedly had in England and Ireland, and that, consequently, he was bound to adopt that meaning. In the course of the argument at your Lordships' Bar the learned counsel for the Crown admitted that the construction adopted by the Court of Session and the Lord Chief Justice was too narrow, but they insisted that the words must be construed in some popular sense, and without attempting any definition they contended that the expression "charitable purposes," in its ordinary acceptance among persons of education, would not include the purpose of converting the heathen.

In this state of perplexity the question remains for your Lordships to decide. It will be convenient, I think, in the first place to deal with the more important considerations which seem to have weighed with the courts in approaching the subject. Foremost of all is the very broad proposition on which the decision of the Court of Session rests, which has been adopted rather hastily, I think, by the Lord Chief Justice and the majority of the Court of Appeal. Is it true, as a matter of fact, that we always find in these taxing Acts that the words used are words of ordinary meaning, understood by everybody in the three kingdoms in the same sense, and not technical legal terms in use in one part of the United Kingdom? I could wish it were so. But we are not living in Utopia, where a perfect or ideal lawgiver may be had very readily. The Income Tax Acts themselves form an instructive commentary on the proposition of the Lord President. In the earliest Income Tax Act, the Act of 1799, except when it deals with commissioners for districts in Scotland, the language is the language of an English lawyer. So little attention was paid to the legal phraseology of Scotland, that the word "heritages" does not, I think, occur in the Act. The term used to denote real property is the expression "lands, tenements, and hereditaments." In the Acts of 1803 and 1806 the word "heritages" is introduced, but it will not be found inserted in all places where it seems to be required. Even in the Act of 1806 you will find the words "hereditaments" and "messuages"—words I should suppose not of ordinary meaning in Scotland, nor familiar in their English sense to Scottish lawyers—used as applicable to all parts of Great Britain.

Another example, not without some bearing on the present question, is presented by the Succession Duty Act, 1853. That is a taxing Act. It extends to the three kingdoms. No statute was ever drawn with more care. Studiously and with great skill it avoids technical expressions wherever they would be likely to create confusion. Yet there we find the very word "charity," which has given rise to all this argument, used in its technical sense according to English law, and applied to property belonging to charitable or public trusts in Scotland as well as to property dedicated to charitable purposes in England. In s. 16 the Act provides for the case of "a succession to property subject to a trust for any charitable or public purposes," and it goes on to give the trustee for any such property, who is made responsible for the duty and a debtor to the Crown in the event of non-payment, power to raise the duty. How is it to be raised? All the Act says is, "upon the security of the charity property." Again I ask, is the Lord President correct in saying that in construing a taxing Act extending to the whole of the United Kingdom, the court must always take it for granted "that the words used by the legislature are used in their popular signification"? I can find no authority for such a proposition.

There is, indeed, a passage in the judgment of LORD CAMPBELL in *Lord Saltoun v. Advocate-General* (17), which at first sight looks like an authority, and is so treated in the rubric. In reality it has no bearing upon the point. The case was



A this. Lord Saltoun, under an entail created by his grandmother, succeeded to a settled property on the death of his uncle without heirs male of his body. What was the rate of duty? Was it 3 per cent., as on a succession from an uncle, or 1 per cent., as on a succession from a lineal ancestor? This House, differing from the Court of Session, took the latter view, and LORD CAMPBELL began his opinion with these observations:

B "In construing the statute on which the case depends we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the legislature must be understood to be that the like interests in property taken by succession should be subjected to the like duties, wheresoever the property may be situated. The technicalities of the laws of England and of Scotland, where they differ, must be disregarded, and the language of the legislature must be taken in its popular sense."

C The technicalities to be disregarded were not technical expressions in the Act, but, as LORD WENSLEYDALE I think very clearly points out, the technicalities of the law of real property outside the Act altogether. In the Act itself, so far as it came under consideration in that case, there were no technical expressions belonging to the law of either country. But outside the Act there was the technical rule of Scottish law by which each succeeding substitute takes the whole fee and must be served heir to the preceding owner.

D Since these remarks have been in print, I have had the advantage of reading the criticism passed upon them by the Lord Chancellor. I must say I am rather surprised to learn that in *Lord Saltoun's Case* (17) "the word which was in debate was 'predecessor'"; that "the turning point of the case" was the question, "whether that word was to receive its meaning according to technical application in Scottish law, or its more popular meaning"; and, moreover, that "it was with reference to that word 'predecessor' that LORD CAMPBELL's observations were made." It is no concern of mine to defend LORD CAMPBELL. For aught I know he may have supposed that the term "predecessor" was a technical expression with Scottish lawyers. But, even so, why should it be assumed that he thought its meaning open to debate in *Lord Saltoun's Case* (17)? The very Act before him defined the term "predecessor." The definition seems somewhat remote from the popular meaning of the word, and not less remote from any technical application of it that can be imagined. I am very sorry to differ from my noble and learned friend. I may be wrong. But I cannot help thinking that when you find a special meaning assigned to a particular word in an Act of Parliament you must abide by that meaning in construing the Act—you cannot add to it or take away from it—nor can you substitute anything else for it. And, therefore, with the utmost respect, I venture to doubt whether it would have been permissible in *Lord Saltoun's Case* (17) to have discussed the comparative merits of other meanings which the Act had not adopted. And certainly I have some difficulty in understanding how such a discussion, if permitted, could have presented or involved the turning point of the case.

E It seems to me that statutes which apply to Scotland as well as to England, and touch upon matters commonly dealt with in legal language, may be divided into three classes. Sometimes, but very rarely, all legal terms are carefully avoided, as in the Succession Duty Act. Sometimes in very recent statutes, as in the Bills of Exchange Act, 1882, and the Partnership Act, 1890, every legal term according to English law is immediately followed by its equivalent in Scottish legal phraseology; and where no exact equivalent is to be found, a neutral and non-legal expression is adopted. But in some cases certainly, and especially in the legislation of former days, the statute proclaims its origin, and speaks the language of an English lawyer, with some Scottish legal phrases thrown in rather casually. The Income Tax Acts, I think, fall within this class, though, no doubt, the Act of 1842 is less conspicuously English than its predecessors.

I How are you to approach the construction of such statutes? We are not, I think, quite without a guide. It seems to me that there is much good sense in what

LORD HARDWICKE says in his well-known letter to an eminent Scottish judge (see LORD KAMES' ELUCIDATIONS (Edn. 1800), p. 385). Incidentally he happens to deal with the very point. He observes that, where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not harmonise equally with the genius or terms of both systems of law. That was, perhaps, rather a delicate way of stating the case, but one must remember to whom LORD HARDWICKE was writing, and his meaning is perfectly clear. Then he explains how the statutes ought to be expounded. You must, he says, as in other sciences, reason by analogy—that is, as I understand it, you must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what LORD HARDWICKE calls “a consistent, sensible construction.” A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates directly to the furthest part of the room. That was not LORD HARDWICKE's view. He seems to have thought reflected light better than none.

In construing Acts of Parliament, it is a general rule, not without authority in this House (*Stephenson v. Higginson* (31)), that words must be taken in their legal sense unless a contrary intention appears. Is a contrary intention shown merely by the circumstances that the legal meaning of the words used belongs more properly, or even exclusively, to the jurisprudence of one part of Great Britain? Agreeing with LORD HARDWICKE rather than with the Court of Session, I am disposed to answer that question in the negative. That according to the law of England a technical meaning is attached to the word “charity,” and to the word “charitable” in such expressions as “charitable uses,” “charitable trusts,” or “charitable purposes,” cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that, owing to their nature, they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being to a charity is void.

Whatever may have been the foundation of the jurisdiction of the court over this class of trusts, and whatever may have been the origin of the title by which these trusts are still known, no one I think who takes the trouble to investigate the question can doubt that the title was recognised, and the jurisdiction established before the Charitable Gifts Act, 1601, and quite independently of that Act. The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the “objects there enumerated,” as CRANWORTH, L.C., observes in *London University v. Yarrow* (32) (1 De G. & J. at p. 79), “are not to be taken as the only objects of charity, but are given as instances.” Courts of law, of course, had nothing to do with the administration of trusts. Originally, therefore, they were not concerned with charities at all. But after the passing of the Act 9 Geo. 2, c. 36, commonly known as the Statute of Mortmain, which avoided in certain cases gifts to “uses called charitable uses,” alienations and dispositions to charitable uses sometimes came under the cognisance of courts of law, and those courts, as they were bound to do, construed the words “charitable uses” in the sense recognised in the Court of Chancery, and in the statute of 1601, as their proper meaning.

**A** I have already dwelt for a moment on this point, because it seems to me that there is a disposition to treat the technical meaning of the term "charity" rather as the idiom of a particular court than as the language of the law of England. And yet, of all words in the English language bearing a popular as well as a legal signification, I am not sure that there is one which more unmistakably has a technical meaning in the strictest sense of the term, that is, a meaning clear and distinct

**B** peculiar to the law as understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word.

In Ireland, though neither the statute of Elizabeth nor the so-called Statute of Mortmain extended to that country, the legal and technical meaning of the term "charity" is precisely the same as it is in England. As regards the law of Scotland, the case is somewhat different. I think that FRY, L.J., with whose very able judgment in other respects I concur, has gone rather too far in saying that the word "charity" has the same technical meaning in Scotland which it has in England. On the other hand, it seems to me that, in *Baird's Trustees v. Lord Advocate* (1), the Court of Session has erred more seriously in the opposite direction. To borrow the words of LORD CHELMSFORD (*Dundee Magistrates v. Morris* (33), 3 Macq. at p. 154):

**D** "I cannot discover that there is any great dissimilarity between the law of Scotland, and the law of England with respect to charities."

And the result of such researches as I have been able to make is that, in the Scottish Act to which counsel for the respondent referred, the Act of 1633, in some statutes extending to Scotland, as in 2 & 3 Will. 4, c. 115, a Roman Catholic Relief

**E** Act, and the Succession Duty Act, 1853, to which I have already referred, in some opinions, delivered by Scottish judges in Scotland, as in *Ferguson v. Marjoribanks* (23), and not unfrequently in this House, sitting as a Court of Scottish Appeal, as in *Aberdeen University v. Irvine* (25) and *Andrews v. McGuffog* (34), the words "charity" and "charitable" are used sometimes in the sense which they bear in English law, sometimes in a sense hardly distinguishable from it.

**F** If this conclusion is right, although the expression "charitable purposes" may not have acquired a technical meaning, properly so called, in the law of Scotland, I cannot see that the use of the expression in a general Act as a legal term without the addition of its equivalent according to Scottish law (if any such equivalent could be found) would of itself, and apart from other circumstances, either create surprise or lead to any practical difficulty. No doubt the popular meaning of the words "charity" and "charitable" does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the court to the extreme, and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence, and no one as yet has succeeded in defining the popular meaning of the word "charity."

**H** The learned counsel for the Crown did not attempt the task. Even the paraphrase of the Master of the Rolls is not quite satisfactory. It would extend to every gift which the donor, with or without reason, might happen to think beneficial for the recipient; and to which he might be moved by the consideration that it was beyond the means of the object of his bounty to procure it for himself. That seems to me much too wide. If I may say so without offence, under conceivable circumstances, it might cover a trip to the Continent,

**I** or a box at the Opera. But how does it save Moravian missions? The Moravians are peculiarly zealous in missionary work. It is one of their distinguishing tenets. I think they would be surprised to learn that the substantial cause of their missionary zeal was an intention to assist the poverty of heathen tribes.

How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The



trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division. Even there it is difficult to draw the line. A layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity. Many people, I think, would consider a gift for the support of a lifeboat a charitable gift, though its object is not the advancement of religion, or the advancement of education, or the relief of the poor. And even a layman might take the same favourable view of a gratuitous supply of pure water for the benefit of a crowded neighbourhood; but after all, this is rather an academical discussion. If a gentleman of education, without legal training, were asked what is the meaning of "a trust for charitable purposes," I think he would most probably reply: "That sounds like a legal phrase. You had better ask a lawyer."

Having attempted to clear the ground so far, I come to the words of the enactment, on which the question before the House depends. They are to be found in the Income Tax Act, 1842. By s. 61 of that Act it is provided that, under Sched. A certain allowances are to be made for the duties charged on colleges or halls in the universities, and on any hospital, public school, or almshouse in respect of their public buildings, offices, and premises. The allowances are to be granted by the Commissioners for General Purposes in their respective districts. Then allowances are to be made

"on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes."

These allowances are in the hands of quite a different body. They are to be granted

"on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

They are

"to be claimed and proved by any steward, agent, or factor acting for such school, hospital, or almshouse, or other trust for charitable purposes, or by any trustee of the same by affidavit . . . stating the amount of the duties chargeable, and the application thereof,"

and are to be carried into effect by the special commissioners without altering the assessments which are to be levied notwithstanding such allowances. By s. 88 it is provided, with respect to Sched. C, that exemption shall be given to

"the stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only, or which according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee to charitable purposes only, and in so far as the same shall be applied to charitable purposes only, or the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purpose of Divine worship, and in so far as the same shall be applied to such purposes, provided the application thereof to such purposes shall be duly proved before the said Commissioners for Special Purposes by any agent or factor on the behalf of any such corporation, fraternity, or society, or by any of the members or trustees."

**A** Section 98 contains directions as to the manner in which these claims of exemption are to be made and carried into effect. Section 105 provides, by reference to the provisions of Sched. C, for similar exemptions under Sched. D, in the case of "any corporation, fraternity, or society of persons, and any trustee for charitable purposes only." In the case of the British Museum, s. 149 provides for the like allowances under Sched. A, "as are granted to colleges and other properties mentioned in No. 6 of that schedule," and the like exemptions in respect of any dividends of stock, "as are granted to charitable institutions" in the Act. Section 188 enacts that every provision applied to the duties in any particular schedule, which is also applicable to the duties in any other schedule, and not repugnant to its provisions, shall be applied as fully and effectually as if the application thereof had been expressly directed.

**C** What is the meaning of the expression "charitable purposes," as used in the Act of 1842? In order to determine that question, it is necessary, I think, to consider what the Act is speaking about, and whom it is speaking to. It does not help one much to take the word "charity" nakedly, and in the abstract, and then to turn to dictionaries for its meaning. It is said that the most common signification of "charity" is conveyed by the word "alms." So it is when that meaning fits the context, or the occasion. Perhaps, by way of illustrating my meaning, I may be permitted to refer to a passage in the writings of one of the most popular authors of the last century, where a striking contrast is drawn between charity, in its vulgar sense, and a gift for purposes which the law of England, rightly or wrongly—wrongly, as some think—considers charitable. In one of his essays, GOLDSMITH tells the story of a French priest at Rheims, so miserly in his habits, that he went **E** by the name of "The Griper." Working incessantly in his vineyard, steadily refusing to relieve distress, he managed to save a large sum of money. Then the writer adds:

**F** "This good man had long perceived the wants of the poor in the city, particularly in having no water but what they were obliged to buy at an advanced price; wherefore, that whole fortune which he had been amassing he laid out in an aqueduct, by which he did the poor more useful and lasting service than if he had distributed his whole income in charity every day at his door."

No one can misunderstand the meaning of the word there.

But the Act of 1842 has nothing to do with casual almsgiving or charity of that sort. Nor indeed has it anything to do with charity which is not protected by a **G** trust of a permanent character. The provisions of the Act which your Lordships have to consider are concerned with the revenues of established institutions—the income of charitable endowments. Such endowments, as I have already pointed out, form, according to English law, a distinct class of trusts standing by themselves, and owing their validity in each case, if the trust is a perpetuity, to the fact that the purposes are charitable in the eye of the law. Then I ask: To whom is **H** the Act speaking? In one sense, no doubt, it is speaking to all concerned; but it is addressed, I think, specially to that body under whose "cognisance and jurisdiction," to use the words of the Act, these particular allowances and exemptions are placed. All applications for these allowances and exemptions are to be made, not to the general commissioners in their respective districts, but to the special commissioners, and "at the head office for stamps and taxes in England." This is an **I** express direction with reference to exemptions under Sched. C, and, having regard to s. 188, the same rule must hold good in all cases, so that in no case can the question come along before any board or any commissioners in Scotland. Practically the special commissioners are identical with the Board of Inland Revenue, who now represent the Commissioners of Stamps and Taxes named in the Act of 1842. How are the authorities at Somerset House to determine what constitutes a trust for charitable purposes? The majority of the Court of Appeal tell them they must be guided by the popular meaning of "charity," and that "each individual case must be decided on its own facts." There is certainly no indication in the Act that

such a hopeless task as that was laid on the special commissioners. They have to satisfy themselves that the income in respect of which exemption is claimed is applied solely to charitable purposes, and they are told how that is to be proved. But the question, charity or no charity, if you accept the contention of the respondent, is determined for them by the law of the country in which they sit to exercise their jurisdiction. In *Baird's Trustees v. Lord Advocate* (1), the Lord President observed that such a construction "would have a most disturbing and confusing effect." With the utmost deference, it seems to me the only way to ensure uniformity in the administration of the Act.

On these grounds I have come to the conclusion that the expression "trust for charitable purposes" in the Act of 1842, and the other expressions in the Act in which the word "charitable" occurs, must be construed in their technical meaning according to English law. Although I rest my opinion on these broad grounds, it is I think, satisfactory to find that every consideration to which the case has given rise, if examined closely, confirms this view, and that there is no indication in the Act pointing in the opposite direction. In the first place, it is plain on the very words of Sched. A, that the legislature considered the purposes of a public school to be charitable, and a public school to be a trust for charitable purposes, just as much as an almshouse or a hospital. This seems to me to be enough to displace the narrow view of the Court of Session. Then, as Fry, L.J., points out, every expression in the first provision which I have read from Sched. A is a legal expression. But the argument may be carried further. Turn to the parallel passage in the Act of 1806 from which the Act of 1842 is copied. There the words are

"on the rents and profits of messuages, lands, tenements, or hereditaments, belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes."

In that passage every expression is a legal expression, and what is more to the purpose, a legal expression according to English law. There is no trace of Scottish legal phraseology there. I am not sure that the omission of the word "messuages" and the introduction of the word "heritages" may not have had something to do with creating the difficulty which your Lordships have now to solve. It seems to me, too, that the expressions in Sched. C "decree, deed of trust, or will" more properly belong to English legal phraseology than to Scottish. "Deed of trust" indeed is common to the legal language of both countries. But the word "decree" I think points primarily to the decrees of the Court of Chancery, by which no small proportion of the charities in this kingdom have been established, and I rather doubt whether the word "will" would have been used there as it is, if due attention had been paid to the language of Scottish lawyers.

There was an argument which appears to have had great weight with one of the learned judges in the Court of Session, to which I cannot attach much importance. That learned judge points out that in Sched. C there is a special exemption in favour of funds dedicated to the repair of cathedrals, colleges, churches, and places of worship. From that he infers that such purposes are not charitable within the meaning of the Act, and so, "without going outside of Sched. C," he finds a construction conclusive, as he thinks, in favour of the claim of the Crown. But, my Lords, in construing any document, it is not well to confine your attention to an isolated passage. It seems to me to be necessary to go outside of Sched. C in order to understand the Act. If you turn to Sched. A, and Sched. D, you will observe that these special exemptions are not to be found in either. So that, if that learned judge is right, we have this singular result. If property devoted to these special purposes is in land, income tax attaches. If the land is taken by a railway company and there is an interim investment in consols, or if the property is in any government funds, home, foreign, or colonial, it is exempt; in any other form of investment it is subject to income tax. Why should a premium be offered for the investment of money intended for church repairs in the funds of foreign or colonial governments? A construction which leads to a result so whimsical ought



A not, I think, to be adopted without good reason. It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption. Nor is surplusage or even tautology wholly unknown in the language of the legislature. On the other hand, if the legal meaning of the expression "charitable purposes" be adopted, there may be a superfluous expression here or there, but the Act will be consistent throughout. No argument can, I think, be founded on the special exemption of the British Museum. The clause relating to the Museum, which is also to be found in the Act of 1806, is obviously out of its place, and was probably introduced at the instance of the trustees of the Museum. It was necessary as regards the buildings and premises in the actual occupation of the Museum chargeable under Sched. A, and, that being so, it was natural, and not, I think, improper, that the exemptions to which the Museum would be entitled, as a charitable institution, under Sched. C, should be also specially mentioned.

A strong confirmation of the view which I am presenting to your Lordships is, I think, furnished by the income tax section of the Charitable Trusts Amendment Act, 1855. The Charitable Trusts Act, 1853, which established the Charity Commission, provided for the transfer of charitable funds to official trustees, of whom the secretary to the Commission was one. It appears from a parliamentary paper ("Charities," 1865), which contains a correspondence between the Board of Inland Revenue as Special Commissioners of Income Tax, and the Treasury, on the subject of income tax on charities, that it was the practice of the Board to give exemption to all stock standing in the names of the official trustees of charitable funds without further inquiry. This practice was confirmed, and the principle was carried still further by the Charitable Trusts Amendment Act, 1855, which enacts (s. 28) that

"all dividends arising from any stock in the public funds standing in the names of the official trustees of charitable funds, and which shall be certified by the Board [that is, the Charity Commissioners] to the governor and company of the Bank of England to be exempt from the property or income tax, shall be paid or carried to the banking account of the official trustees, without any deduction of such tax, and all dividends arising from any stock in the public funds standing in any other names or name, and which the Board shall certify to the governor and company of the Bank of England to be subject only to charitable trusts, and to be exempt from such tax, shall be paid without any deduction thereof."

By virtue of this enactment the income of a large proportion of the funds devoted to charity in this country, exceeding in amount for the year 1865 one million and a half, and now probably much larger, was entirely withdrawn from the cognisance and jurisdiction of the Board of Inland Revenue. Thenceforth, for the purposes of the Income Tax Acts, as well as for the purposes of administration, that income has been under the jurisdiction of a body bound by law to construe the expression "charitable trusts" according to its legal meaning, and to give certificates of exemption in accordance with that construction. The obligation is clear. The Charitable Trusts Amendment Act, 1855, is to be construed as one Act with the Charitable Trusts Act, 1853, and the Act of 1853 contains a definition of "charity" by reference to the Act of Elizabeth, and the practice of the Court of Chancery. I may add that s. 28 of the Act of 1855 has always formed part of the income tax code whenever the tax has been re-imposed, carrying with it into the code, to a certain extent at least, the legal definition of "charity."

I cannot help reminding your Lordships, in conclusion, that the Income Tax Act is not a statute which was passed once for all. It has expired, and has been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when

the practice was fully laid before Parliament in the correspondence to which I have referred ("Charities," 1865). It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point, of course, is not that a continuous practice following legislation interprets the mind of the legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the legislature, in re-enacting the statute, used those words in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment. However, as the point was not dealt with at the Bar, I forbear to express any opinion upon it.

With the policy of taxing charities I have nothing to do. It may be right, or it may be wrong; but, speaking for myself, I am not sorry to be compelled to give my voice for the respondent. To my mind it is rather startling to find the established practice of so many years suddenly set aside by an administrative department of their own motion, and after something like an assurance given to Parliament that no change would be made without the interposition of the legislature. In 1865 the Treasury communicated to Parliament the fact that they had come to the conclusion that the subject was "one which should be reserved to be dealt with by the legislature, and that in the meantime the practice which has hitherto prevailed should be followed." For such a conclusion, even if the claim of the Crown had been originally well-founded, there would be much to be said. The legislature declaring the law can at the same time grant immunity for the past; but a change of practice, established by judicial decision only, would leave the bulk of the charitable foundations in this country exposed to liabilities appalling in amount. I am, therefore, glad to find that the claim of the Crown is based on what seems to me to be a very superficial view of the meaning of the legislature, and my opinion is that the appeal should be dismissed with costs.

**LORD MORRIS.**—I have had an opportunity of reading and fully considering the opinion which has just now been announced by LORD MACNAGHTEN, and I can only add that I concur unreservedly in the reasons he has given and in the result he has arrived at.

*Appeal dismissed.*

Solicitors: *Sir W. H. Melvill* (Solicitor of Inland Revenue); *Francis & Calley*.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

# R. v. JACKSON. Ex parte JACKSON

[COURT OF APPEAL (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.),  
March 19, 1891]

[Reported [1891] 1 Q.B. 671; 60 L.J.Q.B. 346; 64 L.T. 679;  
55 J.P. 246; 7 T.L.R. 382]

*Husband and Wife—Consortium—Right of consortium—Refusal of wife to live with husband—Husband's right to seize and confine her—Right to beat wife.*

A husband has no right to take the person of his wife by force and keep her in confinement in order to prevent her from absenting herself from him for any purpose however innocent of moral offence until she renders to him conjugal rights.

*Re Cochrane* (1) (1840), 8 Dowl. 630, overruled.

**Quære** whether a husband has the right to restrain his wife if he found her about immediately to do something which would be to his dishonour, e.g., if she were about to elope with another or going to meet a paramour.

**PET LORD ESHER, M.R.:** One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law.

**Notes.** Considered: *Place v. Searle*, [1932] All E.R.Rep. 84; *R. v. Miller*, [1954] 2 All E.R. 529. Referred to: *Butterworth v. Butterworth and Englefield*, *Collins v. Collins and Harrison*, *Barratt v. Barratt and Fox*, *Howell v. Howell and Walker*, *Adams v. Adams and Ward*, *Ellworthy v. Ellworthy and Ledgard*, [1920] P. 126; *Gottliffe v. Edelston*, [1930] 2 K.B. 378; *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381.

As to the right of consortium, see 19 HALSBURY'S LAWS (3rd Edn.) 819-822; and for cases see 27 DIGEST (Repl.) 86-90.

Cases referred to:

- (1) *Re Cochrane* (1840), 8 Dowl. 630; 4 Jur. 534; 27 Digest (Repl.) 86, 642.
- (2) *R. v. Lister* (1721), 1 Stra. 478; 93 E.R. 645; sub nom. *Lister's Case*, 8 Mod. Rep. 22; 27 Digest (Repl.) 87, 647.
- (3) *R. v. Leggatt* (1852), 18 Q.B. 781; 19 L.T.O.S. 201; 16 J.P. 472; 118 E.R. 295; sub nom. *Ex parte Sandilands*, 21 L.J.Q.B. 342; 17 Jur. 317; 27 Digest (Repl.) 87, 657.

Also referred to in argument:

*Ex parte Bell Cox* (1887), 20 Q.B.D. 1; 57 L.J.Q.B. 98; 58 L.T. 323; 52 J.P. 484; 36 W.R. 209; 4 T.L.R. 81, C.A.; on appeal sub nom. *Cox v. Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 16 Digest (Repl.) 283, 534.

*Manby v. Scott* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O.Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 173, 1273.

*R. v. Mead* (1758), 2 Keny. 279; 1 Burr. 541; 96 E.R. 1182; 27 Digest (Repl.) 239, 1918.

*Atwood v. Atwood* (1718), Prec. Ch. 492; Gilb. Ch. 149; 24 E.R. 220; 27 Digest (Repl.) 86, 640.

*Seymour's Case* (1613), Moore, K.B. 874; Godb. 215; 72 E.R. 966; 27 Digest (Repl.) 265, 2136.

*Lady Lee's Case* (1674), 1 Freem.K.B. 376; 89 E.R. 280; sub nom. *Lord Leigh's Case*, 3 Keb. 433; sub nom. *R. v. Lord Lee*, 2 Lev. 128; 3 Salk. 189; 27 Digest (Repl.) 87, 659.

*R. v. Middleton* (1819), 1 Chit. 654; 27 Digest (Repl.) 88, 662.

*Lord Vane's Case* (1744), 13 East. 171, n.; 2 Stra. 1202; 104 E.R. 334; 17 Digest (Repl.) 237, 1903.



**Appeal** from a decision of a Divisional Court of the Queen's Bench Division (CAVE, J., and JEUNE, J.) refusing a writ of habeas corpus to a married woman, Emily Maude Jackson, who was alleged to be illegally detained by her husband, Edmund Haughton Jackson. A

*Finlay, Q.C.*, moved in the Court of Appeal for the writ by way of appeal from the decision of the Queen's Bench Division, and also as an original motion. The writ was ordered to issue, and the return to the writ was made in the following terms: B

"I, Edmund Haughton Jackson, in obedience to the writ herewith, do certify and return as follows: 1. The said Emily Emma Maude Jackson is my wife. 2. During my absence in New Zealand in the year 1888 my said wife went to reside with her sisters and brother-in-law. It was arranged that she should shortly join me in New Zealand, but she wrote to me pressing me to return to England, and I did so, but on my return to England in July, 1888, she refused to live with me, and I was denied access to her. 3. I commenced proceedings in the Divorce Division of the High Court of Justice against my said wife for restitution of conjugal rights, and on July 30, 1889, a decree was made for such restitution. 4. Since the making of such decree I have endeavoured to persuade my said wife by letters (personal access being still denied me) to come and live with me, but, acting under the advice and counsel of her said sisters and brother-in-law, she has in no way responded to my overtures. 5. I, therefore, on Mar. 8 instant, took my said wife and have since detained her in my house, using no more force or constraint than was necessary to take her or to prevent her returning to her said relations. She has had perfect liberty in and the full run of the house, short of leaving it. 6. Such restraint, I submit, I could lawfully use in order to have an opportunity of regaining the affection of my wife which had become alienated from me, and which it was impossible I could do when she was under the influence of her said relations." C

In his affidavit Mr. Jackson stated that his wife was a woman of independent means, and that he was married to her on Nov. 5, 1887, contrary to the wishes of her relatives. With his wife's consent he went to New Zealand two days after the marriage, on the understanding that she would follow him there later on. Mrs. Jackson wrote to him shortly afterwards to come back, but when he returned she refused to live with him, and he was not allowed access to her. On July 30, 1889, he obtained against her a decree for restitution of conjugal rights which she refused to obey. On Sunday, Mar. 8, 1891, with the help of two friends, Mr. Dixon Robinson and Dr. W. H. Robinson, he seized her as she was leaving church at Clitheroe, in Lancashire. In obtaining possession of her they used no violence, but only such force as was necessary to separate her from her sister, Mrs. Baldwin, to whom she was clinging, and to get her into the deponent's carriage. He then drove with her to his house at Blackburn. The affidavit continued: D

"After the carriage started, my wife offered no further resistance, though she continuously protested against having been taken, and desired to be released, saying that I could not force her to live with me. On arriving at the house she walked quietly in without any use of force whatever. My friend Dixon Robinson drove with us to Blackburn inside the carriage, and later in the day we were joined by Dr. Robinson, who was my other coadjutor in the seizure of my wife. Immediately on my arrival home I placed my wife in the charge of my sister who now resides with me, with instructions to give her every attention, and I also engaged the services of a qualified nurse. . . . Until about seven o'clock on Sunday evening my wife refused all refreshment of any description, but ultimately consented to take some light refreshment, insisting however, in regard to every thing she took, that my friend Dr. Robinson should share it with her, as she feared it might be drugged. After the nurse came, however, she appeared to regain confidence, and since the Monday after her capture she has freely partaken of any food set before her." E

A He then stated that Dr. Martin, his medical attendant, had been in daily attendance on her, though she had been very well, and continued :

B "During the whole period since the seizure of my wife she has been treated by myself and everyone in the house with every kindness and consideration, and I cannot remember to have said or done a cruel, unkind, or ungentlemanly word or act to her during the whole time. . . . Since Wednesday last my wife has had the free run of the house, doing just as she pleased (save leaving the house, had she so desired), but declining to come downstairs till the evening. I have moreover several times offered to take her a drive with me, but she has declined. On one occasion only were the blinds of her room upstairs pulled down to prevent her exchanging signals with her relatives outside, and they were drawn up a few moments afterwards, and no restraint or interference was subsequently placed upon her so seeing or communicating with her relatives."

C Mrs. Baldwin, Mrs. Jackson's sister, filed an affidavit in which, referring to the seizure of the wife on Mar. 8, she stated :

D "Mr. Jackson had his face almost covered with a black wrap which went over his nose. He rushed at my sister and seized her by the arm and said : 'You are my wife, come with me into this carriage.' She said : 'I will not,' and then said to me : 'Hold me fast and prevent him taking me.' I caught hold of her waist. He was accompanied by two young men named Robinson, one a surgeon, the other a solicitor's articled clerk. A struggle ensued, they endeavouring to force her into the carriage, she resisting with all her might, and I assisting her to the utmost of my power. Eventually she was dragged backwards into the bottom of the carriage by her husband, I clinging to her all the time. He then bent back with great violence two of the fingers of my right hand, and so loosened my grip round her waist. When my hands were being thus loosened, Dixon Robinson (the articled clerk) pushed me violently on the right shoulder, and I fell back from the carriage. My sister's legs were sticking out of the carriage when she was on the bottom of the carriage, and Dixon Robinson, after pushing me away, got hold of her legs and shoved them into the carriage and jumped in, and immediately drove away with her. The struggle took place in the full view of the congregation coming out of church. She resisted going with him to the utmost of her power, and struggled violently against him, and was only taken away by main force."

E F G H Dixon Robinson in his affidavit said that he helped Mr. Jackson to separate Mrs. Jackson and Mrs. Baldwin, and to put Mrs. Jackson into the carriage, and that no more force was used than was absolutely necessary. He also stated that he did not see Mrs. Jackson again till the Tuesday after the capture, but he remained in the house until Mar. 14, and during that time he had never seen the slightest approach to cruelty. Mr. Jackson always treated his wife with the greatest kindness and consideration. Dr. Robinson, who was in the house until Mar. 14, also stated that he repeatedly saw Mrs. Jackson during that time, and she was always treated kindly, and, except on the Sunday when he removed her from the room, he never saw anything on Mr. Jackson's part which had even the appearance of force.

I Dr. Martin stated in his affidavit that when he first saw Mrs. Jackson on the Sunday evening he found her suffering from excitement and exhaustion, having had no food since breakfast. The only complaint she made was that her husband when he got in had rudely taken her bonnet off and thrown it on the fire. He found also an extensive bruise on her arm, which, she said, was done while they were struggling to get her into the carriage. He had attended her since, and, though she suffered from fits of depression, she had kept up very well, and so far, he thought, her health had not suffered. He had observed no symptoms of harsh treatment, and she seemed to have been treated with every consideration. The nurse made an affidavit to the same effect.

Mrs. Jackson made no affidavit, as she had no opportunity, her solicitor having been refused access to her when he had applied for it.

*Henn Collins, Q.C.* (*Malcolm Douglas* with him), for Mr. Jackson: I submit that the husband has done nothing more than what he has at common law a right to do, namely, have possession of his wife and keep her to prevent her escaping from him. This is the law as laid down by *COLERIDGE, J.*, in *Re Cochrane* (1), in which he refers to *BACON'S ABRIDGMENT*, tit. "Baron and Feme," B., and also says (8 Dowl. at p. 636) that

"for the happiness and honour of both parties [the law] places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world by enforcing cohabitation and a common residence."

A husband may confine his wife in his house; that is not the same thing as imprisoning her, and there is no need for him to justify his using restraint by showing that the wife would make a bad use of her liberty: *R. v. Lister* (2). If the wife will not promise to abstain from misconduct, or if the husband thinks she is not to be trusted, he may confine her. In *Manby v. Scott* it is said that,

"although our law makes a wife subject to her husband, yet the husband may not put her to death, but this shall be murder; neither can he beat her, but the wife may swear the peace against him."

*LORD MANSFIELD* has said:

"A husband has, in consequence of his marriage, a right to the custody of his wife; and whoever detains her from him violates that right; and he has a right to seize her wherever he finds her."

In that case a writ was refused because there had been an agreement for separation made between the husband and wife: *R. v. Mead*. The right of the husband to the custody of his wife is shown also in other cases: *Atwood v. Atwood*; *Seymour's Case*; *Lady Lee's Case*. It is impossible to give exact grounds when a husband may exert his right; in each case the circumstances must be different. But the result of the cases is that the husband may confine his wife in his house and even use such violence as may reasonably be necessary to restrain her. The evidence here shows that no unnecessary cruelty or violence has been used by Mr. Jackson. Section 2 of the Matrimonial Causes Act, 1884, [which provided that a decree of restitution of conjugal rights should no longer be enforced by attachment] has not affected the right of a husband; it merely took away the power that the court formerly had of enforcing the restitution of conjugal rights by attachment. [*R. v. Leggatt* (3) was also referred to.]

*Finlay, Q.C.*, and *Forbes Lankester*, in support of the writ.—The distinction which is suggested between confinement and imprisonment does not exist. Every confinement is legally an imprisonment. The contention amounts to giving the husband the right to condemn his wife to perpetual imprisonment; to saying that he is to be judge and executioner in his own cause. Such a contention is monstrous. The old authorities are barbarous and obsolete. *Re Cochrane* (1) was overruled by *R. v. Leggatt* (3), or if it was not, it should be overruled now. If the law is as contended for, what was the use of a decree for the restitution of conjugal rights? In cases of intended serious misconduct, such as if a wife was about to elope with another man, a husband might no doubt temporarily restrain his wife, but here the wife was not guilty of any such thing. It has been stated that if a husband restrained his wife's personal liberty a habeas corpus would be granted: *R. v. Middleton*. They also cited *Lord Vane's Case*.

*Henn Collins, Q.C.*, in reply, referred to 1 Hale P.C. 629.

Their Lordships saw Mrs. Jackson in camera, and then delivered the following judgments.



**A LORD HALSBURY, L.C.**—The court has satisfied itself from what Mrs. Jackson has said that, in refusing to stay in her husband's house, she has been acting entirely of her own free will, and has not been forced either to refuse to stay or to remain where she was before he carried her away.

**B** I confess that some of the propositions which have been referred to in the course of the argument are such as I am reluctant to think could ever have been the law of England. Little more than a century ago it was boldly contended that slavery existed in England; but, if such a contention were put forward now, it would be regarded with ridicule. In the same way I should think that such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in the matter of personal chastisement are not now capable of being cited as authorities in this or any civilised country. It is important to bear this in mind, because with these old dicta are bound up many statements as to the rights of a husband over his wife of a more moderate and humane character. The only justification, as it appears to me, for some of these expressions is to be found in the interpretation put on the word "castigatio" by LORD HALE, who suggests that it means not personal violence but admonition only. Whether that interpretation can be borne out I cannot say, but I am glad that someone, even in that early age, attempted to show how such an alleged power in the husband to chastise his wife personally might be got rid of.

**E** It seems to me that all the authorities relied upon for the husband are tainted with some notion of the husband's absolute dominion over his wife. The only case in which, as a question of abstract law, a husband was held to have a right to the custody of his wife was *Cochrane's Case* (1). But with regard to the contention that the mere relation of husband and wife, apart from any right of restraint arising from her misconduct, gives a husband complete dominion over his wife's person, I know of no authority establishing such a proposition. I do not mean to lay down as law that there may not be some acts of the wife, proximate to acts of misconduct, which may give the husband some right of physical interference with her freedom; just as he, or anyone else, might restrain her if for instance, she were out of her mind and were going to throw herself out of the window. So, if a husband found his wife on the staircase just going to elope with someone, he might have some right to restrain her. It is not necessary, however, to consider that question any further on the present occasion, and I will only say that I can understand that some such authority on the part of the husband might well be justified as reasonable in any system of law.

**G** We have to consider the return to this writ. That return states the refusal of the wife to live with her husband, and that in consequence of the refusal he has taken her and detained her in his house, using no more force or constraint than was necessary to take her and prevent her from returning to her relations. That is the return by which he attempts to justify the admitted imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement"; but, if there be any, I can only say that in this case I should find that there has been an imprisonment of the lady in her husband's house. Looking at the return, it appears to me to be based on the broad proposition that where a wife has wilfully absented herself from her husband he has the right to seize her by force and detain her until she shall be willing to restore to him his conjugal rights. I cannot assent to that proposition. The legislature, by s. 2 of the Matrimonial Causes Act, 1884, has deprived the matrimonial court of the power to enforce by imprisonment a decree for the restitution of conjugal rights; and the contention now put forward on behalf of the husband is that, whereas the court had only the power to send a wife to prison in the ordinary way for contempt in disobeying a decree for restitution of conjugal rights, and that power is now taken away, yet a husband may himself, of his own motion, where his wife has withdrawn from the conjugal consortium, seize and imprison her until she consents to restore him his rights. I am of opinion that no such right or power exists or ever did exist. Whatever

authority there may be for such a proposition, this qualification will always be found to be imported, that where the wife complains, or has a reasonable apprehension, of violence or ill-usage, the court will never interfere to compel her to return to her husband.

Coming now to the circumstances of the case before us, I am prepared to base my judgment on this, that no English subject has a right to imprison, of his own motion, another English subject—whether his wife or anyone else—who is *sui juris*, and of age, but, assuming that there were such a right, it would be subject to the qualification I have just mentioned of reasonable apprehension of violence or ill-usage, and on the facts of this case I am of opinion that the court has ample grounds for refusing to allow Mr. Jackson to retain the custody of his wife. It seems to have been thought that the husband's rights are subject only to the question of the exact amount of force or violence used in enforcing them. But is it nothing that a lady coming out of church on a Sunday is to be seized by three men in the face of the congregation, and forcibly put into a carriage and driven off? Is not the insult involved in such a proceeding to be considered? Then there is the complaint of the husband's tearing off the bonnet and throwing it into the fire. That incident is related in one of the affidavits filed on behalf of the husband, and no explanation of it is given. I confess I regard with something like indignation the statement of the facts of this case, and the absence on the part of the husband of delicacy and respect towards the wife whom he has sworn to love and cherish.

I am unwilling to look at the earlier part of the narrative as set out in the husband's affidavit, and for this reason. It is true that his statements, standing unqualified and uncontradicted, do make out a case in his favour, and show that the lady was married to him voluntarily, and not under circumstances which reflect any discredit on him; but I do not know how far these statements are to be trusted, inasmuch as the wife has not been allowed to communicate with any legal adviser so as to give her an opportunity of saying how far she agrees with them. I do not say the statements should be disbelieved, but I cannot rely upon them. The result is, in my opinion, that there is no power given by law to a husband such as is claimed here, and if there were such a power, then upon the facts of this case I think the wife has reasonable grounds to apprehend violence in the future. On either ground the return to the writ is bad, and the lady must be restored to her liberty.

**LORD ESHER, M.R.**—In this case it is admitted that the lady is physically confined by her husband, so as to take away her liberty. The only question for us to determine is whether we can allow that to continue. The husband declares his intention to continue it. He justifies the detention, and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement in order to prevent her from absenting herself from him so as to deprive him of her society.

A series of propositions have been quoted which, if true, make an English wife the abject slave of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if a wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleased. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that would be confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining that person to one room. I do not believe that this contention is the law, or ever was.

It was said that by the law of England a husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must

A mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case* (1) was cited as deciding that the husband has the right to such a custody of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very carefully worded, and uses different expressions in many places where it means the same thing; but that seems to me the result of it. It appears to me, B if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it.

I do not believe that an English husband has by law any such rights over his wife's person as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. C For instance, if a wife were about immediately to do something which would be to the dishonour of her husband—as if the husband saw his wife in the act of going to meet a paramour—I think that he might seize her and pull her back. That is not the right which is contended for in this case. The right now contended for is that he may imprison his wife by way of punishment; or, if he thinks that she is going to absent herself from him, for any purpose however innocent of moral offence, he may imprison her; and it must go to the full length that he may perpetually D imprison her. I do not think that this is the law of England.

But, assuming that there is such a right, the question arises whether the way in which, and the circumstances under which, it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out E of church in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage and falls on the floor of the carriage, with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? F The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one of her relations being outside, the blind is immediately pulled down.

I think that the circumstances of this seizure and detention were those of G extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion the circumstances are such that the court ought not to give her back into his custody. He has obtained, it is true, a decree for the restitution of conjugal rights, but that gives him no power to take the law into his own hands and himself enforce the decree of the court by imprisonment. Formerly that decree might have been enforced by attachment for H contempt, but that would have been imprisonment by the court, not by the husband. The power of attachment in such cases is now taken away [by s. 2 of Matrimonial Causes Act, 1884]. The suggestion, therefore, must be that, though the court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the court. I think that the passing of the Act of Parliament which I took away the power of attachment in such cases is the strongest possible evidence to show that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to show that it is not, and never was, the law of England that the husband has such a right of seizing and imprisoning his wife as contended for in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible to enforce effectively, a decree for the restitution of conjugal rights, the legislature has caused this by Act of Parliament, and the legislature must deal with the matter. For these reasons



I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back to him the custody of this lady. A

**FRY, L.J.**—The return to the writ raises the question whether a husband has by the law of England, when his wife refuses to live with him, a right to capture and confine her until she renders to him conjugal rights. The affirmative of this proposition was contended for by the counsel for the husband. B

The proposition divides itself into two parts, one having regard to the right to capture, the other to the right to confine. With regard to the alleged right to capture there does not appear to me to be a rag of authority in favour of such a right. No authority even of the oldest times was cited in support of such a right. *Cochrane's Case* (1) did not relate to the right of capture, but to the right of the husband to confine or imprison the wife until she rendered to him conjugal rights. C That case occurred in 1840, and no earlier authority was cited in it for the proposition that the husband had such a right except the passage in *BACON'S ABRIDGMENT* which affirms that

"the husband has power and dominion over the wife, and may keep her by force within the bounds of duty." D

That proposition is so vague that it cannot be considered satisfactory authority, and it is directly at variance with the decision in *R. v. Lister* (2), where it is said that the husband may restrain the wife on certain grounds, such as that she was spending his estate and consorting with lewd company, and that those are the only grounds on which he may restrain his wife. I cannot under these circumstances consider that *Cochrane's Case* (1) is a satisfactory authority. I cannot overlook the consideration that similar cases must have occurred over and over again, but the habitual course of practice has been to have recourse to the ecclesiastical court, and to obtain a decree for the restitution of conjugal rights; and no case is to be found by which it is established that such a right as that contended for by the husband in this case is given by the law of England. After *Cochrane's Case* (1) came *R. v. Leggatt* (3), which, to say the least, weakens the authority of *Cochrane's Case* (1). It is there said by *CAMPBELL, C.J.*, that the husband has no such custody of his wife as a parent has of a child. E

Therefore, if the matter rested there, I should say it was clear that by law there was no such right as is contended for by the husband. But, assuming that the matter was doubtful at the time of the passing of the Act of 1884 with regard to the practice of the Matrimonial Causes Court, I say that it is doubtful no longer. F That Act, by s. 2, deprived the court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for the restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment. G I cannot think that, after the legislature has taken away the right of the court to enforce restitution of conjugal rights by attachment, the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife without the assistance of the court. H

I confine myself to determining the precise question which is raised by this return, and I prefer not to diverge into the consideration of other questions more or less cognate to this. I do not think it necessary for the present purpose to advert to the older authorities on those questions which have been cited to us, beyond saying that I do not regard them with exactly the same feeling as the Master of the Rolls, nor think that all our predecessors on the judgment-seat were deficient in good sense. I also prefer to abstain from expressing an opinion as to the personal conduct of the husband in this transaction, and I do not make any view of his conduct any part of the grounds of my decision. I do not think that I

**A** it is possible to arrive at a just conclusion on these matters without further knowledge of the circumstances which led up to the transaction. There may or may not have been matters which might more or less furnish excuses for what was done on both sides, but, for the reasons which have been indicated by the Lord Chancellor, it seems to me to be unsafe to rely upon any view of matters the history of which is not fully before us. I agree in the result at which the Lord Chancellor

**B** and the Master of the Rolls have arrived, on the ground that the right set up by the husband does not exist by the law of England.

*Order accordingly.*

Solicitors: Shaw, Tremellen & Kirkman for Hall, Baldwin & Weeks, Clitheroe; F. J. Thairlwall for Ainsworth, Sanderson & Howson, Blackburn.

**C** [Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

**D**

### SMITH v. BAKER & SONS

**E** [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Herschell and Lord Morris), December 1, 2, 4, 1890, July 21, 1891]

[Reported [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467;  
55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679]

**F** *Negligence—Defence—Volenti non fit injuria—Risk created or enhanced by employer's negligence—Safe system of work not provided—Continuance by employee in employment.*

**G** When an employee undertakes to do work which is intrinsically dangerous notwithstanding that reasonable care has been taken to render it as little dangerous as possible he voluntarily subjects himself to the risks inevitably accompanying it, and, if he suffers, the doctrine of *volenti non fit injuria* is open to his employer in defence to any claim made by him. But where a risk to the employee has been created or enhanced by the negligence of the employer in not providing a safe system of work the mere continuance by the employee in his service with knowledge of the risk does not preclude the employee, if he suffer from such negligence, from recovering in respect of the employer's breach of duty. Whatever the dangers of the employment which

**H** the employee undertakes, among them is not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered, unless the employee specially agrees to take that risk.

*Master and Servant—Duty of master—Provision of safe plant—Safe system of work.*

**I** Per LORD WATSON: At common law a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. He is no less responsible to his workman for injuries occasioned by a defective system of using machinery and his failing to see that it is properly used than for injuries caused by a defect in the machinery itself. An arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business constitutes a defect in the condition of the works.

County Court—Appeal—Right of appellant to raise point of law not taken by him in county court.

On an appeal against the decision of a case in the county court it is not open to the appellant to rely on any matter which was not raised in the county court at the trial.

*Clarkson v. Musgrave* (1) (1882), 9 Q.B.D. 386, approved.

**Notes.** Followed: *Greenhalgh v. Cwmaman Coal Co.* (1891), 8 T.L.R. 31. Considered: *Willetts v. Watt* (1892), 61 L.J.Q.B. 540. Applied: *Stanton v. Scrutton* (1893), 62 L.J.Q.B. 405. Considered: *Thomas v. Great Western Colliery Co.* (1894), 10 T.L.R. 244. Applied: *Williams v. Birmingham Battery and Metal Co.*, [1895-99] All E.R.Rep. 235. Considered: *Wohlgemuthe v. Coste*, [1899] 1 Q.B. 501; *Darlow v. Singleton* (1901), 86 L.T. 529, n.; *Lloyd v. Woolland* (1902), 19 T.L.R. 244; *Nathan v. Rouse* (1904), 2 L.G.R. 1304. Applied: *Hase v. London General Omnibus Co.* (1907), 23 T.L.R. 616. Distinguished: *Cresswell v. Jones and Andrews*, *Johnson v. Refuge Assurance* (1912), 1 L.J.C.C.R. 28. Considered: *Smerkinich v. Newport Corpn.* (1912), 76 J.P. 454. Applied: *Norman v. Great Western Railway*, [1914] 2 K.B. 153. Explained: *Taylor v. National Amalgamated Approved Society*, [1914-15] All E.R.Rep. 869. Considered: *Canadian Pacific Rail. Co. v. Fréchette*, [1915] A.C. 871; *Abbott v. Isham* (1920), 90 L.J.K.B. 309. Applied: *Monaghan v. Rhodes*, [1920] 1 K.B. 487. Explained: *Waller & Son v. Thomas*, [1920] All E.R.Rep. 366. Considered: *Baker v. James Bros. & Sons*, [1921] All E.R.Rep. 590; *Kimpson v. Markham*, [1921] 2 K.B. 157; *Ninmo v. Connell*, [1924] A.C. 595; *Ward v. Sneiman* (1925), 133 L.T. 560. Distinguished: *Lefevre v. Hirst* (1931), 100 L.J.K.B. 733. Considered: *Fanton v. Denville*, [1932] All E.R.Rep. 360; *Rudd v. Elder Dempster & Co.*, [1933] 1 K.B. 566; *Dann v. Hamilton*, [1939] 1 All E.R. 59; *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; *Mason v. Warlow*, [1941] 1 All E.R. 475. Applied: *Bowater v. Rowley Regis Corpn.*, [1944] 1 All E.R. 465. Considered: *Mackley v. Nutting*, [1949] 1 All E.R. 413. Applied: *Bell v. Gosden*, [1950] 1 All E.R. 266. Considered: *Davies v. De Havilland Aircraft Co.*, [1950] 2 All E.R. 582; *Bergood Investments, Ltd. v. Hirsch* (1951), 212 L.T.Jo. 90. Explained: *Boyer v. Warbey*, [1952] 2 All E.R. 976. Distinguished: *Whall v. Bulman*, [1953] 2 All E.R. 306. Considered: *Woods v. Durable Suites, Ltd.*, [1953] 2 All E.R. 391. Applied: *United Dominions Trust, Ltd. v. Bycroft*, [1954] 3 All E.R. 455. Considered: *Haynes v. Qualcast (Wolverhampton) Ltd.*, [1958] 1 All E.R. 441. Referred to: *Wild v. Waygood* (1892), 66 L.T. 309; *Ultzen v. Nicol* (1893), 63 L.J.Q.B. 289; *Neptune Steam Navigation Co. v. Sclater and Proctor*, *The Delano* (1894), 71 L.T. 544; *Pyner v. Bullard, King & Co.* (1897), 14 T.L.R. 57; *London and North Western Rail. Co. v. Donellan*, *London and North Western Rail. Co. v. Billington* (1898), 78 L.T. 575; *Darlow v. Shuttleworth*, [1902] 1 K.B. 721; *Stephen v. International Sleeping Car Co.* (1903), 47 Sol. Jo. 692; *Barry v. Minturn*, [1913] A.C. 584; *Sales Agency v. Elite Theatres*, [1917] 2 K.B. 164; *Cole v. De Trafford*, [1918-19] All E.R.Rep. 290; *Gonsky v. Durrell*, [1918-19] All E.R.Rep. 772; *Smith v. Great Eastern Rail. Co.* (1920), 37 T.L.R. 117; *Moriarty v. Regent's Garage and Engineering Co.*, [1921] 2 K.B. 766; *Nelson Murdoch v. Wood* (1922), 126 L.T. 745; *Dew v. United British Steamship Co.* (1928), 139 L.T. 628; *Lloyd v. Cook*, *Goudge v. Broughton*, *Simson v. Miatt*, *Bartram v. Brown*, *Barker v. Hutson*, [1928] All E.R.Rep. 201; *Chapman v. Ellesmere*, [1932] All E.R.Rep. 221; *Whoecler v. New Merton Board Mills, Ltd.*, [1933] All E.R.Rep. 28; *Haynes v. Harwood & Son*, [1934] 2 K.B. 240; *Williams-Ellis v. Cobb*, [1934] All E.R.Rep. 465; *Olsen v. Corry and Gravesend Aviation, Ltd.*, [1936] 3 All E.R. 241; *Russell v. Criterion Film Products, Ltd.*, [1936] 3 All E.R. 627; *Wilsons and Clyde Coal Co. v. English*, [1937] 3 All E.R. 628; *O'Melia v. Freight Conveyors, Ltd.*, and *Redieraktiebolaget Svenska Lloyd*, [1940] 4 All E.R. 516; *Taylor v. Sims and Sims*, [1942] 2 All E.R. 375; *Westminster Bank, Ltd. v. Edwards*, [1942] 1 All E.R. 470; *Davies v. Warwick*, [1943] 1 All E.R. 309; *Garcia v. Harland and Wolff, Ltd.*,



- A** [1943] 2 All E.R. 477; *Speed v. Thomas Swift & Co.*, [1943] 1 All E.R. 539; *Read v. J. Lyons & Co.*, [1944] 2 All E.R. 98; *Colfar v. Coggins and Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 326; *Calvert v. London Transport Execulive* (1949), 93 Sol. Jo. 646; *London Graving Dock Co. v. Horton*, [1951] 1 All E.R. 1; *Latimer v. A.E.C., Ltd.*, [1952] 1 All E.R. 443; *Harris v. Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; *Watt v. Hertfordshire C.C.*, [1954] 2 All E.R. 368; *Staveley Iron and Chemical Co. v. Jones*, [1956] 1 All E.R. 403; *Kilgollan v. William Cooke & Co.*, [1956] 2 All E.R. 294; *Riden v. A. C. Billings & Sons*, [1956] 3 All E.R. 357; *Hicks v. British Transport Commission*, [1958] 2 All E.R. 39; *Wilson v. Tyneside Window Cleaning Co.*, [1958] 2 All E.R. 265; *Nolan v. Dental Manufacturing Co.*, [1958] 2 All E.R. 449; *Smith v. Austin Lifts, Ltd.*, [1959] 1 All E.R. 81; *Davie v. New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346; *Cavanagh v. Ulster Weaving Co., Ltd.*, [1959] 2 All E.R. 745.

As to *volenti non fit injuria*, see 28 HALSBURY'S LAWS (3rd Edn.) 82-85; as to safety of employment, see *ibid.*, vol. 25, p. 505 et seq.; as to appeals from the county court, see *ibid.*, vol. 9, p. 320 et seq. For cases see 36 DIGEST (Repl.) 150 et seq.; 34 DIGEST 194 et seq.; 13 DIGEST (Repl.) 467 et seq.

**D** Cases referred to:

- (1) *Clarkson v. Musgrave* (1882), 9 Q.B.D. 386; 51 L.J.Q.B. 525; 31 W.R. 47, D.C.; 13 Digest (Repl.) 467, 917.  
 (2) *Yarmouth v. France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, C.A.; 36 Digest (Repl.) 135, 710.  
**E** (3) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, 11.  
 (4) *Rhodes v. Liverpool Commercial Investment Co.* (1879), 4 C.P.D. 425, D.C.; 16 Digest (Repl.) 481, 1049.  
 (5) *Seymour v. Coulson* (1880), 5 Q.B.D. 359; 49 L.J.Q.B. 604; 28 W.R. 664, C.A.; 13 Digest (Repl.) 481, 1050.  
**F** (6) *MacDougall v. Knight* (1889), 14 App. Cas. 194; 58 L.J.Q.B. 537; 60 L.T. 762; 53 J.P. 691; 38 W.R. 44; 5 T.L.R. 390, H.L.; 32 Digest 138, 1698.  
 (7) *Sword v. Cameron* (1839), 1 Dunl. (Ct. of Sess.) 493; 34 Digest 199, 1624 vii.  
 (8) *Bartonshill Coal Co. v. McGuire* (1858), 3 Macq. 300; 31 L.T.O.S. 258; 4 Jur.N.S. 772; sub nom. *Bartonshill Coal Co. v. Stewart*, 6 W.R. 697, H.L.; 34 Digest 126, 972.  
**G** (9) *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; sub nom. *Bartonshill Coal Co. v. Clark*, 6 W.R. 664, H.L.; 34 Digest 126, 971.  
 (10) *Weems v. Mathieson* (1861), 4 Macq. 215, H.L.; 36 Digest (Repl.) 209, 1102.

Also referred to in argument:

- Scott v. London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, 772.  
**H** *Clarke v. Holmes* (1862), 7 H. & N. 937; 31 L.J.Ex. 356; 9 L.T. 178; 8 Jur.N.S. 992; 158 E.R. 751; sub nom. *Holmes v. Clark*, 10 W.R. 405, Ex. Ch.; 36 Digest (Repl.) 157, 831.  
*Woodley v. Metropolitan District Rail. Co.* (1877), 2 Ex.D. 384; 46 L.J.Q.B. 521; 36 L.T. 419; 42 J.P. 181, C.A.; 36 Digest (Repl.) 150, 783.  
**I** *Byrne v. Boadle* (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur.N.S. 1107; 12 W.R. 279; 159 E.R. 299; 36 Digest (Repl.) 73, 387.  
*Tasmania (Ship Owners and Freight Owners) v. Smith, etc., City of Corinth (Owners), The Tasmania* (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp.M.L.C. 517, H.L.; 41 Digest 708, 5446.  
*Skipp v. Eastern Counties Rail. Co.* (1853), 9 Exch. 223; 2 C.L.R. 185; 23 L.J.Ex. 23; 156 E.R. 95; sub nom. *Skeipp v. Eastern Counties Rail. Co.*, 22 L.T.O.S. 123; 36 Digest (Repl.) 156, 824.

*Heske v. Samuelson* (1883), 12 Q.B.D. 30; 53 L.J.Q.B. 45; 49 L.T. 474; 32 W.R. 595, D.C.; 34 Digest 226, 1902. **A**

*Membery v. Great Western Rail. Co.* (1889), 14 App. Cas. 179; 58 L.J.Q.B. 563; 61 L.T. 566; 54 J.P. 244; 38 W.R. 145; 5 T.L.R. 468, H.L.; 36 Digest (Repl.) 150, 786.

**Appeal** by the plaintiff in the action from a decision of the Court of Appeal (LORD COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.), reversing a decision of the Queen's Bench Division (HUDDLESTON, B., and WILLS, J.), affirming a judgment of the learned judge of Halifax County Court. **B**

The action was brought in that court by the appellant, a navvy, to recover damages against the respondents, who were railway contractors, for injuries sustained by him while in their employment. The appellant had been engaged on the respondents' works for some months prior to the day on which he received his injuries. The duty assigned to him was to work a hammer and drill with two other servants of the respondents, he working the drill, while they worked the hammer. On the day of the accident he was sent with two others to drill a hole. While they were thus employed, stones were being lifted from a cutting, which was seventeen feet or eighteen feet deep. When the stones were clear of the bank, the arm of the crane was jibbed in the one or other direction, according to the position of the waggons into which the stone was to be loaded. If it was jibbed in one direction, it passed over the place where the appellant was working. While he was working the drill, a stone in the course of being lifted fell upon him and caused serious injuries. In the county court the learned judge left questions to the jury, which were answered by them as follows: Q. Was the machinery for lifting stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?—A. No. Q. Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, work, machinery, and plant?—A. Yes. Q. If so, were the employers (or some person engaged by them to look after the condition of the works, etc.) guilty of negligence in not remedying that defect?—A. Yes. Q. Was the plaintiff guilty of contributory negligence?—A. No. Q. Did the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?—A. No. Application was made on behalf of the defendants to have judgment entered for them, notwithstanding the findings of the jury, on the ground that the case ought not to have been allowed to go to them, the plaintiff having admitted in evidence that he knew of the risk and voluntarily incurred it. The learned judge, however, directed judgment to be entered for the plaintiff for £100, the amount of damages assessed by the jury. Notice of motion to set aside the judgment, and to have judgment entered for the defendants, was afterwards given in the Queen's Bench Division. The grounds stated in that notice were as follows: **C**

"That the case ought not to have been allowed by the judge to go to the jury, the plaintiff having admitted that he knew of the risk which caused his injury, and voluntarily incurred it; that on the plaintiff's own admissions, made on the trial of the action, a nonsuit ought to have been entered by the judge; that the entry of the said judgment for the plaintiff was bad in law, and that the judge ought not to have entered judgment for the plaintiff." **D**

The learned judges before whom the appeal came, thinking that there was a conflict between the decisions of the Court of Appeal in *Yarmouth v. France* (2) and *Thomas v. Quartermaine* (3), which they were unable to reconcile, and it was desirable that the Court of Appeal should explain, dismissed the appeal in the present case, at the same time granting leave to proceed to the Court of Appeal. The Court of Appeal reversed the judgment of the court below mainly on the ground that there was no evidence of negligence on the part of the defendants, although the Lord Chief Justice expressed an opinion that the judgment of the county court judge ought to be set aside on another ground also—namely, that the **E**

**A** plaintiff had been engaged to perform a dangerous operation, and took the risk of the operation he was so called upon to perform. The plaintiff appealed.

*Yarborough Anderson* and *Byrne* for the appellant.

*Tindal Atkinson, Q.C.*, and *Robson* for the respondents.

Their Lordships took time for consideration.

**B** July 21, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—This was an action originally tried in the county court, and it is very important to bear in mind that only a limited appeal is allowed by law in actions so tried. There is no power to review the decision of fact arrived at in the county court by any other tribunal than the county court itself [but see now County Courts Act, 1959, s. 109: 39 HALSBURY'S STATUTES (2nd Edn.) 186]. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge. That question was decided in *Rhodes v. Liverpool Commercial Investment Co.* (4). In *Seymour v. Coulson* (5) the principle was affirmed that the point of law must be taken; and finally, in *Clarkson v. Musgrave* (1), where all the cases were reviewed, it was established (and I think has been accepted ever since) that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the county court. I think there are good reasons for so limiting an appeal, and, in truth, even where written pleadings render such precautions as the statute has enforced in the county court less necessary, the same precaution has been constantly enforced where applications for a new trial have been made in the superior courts. It is obvious that it would be unjust to one of the parties if the other could lie by, and afterwards, having failed on the contention that he in fact set up, be permitted to rely on some other point not suggested at the trial, which, if it had been suggested, might have been answered by evidence: see *MacDougall v. Knight* (6).

**F** The first question, therefore, to consider here is: What question was in fact raised before the county court judge in this case?, and, consequently, what question is open to your Lordships to consider on this appeal? The action was an action in which the plaintiff sued his employers for injuries sustained while in the course of working in their employment. He was employed in working at a drill while two fellow workmen were engaged in striking with a hammer at the drill, which he was employed to hold in the proper position. The nature of the employment **G** was one which involved his attention being fixed upon the drill, that it might be held in a proper position when receiving alternate strokes from the hammers wielded by his fellow workmen. The place where he was employed was in a cutting, and in his immediate proximity another set of workmen were engaged in working in the cutting, and taking stones out of it. For the purpose of this operation a steam crane was used, and occasionally, though not invariably, the **H** stones lifted by the crane were swung over the place where the plaintiff was employed. On the occasion which gave rise to the action a stone was swung over the plaintiff, and from some cause not explained, and not attempted to be explained, the stone slipped from the crane, fell upon the plaintiff, and did him serious injury.

**I** The first point attempted to be argued at your Lordships' Bar was that there was no evidence to go to the jury of any negligence. It is manifest upon the notes of the learned county court judge that no such point was taken at the trial, and it is, therefore, perfectly intelligible why no evidence is referred to with respect both to the crane, the manner of slinging the stone, or the mode in which the stone was fastened. Each of these things would have been material to consider if any such question had in fact been raised. I will not myself suggest, or even conjecture, what was the cause of the stone falling, or what precautions ought properly to have been taken against such a contingency. What is, or is not, negligence under such circumstances may depend upon a variety of considerations. If, for instance,



the only result of not properly fastening a stone may be that it will fall back again, and so necessitate a repeating of the operation, there may be no negligence in not taking great care in so fastening the stone as to render such an accident improbable, if not impossible. It may be simply a question of whether the extra pains taken in fastening the stone may not be an unnecessary waste of time and care, and those engaged in the operation may well be justified in risking the possibility of the stone falling. But if the stone is to be lifted under such circumstances as, when lifted, to be swung over a workman beneath it, totally different considerations arise. And, I think, the unexplained, and unaccounted for fact, that the stone was being lifted over a workman, and that it fell, and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation. But whether that was so or not, the question does not here arise.

The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with. The facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice. Giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head, or negligently permitted to fall on him and do him injury.

I am of opinion that the application of the maxim *volenti non fit injuria* is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall. I emphasise the word "negligently" here, because, with all respect, some of the judgments below appear to me to alternate between the question whether the plaintiff consented to the risk, and the question whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition. I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that with which I am now dealing. For my own part, I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said: "I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself. I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself."

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim *volenti non fit injuria*. I think

A they must go to the extent of saying that, wherever a person knows that there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited, but where it applies it applies equally to a stranger as to anyone else, and

B if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets. For no one (at all events, some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over. It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given, and in both *Thomas v. Quartermaine* (3)

C and in *Yarmouth v. France* (2) it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. BOWEN, L.J., carefully points out in the earlier case (*Thomas v. Quartermaine* (3)) that the maxim is not *scienti non fit injuria*, but *volenti non fit injuria*. And LINDLEY, L.J. (in *Yarmouth v. France* (2)), in quoting BOWEN, L.J.'s distinction with approval, adds (19 Q.B.D. at p. 660) :

D "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff."

Again, LINDLEY, L.J., says :

E "If in any case it can be shown, as a fact, that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the [Employer's Liability Act, 1880] a workman who never, in fact, engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not

F refuse to face it."

Again, LINDLEY, L.J., says (*ibid.* at p. 661) :

"If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon

G himself."

I am of opinion myself that in order to defeat, by the application of the maxim relied on, the right of a plaintiff who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself. It is

H manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question. As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the

I rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim *volenti non fit injuria* is completely justified. I have hitherto treated the question apart from the specific findings by the jury. But I am not disposed to think that those findings were not justified upon the evidence presented. They found that the machinery for lifting the stone from the cutting was not reasonably fit for the purpose for which it was applied, taken as a whole.

I think the jury meant, and if they did so mean, I am of opinion that they were right, that looking to the risk incurred by the men working below, and to the possibility of the crane when worked (as, in fact, it was worked) letting stones fall, the machinery was not reasonably fit for the purpose for which it was applied, that is to say, not reasonably fit for securing that stones should not fall from it when slung over men's heads. And further, that if with such machinery the stones were being slung over men's heads, special warning ought to have been supplied to the men imperilled by such an operation, and that the employers were guilty of negligence in not remedying such a mode of working such machinery under such conditions of work. A

I think the cases cited at your Lordships' Bar of *Sword v. Cameron* (7) and *Bartonshill Coal Co. v. McGuire* (8) established conclusively the point for which they were cited—that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword v. Cameron* (7) it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk, but, nevertheless, he was held entitled to recover notwithstanding that knowledge. It seems to me that in the present case the right of the plaintiff to recover is far more clear than in *Sword v. Cameron* (7). The interval given to the quarryman to seek shelter was the usual and ordinary one. But suppose in that case the employer had employed the quarryman to do something which by the very form of the employment prevented his hearing the signal which gave him warning to retreat? In this case, as I have pointed out, there was no warning and no signal, but the employer or his representative employed the plaintiff under such circumstances as disabled him from using his eyes for protecting himself against the risk. It seems to me, therefore, that this is a case in which the plaintiff is entitled to recover, and I therefore move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of the county court judge restored. B

**LORD BRAMWELL.**—If this case came before me in the first instance, without any entanglement of statement of claim, finding of a jury, question of objections taken, and former decisions, I should hold it to be the plainest possible, and that the plaintiff had no claim in law or morality. I say this, not from any prejudice against the Employers' Liability Act. I am not certain it would not be a good thing to give a person injured as the plaintiff was a right to compensation, perhaps from the State, even where there was no blame in the master; even where there was blame in the servant. Men would not wilfully injure themselves, and then compensation would be a part of the cost of the work. But we have to deal with the law as it is. What are the facts of this case? The plaintiff was employed by the defendants. The defendants were engaged in making a cutting for a railway, and, of course, had to remove what they excavated, and were doing so by putting the stones in a crate or in a sling, and raising them by a crane to the bank. The crane was turned so that the stones and sling passed over parts of the cutting, and, therefore, over persons who might be standing or working on those parts. A stone so slung, and so being lifted, fell, or parts of it fell, on the plaintiff, and most grievously hurt him. The plaintiff well knew of the possibility of such an accident. Those who were at work with him moved out of the way and escaped. The plaintiff did not; not knowing, as he says, of that particular movement of the crane. C

Now are the defendants to blame? There is no evidence that the crane was not the ordinary crane used for such purposes. No one says it was not. There is no evidence that lifting the stones as they were lifted, that is, by slinging them and jibbing the crane, was not the ordinary and reasonable way of working. No one says it was not. There is no evidence that the particular stone was improperly slung. No one says it was. I have no objection to *res ipsa loquitur*. I believe I was one of the first, if not the first, to use it in some cases about fifteen years ago; but it does not apply here. At least I cannot use it. I know that bales and barrels D



**A** do not move and fall of their own accord. I do not know that stones slung carefully will not come apart and fall. My notion is that they will. I think I have often lifted up a piece of coal and found that the part I had hold of remained in the tongs and the rest broke away. I should think there might be some cleavage, I think it is called, which would prevent the parts holding together. This may be ignorance on my part. But if it is, it should have been removed by evidence, and

**B** there is none. LORD COLERIDGE, C.J., and LINDLEY, L.J., are in the same state of ignorance, if it is one. Further, this is a claim which can only be maintained by virtue of the Employers' Liability Act. If there was negligence or unskilfulness in the slinging of the stone or working of the crane, it was not by anyone in authority within that Act. Lastly, the plaintiff knew of the danger, not of this particular stone, but generally that such stones might fall; yet he remained while

**C** it was passing over his head, not knowing, as he says, of this particular stone, but knowing that that kind of work was going on, and not looking out. His fellow workmen looked out, did know, and got out of the way. There was no one to warn the plaintiff. No one says that it was the practice that there should be, and the plaintiff knew there was no one.

Let us see what is the case that comes before us. The particulars of claim

**D** say that

"a stone or stones slipped from the crane chain and struck the plaintiff, by reason of the negligence of the defendants, they having failed to afford means of warning the plaintiff of the danger of continuing his work during the said craning operation, or of preventing the said stone or stones striking against him."

**E** The meaning of this is not certain. I think it is a complaint of want of "means of warning," whereby the plaintiff could prevent the stone striking against him. But it may be that it means a negligence in the slinging. So be it. If it is, there is no evidence of it. Then there is a claim that the accident was caused by the negligence of the foreman, whom the plaintiff was bound to obey, and did obey.

**F** Of this there is no evidence. Now, as to the evidence. I think it to the credit of the plaintiff that it was truthful, as it seems to me, substantially. He describes the operation, and he says that one of his fellow workmen told the then ganger that it "was not safe to allow them to jib the stones over our heads"; that whenever he and his fellow workmen saw them they got out of the way. He says he had been long enough at the work to know it was dangerous; that he heard another fellow

**G** workman say to the ganger that it was dangerous; that he, the plaintiff, thought so, and told the crane worker so; that if they had stood looking at the craning they would have been sent to the office, that is, discharged. One of the plaintiff's witnesses, West, says it was dangerous, and he so told the ganger; that he got out of the way when the stones were being jibbed; that he knew they had to look out for themselves, for there was no one to warn them. The ganger, called for the

**H** defendants, says he told them to get out of the way; evidently meaning step aside, not leave their work.

The following questions were left to the jury:

"1. Was the machinery for lifting the stone, taken as a whole, reasonably fit for the purpose to which it was applied?"

**I** I am sorry to say that the jury answered "No."

"2. Was the omission to supply means of warning a defect in the ways, works, machinery, and plant?"

The jury say "Yes." So that a man standing on the edge, as West says, would be part of the "plant."

"3. If so, the jury say the defendants were guilty of negligence in not remedying that defect."

Well "if so," it is true that they were negligent or wilful, if they knew of it, as I suppose they did. A

"4. Was the plaintiff guilty of contributory negligence?"

The jury say "No." I incline to think so. It was not negligence on his part; he did it wilfully. Except, indeed, that he was negligent in not doing what his mates did, i.e., step on one side when the stone was coming, and not looking out for it. B

"5. Did the plaintiff voluntarily undertake a risky employment with knowledge of its risks?"

The jury say "No." I wonder what they meant. Indeed, the question is wonderful. The answer, to make it favourable to the plaintiff, is necessarily negative, a negative pregnant of one affirmative and another negative—twins. It might mean that the plaintiff did not voluntarily undertake the employment, or that it was not risky, or that he had not a knowledge of its risks. In any and every sense it is untrue, and, I think, not to the credit of the jury who gave it. C

On this the defendants' advocate applied for judgment, the plaintiff having admitted that he knew of the risk, and voluntarily incurred it. Judgment, however, was given for the plaintiff. There was an appeal to the Queen's Bench Division, that the case ought not to have been allowed to go to the jury, because the plaintiff, having admitted he knew of the risk which caused the injury, voluntarily incurred it. The court considered themselves bound or fettered by some decision of the Court of Appeal, which that court had better solve, and dismissed the appeal, but very clearly indicated that their own opinion was the other way. WILLS, J., said: D

"If I were an authority, I should have said that the evidence is all one way on the point of the man voluntarily accepting the risk, and I cannot draw the distinction between the man accepting the risk in the first instance, and his continuing in the employment under circumstances which brought the risk to his mind." E

WILLS, J., shows his dissent from *Yarmouth v. France* (2). From this judgment there was an appeal on the same ground to the Court of Appeal, who reversed the judgment. LORD COLERIDGE says: F

"This case is clearly within the decisions that have been pronounced in the court below, and in this court, in which it has been held, and I think most properly held, that a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform. As to that, there never was any doubt before the Employers' Liability Act, nor since." G

I think that is a very neat and forcible way of putting it. He gives judgment for the defendants also on another ground, viz., that there was no evidence of negligence in the defendants causing the accident. There certainly was none; but it is said this was not open to the defendants. LINDLEY, L.J., gives judgment the same way; his judgment is of extra importance, because it shows that *Yarmouth v. France* (2), relied on for the plaintiff, is not, in the opinion of LINDLEY, L.J., who was party to it, against the defendants. His Lordship says: H

"If people will enter into dangerous employment, they do so without making other people liable for injuries they sustain." I

I cite also his Lordship's opinion to justify my own, that

"the jury were led away by sympathy, for they found matters that were not in the least warranted by the evidence. I think there was no evidence of negligence at all."

LOPES, L.J., says the same.

The case is now before your Lordships, and there cannot be a doubt how it ought to be decided, unless by some miscarriage of jury or judge, or counsel, the

A defendants are to be made liable, where they are absolutely free from legal blame. In the course of the argument, I said that the maxim *volenti non fit injuria* did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence, at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work. And I think the maxim does apply here, for the complaint in the statement of claim (the only thing proved) was that there was no one to give notice when the stone was passing over where the plaintiff was at work. If this was wrong the plaintiff knew of it, and voluntarily undertook the risk. The case is different from a street accident where a man is injured by the act of one between whom and him there is no relation. It is not dangerous apart from negligent driving. There is indeed a likeness. I admit that personal negligence in the master would make him liable. So also the use of dangerous plant not known to the servant. If this is a maxim is it any the worse? What are maxims but the expression of that which good sense has made a rule? It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can if he chooses say: "I will undertake the risk for so much, and if hurt you must give me so much more, or an equivalent for the hurt." But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt; in effect he undertook the work with its risks for his wages and no more. He says so. Suppose he had said "If I am to run this risk you must give me 6s. a day and not 5s.," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says: "No, I will only give the 5s.?" None. I am ashamed to argue it. I refer to the judgments of BOWEN and FRY, L.JJ., in *Thomas v. Quartermaine* (3). It is not necessary to discuss *Yarmouth v. France* (2) for LINDLEY, L.J., who was party to that judgment, is also a party to that now appealed from, and thinks that whatever that decided it decided nothing inconsistent with the judgment now under consideration. I respectfully express my dissent from that judgment in *Yarmouth v. France* (2). and my concurrence with the observations of WILLS, J., on it.

The fourth question ought not to have been left to the jury. The plaintiff could not make a case without showing his agreement with the defendants to do work involving this risk. If he had said he did not know of this practice of slinging the stones and passing them over the heads of other workmen it would have been false, but a question for the jury. If left to the jury, technically the judge ought to have directed them, on the confession of the plaintiff, to find for the defendants; a verdict the other way would have been perverse. I have always understood that when either party confesses to that which entitles the other side to a verdict, the judge may so direct it, as he ought to have done here. Would it not be absurd to say: "I ask you to say whether so and so is the case?" The plaintiff admits it is.

H There is a confusion in the case. "*Volenti non fit injuria*" say the defendants. The plaintiff answers: "But you were negligent." The defendants reply: "No, we were not." The plaintiff rejoins: "You did not take that objection at the trial." I do not agree; but, supposing it was so, what has that got to do with the question? The plaintiff advances this proposition, you cannot rely on *volenti non fit injuria*, because that does not apply to a case of negligence. A man may be *volens* to encounter the natural dangers of a business, but not those superadded by negligence. I agree. But the plaintiff's proposition involves that he must make out negligence to take the case out of the rule. Assume that the defendants at the trial only took the objection *volenti non fit injuria*, that meant: "You were willing to run the ordinary risks; if you say there was anything extraordinary, show it." There certainly was none for the reasons I have given.

Why are we to say that the danger was enhanced when there is positively no evidence of it? What was the danger the plaintiff was willing to run? This; having stones slung in a particular way jibbed over his head with the risk of their



falling from bad slinging or other cause, and nobody to warn him when the jibbing A  
caused the stone to come over him. How did the defendants enhance this? Did  
they cause the stone to be slung dangerously? As to no warning, the plaintiff knew  
he would have none. The plaintiff must have known that, if not inevitable or  
probable, the accident was possible. It is argued that there was a breach of duty  
in the defendants. What duty? Did the defendants ever undertake with the  
plaintiff that they would conduct their works otherwise than as they did that day? B  
There is no such thing as abstract duty. Is there any evidence that the works  
were not being conducted as they were when the plaintiff entered the defendants'  
service? It is not necessary to consider whether this action would lie if the work  
was more dangerous after the employ had been entered into, and the workmen  
knew it. It was, indeed, once held that if an obstruction was put before a cab-  
man's stable he might run into it, and, if damaged, recover. I think the right C  
course for the workman would be to say: "I entered your employment with a  
certain amount of risk, or with no risk, and you undertook to employ me; you  
have made it dangerous; that is a breach of your engagement, and I sue you."  
But it is immaterial in this case, for the work was unchanged in character, and  
was the same when he entered the service as when he was hurt. Besides, in  
these services every week there is a new engagement, and, therefore, his last  
week's work was under a contract made by the plaintiff with full knowledge of the  
risk. If we suppose the contract was from week to week till determined by notice,  
surely he is volens if he does not give the notice. It is said that to hold that the  
plaintiff is not to recover, is to hold that a master may carry on his work in a  
dangerous way and injure his servant. I do so hold if the servant is foolish enough  
to agree to it. This sounds very cruel. But do not people go to see dangerous  
sports? Acrobats daily incur fearful dangers; so do lion tamers, and the like. E  
Let us hold to the law. If we want to be charitable, gratify ourselves out of our  
own pockets.

As to the authorities, it is a little amusing that LINDLEY, L.J., should be cited to  
show that his very clear judgment in this case was wrong. As to the opinion of  
LORD CRANWORTH, I hold it in the highest respect, but it has no bearing on this  
case. He said the system was wrong. That system was indeed known to the  
workman, but not its danger. But there is another question. I think it clear  
that there was no evidence of wrong, negligent or wilful, in the defendants. It is  
called negligence, but there was no negligence; what was done was done wilfully  
and intentionally. I am surprised it should be said as against the defendants that  
there was no explanation or suggestion as to what was the cause of the disaster. G  
There was not. But who was to give it? Not the defendants; the plaintiff was  
to make out his case. It may be that it is in the power of an employer conducting  
operations such as these to prevent such injuries as this. But who is to prove it?  
I say, then, there was no evidence of wrong, negligence, or wilfulness in the  
defendants. It is said that this is not open to them; that the objection was not  
taken at the trial. I think it clearly was. The defendants applied for a nonsuit H  
at the end of the plaintiff's case. Why? Because there was no evidence for the  
jury. When it was said the thing was intrinsically dangerous, the defendants  
used the maxim *volenti non fit injuria*. If this question was not open to the  
defendants, why was not that objection taken in the Queen's Bench Division and  
Court of Appeal? A new trial might have been granted. This case is wholly  
different from *Clarkson v. Musgrave* (1), where the objection in the Appeal Court  
was of a wholly different character from that in the county court, and did not, as  
it were, arise out of it as here. Here the defendants say there is no evidence of  
wrong in us. Answer: Your very work is dangerous. Reply: But you knew it,  
and undertook it with full knowledge of the extent of the danger. Whether taken  
or not, it should be open to the defendants. Error is *caput lupinum*. Up to the  
last moment, if there was irremediable error, it may be objected to. That was  
here. On this ground, also, the defendants should succeed. Something ought to  
be done; a new trial granted, if necessary, to prevent the defendants being made I

A liable to pay damages which, in the opinion of many judges, there was no ground for claiming against them, and which never would have been claimed but in the hope of an unjust verdict from a jury. Fortified by the opinion of those judges, I should think this is a plain case for the defendants, but that I know your Lordships think otherwise. I am of opinion that the judgment should be affirmed.

B **LORD WATSON.** This action was brought in the county court of Yorkshire by the appellant, for recovery of damages from the respondent firm, who are railway contractors, in respect of personal injuries sustained by him in their service. The jury, under direction of the judge, returned six specific findings. Three affirmed facts implying fault on the part of the respondents, one negatived contributory negligence, and another assumption of risk by the appellant, while the sixth assessed damages at £100. Judgment was delayed in order to give either party C an opportunity of moving to have it entered in their favour. At the hearing the respondents confined their challenge of the verdict to the finding relating to risk. They moved for a nonsuit,

D "on the ground that the case ought not to have been allowed to go to the jury, the plaintiff, having admitted that he knew of the risk and voluntarily incurred it."

The county court judge refused the motion, and entered judgment for the plaintiff for £100. The respondents appealed to a Divisional Court consisting of HUDDLESTON, B., and WILLS, J., who, in consequence of doubts as to the effect of certain recent cases, without expressing any final opinion, took the course of dismissing the appeal, with leave to the respondents to carry the case to the Court of Appeal, in order to obtain an authoritative exposition of the law involved in the maxim *volenti non fit injuria*. The case then came before an Appeal Court, composed of LORD COLERIDGE, C.J., with LINDLEY and LOPES, L.JJ., who recalled the decree obtained by the plaintiff in the county court, and directed judgment to be entered for the defendants in the action. In delivering judgment, LORD COLERIDGE F dealt with the point which had been raised in the county court, and expressed his opinion that the judge erred in refusing to hold that the plaintiff undertook to perform a dangerous operation, and took upon himself the risk attending that operation. His Lordship then proceeded to consider the findings with respect to fault, and came to the conclusion that there was no evidence of negligence to go to the jury. LINDLEY, L.J., rested his decision upon the second of these grounds, being of opinion that, according to the evidence, the plaintiff's injuries were the G result of "pure accident without any element of negligence in it." In expressing the same view, LOPES, L.J., remarked that the

"vexed question with regard to the application of the principle of *volenti non fit injuria*, which arose in *Thomas v. Quartermaine* (3) and *Yarmouth v. France* (2) happily does not arise in this case."

H The provisions of s. 120, and following clauses of the County Courts Act, 1888, do not appear to have been brought to the notice of the learned judges of the Appeal Court. These enactments appear to me to exclude all right of appeal upon questions of law which were not raised and submitted at the trial to the county court judge [see 9 HALSBURY'S LAWS (3rd Edn.) 323]. The reasoning of FIELD and CAVE, JJ., in *Clarkson v. Musgrave* (1) although the decision turned upon the I terms of the County Courts Act, 1875, is in *pari materia*, and is, in my opinion, equally applicable to the statute of 1888. In this case, the contention that there was no evidence of negligence to go to the jury, was never mooted in the court of first instance. It was not raised in the notice of appeal to the Divisional Court, and it was neither included in the leave given by that court, nor referred to in the notice of motion before the Appeal Court. I am, in these circumstances, of opinion that the findings of the jury, bearing upon the question of the defendants' fault, must be taken as conclusive. The legislature has purposely taken away from them the right to raise, and from your Lordships the right to entertain, any question of

law or fact affecting the validity of these findings. The only finding with which, in my opinion, this House has jurisdiction to deal, is embodied in the question put by the presiding judge:

“Did the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?”

and the answer of the jury, which was, “No.” While I am of opinion that it is not within the jurisdiction of any court of review to set aside jury findings which were not impeached in the county court, it does appear to me to be legitimate and necessary in the present case to examine the findings which relate to negligence, in the light of the facts disclosed in evidence, not with the view of disturbing them, but for the purpose of appreciating their effect, and ascertaining the character of the risk which the plaintiff is alleged to have voluntarily undertaken. The facts in evidence do not raise any question of credibility. The real controversy, both in the county court and at your Lordships’ Bar, has been directed to the inferences which ought to be derived from them.

The plaintiff was employed by the defendants from December, 1887, until April 13, 1888, in a rock cutting upon the Halifax High Level Railway. A line of rails upon which there was a travelling steam-crane and tackle ran along the edge of the cutting, and the quarried stone was lifted and deposited in trucks by means of the crane. The larger stones were secured by winding the chain round them, and hitching the end hook into one of its links; the smaller ones were packed in skips or crates. The plaintiff was engaged in loading the crane until the beginning of February, and after that date in assisting to drill holes for blasting. On April 13 he was turning a drill-rod which two of his fellow-workmen struck alternately with their hammers, when a large stone, which was in course of being raised by the crane, fell upon him, and inflicted the injuries complained of. His fellow-workmen saw the falling stone just in time to get out of its way; but the plaintiff, who was stooping at his work, had not time to make his escape. No evidence was led on either side, as to the character of the stone which fell, to the condition of the chain, or to the actual mode in which the stone was secured.

It appears to have been the practice during the whole period of the plaintiff’s employment to permit the crane load, whenever it was found convenient, to be swung directly above the workmen engaged in drilling. At its first start the load swung clear of them, but after it had attained some elevation, the arm of the crane was “jibbed” or deflected to one side or the other, as suited the convenience of those who were loading the trucks. Until the crane was jibbed, the plaintiff and others employed in drilling had no means of knowing whether its load would or would not pass over their heads. Neither of the parties disputed at the trial that the practice in question involved some degree of peril to the workmen employed in drilling. The plaintiff in the evidence stated that he had been long enough at that kind of work to know that the practice was dangerous. He also said:

“I had been at the same class of work in the same cutting. They were jibbing over our heads every day.”

“Sometimes we could see the stones being craned up, and when we saw them we got out of the way.”

Hanson, a witness for the defendants, who was their foreman in charge at the time of the accident, said that

“the men ought to have stopped work while the stone was being jibbed round, that would be the safe way.”

He admitted that no notice was given them; and he also said:

“If the men left their work every time the crane jibbed, it would take two and a half hours to do one hour’s work.”

There is evidence to the effect that the plaintiff and his fellow-workmen had previously complained to the foreman of the danger of slinging stones over their



A heads. There is no evidence to show that the practice was necessary to the conduct of the defendant's operations, and could not have been discontinued without interruption of their work.

The questions touching negligence which were left to the jury, and the answers returned by them were :

B “(1.) Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied? (Answer.) No. (2.) Was the omission to supply special means of warning when the stones were being jibbed, a defect in the ways, works, machinery and plant? (Answer.) Yes. (3.) If so, were the employers (or some person engaged by them to look after the condition of the works, etc.), guilty of negligence in not remedying that defect? (Answer.) Yes.”

C The framing of these questions may be open to criticism; but, on a fair construction of them, together with the answers given, what the jury meant to affirm seems to me to be tolerably plain. They were not, in my opinion, meant to represent three different phases of negligence, but to affirm three different propositions constituting one form of negligence, namely, the neglect of the defendants to take proper precautions for protecting their workmen from the possible consequences of a faulty system of working the crane.

D It is plain that the first question had no reference to any specific flaw in the crane or its tackle, because it expressly relates to the machinery “taken as a whole,” words which, as I understand them, were intended to cover the arrangement and use of the crane and its tackle considered in their relation to other departments of work carried on in the cutting. Accordingly, the first answer of the jury appears to me to affirm that the system of using the crane was not reasonably fit for its purpose, inasmuch as it exposed workmen in another department to unnecessary danger. The second affirms that the use of the crane without warning to the workmen over whose heads its load was jibbed, constituted a defect in the works; and the third, that the defendants, or their foremen, were negligent in respect of their failure to remedy that defect. I so construe the findings of the jury, because I feel bound, in the absence of any exception to the charge of the presiding judge, to assume that these questions, as explained by him to the jury, did not embrace any cause of action not arising on the pleadings, and that they did fairly raise the issues disclosed in the plaintiff's pleadings and evidence. It must be kept in view that, owing to the shape in which the case was submitted to them, the jury were invited to consider these three questions apart from the question of risk, or, in other words, upon the footing that the risk of a stone falling from the crane had not been undertaken by the plaintiff. The incidence of the risk was the subject-matter of a separate question. In that aspect of the findings with regard to negligence, I am not prepared to concur in the observations made upon them by the Court of Appeal. If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendants. If, on the contrary, the principle of *volenti non fit injuria* were eliminated from the case, there would, in my opinion, be reasonable and sufficient warrant in the evidence for the verdict returned by the jury.

H It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by LORD CRANWORTH and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House long before the passing of the Employers' Liability Act, 1880 [repealed], that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword v. Cameron* (7) the First Division of the Court of Session found a master liable in damages to a

quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Co. v. Reid* (9) in support of the proposition that the doctrine of *collaborateur* was unknown to the law of Scotland; but LORD CRANWORTH pointed out (3 Macq. at pp. 289, 290) that the decision did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that

“the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions.”

LORD CHELMSFORD, L.C., expressed the same view in *Bartonshill Coal Co. v. McGuire* (8). The judgment of LORD WENSLEYDALE in *Weems v. Mathieson* (10) clearly shows that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

The main, although not the sole, object of the Act of 1880 was to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they entrust the duty of superintendence, as if it were their own. In effecting that object the legislature has found it expedient in many instances to enact what were acknowledged principles of the common law. Section 1 (1) provides that the employer shall be liable in cases where a workman is injured

“by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer.”

I see no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the subsection. Sometimes (as in the present case), when the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach. The employer may in such cases protect himself, either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning, through the negligence of himself or of his superintendent.

The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is whether, upon the evidence, the jury were warranted in finding, as they did, that the plaintiff did not “voluntarily undertake a risky employment with a knowledge of its risks.” Whether the plaintiff appreciated the full extent of the peril to which he was exposed, or not, it is certain that he was aware of its existence, and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If upon that point there are considerations pro and contra requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendants' case is that the evidence is all one way—that the plaintiff's continuing in their employment after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank. The maxim *volenti non fit injuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was, in the strictest sense of the term, *volens*. The same can hardly be said

A of a slater who is injured by a fall from the roof of a house; although he, too, may be volens in the sense of English law.

In its application to questions between the employer and the employed, the maxim, as now used, generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury.

B The question which has most frequently to be considered is, not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, the incidence of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence, and appreciated, or had the means of appreciating, its danger. But assuming that

C he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case.

D It is material to notice that the Employers' Liability Act, 1880, [repealed] under which the present action was brought, by s. 2 (3), provides that a workman shall have no right to compensation for injuries caused by reason of any defect or negligence which is specified in s. 1, in any case where

"he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

E

I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but, as was forcibly pointed out by LORD ESHER, M.R., in *Thomas v. Quartermaine* (3), in cases where the employer and his deputies were personally ignorant of the defect it is made a condition precedent

G of the workman's right to recover that he shall have given them information of it before he was injured. That does not lead me to the conclusion that the provisions of the Employers' Liability Act wholly exclude the application of the doctrine volenti non fit injuria to claims falling within the scope of the Act; but it does, in my opinion, show that the legislature did not intend that the statutory remedy given to the workman should be taken away simply by reason of his continuing in

H the same employment after he became aware of the defect from which he ultimately suffered.

There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve

I and skill, and, in the absence of express stipulation to the contrary, the risk is held to be with him, and not with the employer. On the other hand, there are cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that description the relations of the workman to the peril are so various that it is impossible to lay down any rule regarding the operation of the maxim which will apply to them all alike; and I shall refer to two instances only by way of illustration. The risk may arise from a defect in a machine which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his



own act. If he clearly foresaw the likelihood of such a result, and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in machinery used in another department, over which he has no control.

The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation. I should be prepared to hold that, apart from the Act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work. In the circumstances of this case, the question whether he had accepted the risk is one of fact: there is no arbitrary rule of law which decides it. The complaints made to the foreman by the plaintiff and his fellow-workmen, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen, or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it, or to accept the risk of it.

I am confirmed in that view by the decision in *Sword v. Cameron* (7), which came very near in its circumstances to the present case. There the dangerous practice consisted in firing a shot at so short an interval after notice to the workmen that they had not time to reach a place of safety; and the pursuer had continued to work until he was injured, in full knowledge of the practice and its attendant risks. The Court of Session held that the maxim *volenti non fit injuria* did not apply; and it appears to me that, in *Bartonshill Coal Co. v. Reid* (9), LORD CRANWORTH approved of the judgment. It is true that in the *Bartonshill Cases* (8), (9) there was no question directly raised in regard to the maxim; but the noble and learned Lord examined the facts of *Sword v. Cameron* (7) in detail, and expressed the opinion, not that the decision might be explained, but that it was justifiable in the circumstances of the case. This case, however, is under the statute of 1880, and, as already indicated, I am of opinion that the mere fact of the plaintiff having continued in the employment of the defendants cannot defeat his statutory claim. I, therefore, concur with the majority of your Lordships in thinking that the order of the Court of Appeal must be reversed, and the judgment of the county court judge restored.

LORD HERSCHELL stated the facts and the course of the proceedings and continued: The first argument addressed to your Lordships by the learned counsel for the appellant was that it was not competent for the respondents to raise the objection that there was no evidence of negligence, no such point having been made in the county court. In support of this proposition he cited *Clarkson v. Musgrave* (1), which is a distinct authority to that effect. The learned counsel for the respondents did not impeach the authority of that decision, or invite your Lordships to overrule it. I see no reason to think the decision was erroneous. It would, in my opinion, be very mischievous if an appeal from the decision of a county court could be sustained on the ground that there was no evidence to go to the jury, when that point had not been raised before the county court judge. In the present case it is perfectly clear that no such objection was ever taken. At the close of the evidence for the plaintiff, the only ground submitted for a nonsuit was, that the plaintiff had himself admitted that he knew of the risk, and voluntarily incurred it, and it was on this ground that the defendants applied to have judgment entered for them, notwithstanding the finding of the jury. Indeed, in the notice of motion in the Queen's Bench Division on appeal from the county court, the ground that there was no evidence of negligence is nowhere taken. I think that it was not

A competent for the Court of Appeal to inquire whether there was any evidence of negligence.

For the reasons I have given, I do not think it is necessary to determine whether there was such evidence in the present case, but I am far from being satisfied that there was not. No satisfactory explanation was given of the cause which led to the fall of the stone and the consequent injury to the plaintiff. It is said that while in some cases the fall of a substance, such as a bale of cotton which is being raised by a crane, would, if unexplained, be evidence of negligence, the fall of a stone from a crane, as in the present instance, is not so, because stone is apt to disintegrate, and thus to fall; but I am not prepared to admit that it is beyond the reasonable power of an employer conducting operations such as those in question to prevent the risk of injury to life or limb of those who are working at the locality over which the stones are being lifted. I should have thought it would have been possible to use such appliances as under ordinary circumstances to prevent the risk of the stones falling; but if it be not possible to do so, and the stones cannot pass over those engaged in other operations below without serious danger to them, it would certainly be within the employer's power to warn them when it is necessary to desist from work and get out of the way of the impending risk. It seems to me, then, that the employer in such a case is in this dilemma: either it was reasonably practicable for him to use appliances by which the accident would have been avoided, in which case he should have done so; or, if it was not, sufficient warning should have been given to those endangered to enable them to escape the danger. It is, of course, possible that the employer might have shown that neither of these courses was reasonably practicable. But that is immaterial. All that I am concerned with at the present moment is whether the accident which happened afforded evidence of negligence.

It was, of course, open to the respondents to contend that, after the admission of the plaintiff as to his knowledge of the dangerous character of the work, the case ought to have been withdrawn from the jury, and judgment entered for them, and this was the point strenuously argued at your Lordships' Bar on their behalf. It was said that the maxim *volenti non fit injuria* applied, and effectually precluded the plaintiff from recovering. The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes, in relation to cases of employer and employed, been stated thus. A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error.

Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause. But the argument for the respondents went far beyond this. The learned counsel contended that, even though there had been negligence on the part of the defendants, yet the risk created by it was known to the plaintiff, and inasmuch as he continued in the defendants' employment, doing their work under conditions the risk of which he appreciated, the maxim *volenti non fit injuria* applied, and he could not

recover; that his proper course, if he wished to avoid the risk of his employer's negligence, was to refuse to perform the work under such conditions. Their argument necessarily went this length, for the fact on which it was grounded was simply that the plaintiff had admitted that he knew the work was dangerous. I am not quite sure that he was not referring in his answer to the character of the work generally rather than to the special danger arising from jibbing the stones overhead; but in a subsequent answer he stated that he had heard a fellow-workman say to the ganger that it was dangerous to jib stones and skips over their heads, and that he thought so too. A B

It is obvious that the degree in which the work was dangerous depended entirely on the conditions under which it was carried on, and the amount of care exercised. It would be practically unimportant, or very great, according to the character of the appliances used, the mode in which the stone was slung, and the presence or absence of warning at the critical time. In the present case it must be taken on the finding of the jury that the danger was at least enhanced and the catastrophe caused by the negligence of the defendants; and the question for your Lordships' consideration is whether under such circumstances the fact of the plaintiff having continued to perform the duties of his service precludes his recovery in respect of this breach of duty because the acts or defaults which constituted it were done volens. There may be cases in which a workman would be precluded from recovering, even though the risk which led to the disaster resulted from the employers' negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. C D E F

Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *volenti non fit injuria* applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong. It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, among them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invites or assents to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim *volenti non fit injuria* becomes applicable. G H I

It was suggested, in the course of the argument, that the employed might, on account of special risk in his employment, receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of the accident. I think that this might be so. If the employed agreed, in consideration of special remuneration or otherwise, to work under conditions in



A which the care which the employer ought to bestow, by providing proper machinery or in any other way to secure the safety of the employed was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance. But no such case is in question here. There is no evidence that any such contract was entered into at the time when the plaintiff was first engaged, and the fact that he continued work, notwithstanding the employer's breach of duty, affords no evidence of such special contract as that suggested. It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks; and the judgment of the county court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into, I should require to have it clearly shown that the employed had brought home to his mind the nature of the risk he was undertaking, and that the accident to him arose from a danger both foreseen and appreciated.

D I have so far dealt with the subject under consideration as matter of principle apart from authority, but it appears to me that the view which I have taken receives strong support from the approval with which LORD CRANWORTH refers to *Sword v. Cameron* (7) in his judgment in *Bartonshill Coal Co. v. Reid* (9). In *Sword v. Cameron* (7) it was the pursuer's duty to work near a crane, and other servants were employed to blast the rock. The practice was to give a signal to the men by the word "fire." It was then the duty of the men employed at the crane to hasten away. The interval allowed before firing varied from one minute to two. The pursuer was struck when he had got fifty or sixty yards off. An interval of about two minutes elapsed between the order to fire and the explosion, and it was stated to have frequently occurred that by the effects of the explosion, stones flew over the heads of the retreating workmen. LORD CRANWORTH said (3 Macq. at p. 290):

F "This case may be justified without resort to such a doctrine as that a master is responsible for injuries to a workman in his employ, occasioned by the negligence of a fellow workman engaged in a common work. The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated that the notices and signals given were those which had been sanctioned by the employer; and that the workmen had been directed to remain at work near the crane until the order to fire had been given, and then, that after an interval of a minute or two, the explosion would take place. The accident occurred, not from any neglect on the part of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security."

H This case appears to me to be analogous to the present, and the ground upon which LORD CRANWORTH bases the liability of the employer to be applicable to it. It will be noticed that in that case the defective system which created the risk, and from which the pursuer suffered, was known to him, and that he continued his work notwithstanding this knowledge; yet it never appears to have occurred, either to the Scottish court or to LORD CRANWORTH, that this absolved the employer from liability.

I In *Yarmouth v. France* (2) the plaintiff was subjected to a risk owing to a defect in the condition of what was held to be plant within the meaning of s. 1 of the Employers' Liability Act, 1880. He complained of this to the person who had the general management of the defendant's business, but was told, nevertheless, to go on with his work. He did so, and sustained the injury for which he brought his action. The county court judge gave judgment for the defendant on the ground that the plaintiff must be assumed to have assented to take upon himself the risk.

On the authority of *Thomas v. Quartermaine* (3), to which case I will refer immediately, the Court of Appeal ordered a new trial. LINDLEY, L.J., said (19 Q.B.D. at p. 661):

"The Act cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations, or submit to use what is known to be unfit for use. . . . If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

I think that the judgment in *Yarmouth v. France* (2) was perfectly right, but I should not lay the same stress as LINDLEY, L.J., did upon the fact that the workman had remonstrated against the risk to which he was exposed, and on being told to continue his work did so to avoid dismissal. For the reasons which I have given I think that where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine *volenti non fit injuria*, which, in my opinion, has no application to such a case. It appears to me that s. 2 (3) of the Employers' Liability Act indicates that the legislature regarded this as the law.

The respondents' counsel naturally placed his main reliance upon *Thomas v. Quartermaine* (3). The plaintiff there was employed in a room in the defendant's brewery, where a boiling and a cooling vat were placed. A passage which was in parts only three feet wide ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff went along this passage in order to get from under the boiling vat a board which was used as a lid, and as this lid stuck, the plaintiff gave it an extra pull, when it came away suddenly, and the plaintiff falling back into the cooling vat was scalded. The county court judge held that there was evidence of defect in the condition of the works in there being no sufficient fence to the cooling vat. He found that the condition of the vat was known to both the plaintiff and the defendant, and that the plaintiff had not been guilty of contributory negligence, and he gave judgment for him. The case was carried to the Court of Appeal, where the learned judges, BOWEN and FRY, L.JJ. (Lord ESHER, M.R., dissenting), affirmed a decision of the Divisional Court directing judgment to be entered for the defendant. The judgments of the learned judges forming the majority in that case were chiefly occupied by a consideration of the provisions of the Employers' Liability Act.

It appears to have been contended in that case that the effect of the statute was to preclude the employer from relying on the maxim *volenti non fit injuria* in cases where, but for the statute, such a defence would have been open to him. But it is to be observed that in the case there under consideration the county court judge had found that the defendant was himself aware of the defective condition of his works, and, if he had not taken reasonable care so to carry on his business as not to subject those employed by him to undue risk, he would, according to the law laid down by this House in the *Bartonskill Coal Co. v. Reid* (9) be *prima facie* liable to an action. The learned judges, however, came to the conclusion that the defendant was entitled to judgment because the maxim *volenti non fit injuria* applied, the county court judge having found that the condition of the vat was known to the plaintiff as well as to the defendant. I find myself unable to concur in the view that this could properly be held under the circumstances as matter of law. The fact seems to have been lost sight of that the danger to the plaintiff did not arise from the circumstance that he had to pass from one part of the premises to the other, in proximity to the vats, even if this would have justified the con-

A conclusion arrived at. The accident arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears, this was among the ordinary duties of his employment, and if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to inquire whether the maxim *volenti non fit injuria* afforded a defence, it seems to me that it must have been a question of fact, and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform. If the effect of the judgment be that the mere fact that the plaintiff, after he knew the condition of the premises, continued to work, and did not quit his employment, afforded his employer an answer to the action, even though a breach of duty on his part was made out, I am unable, for the reasons I have given, to concur in the decision. I think that the judgment of the court below in the case now before your Lordships ought to be reversed, and judgment for the plaintiff restored.

LORD MORRIS.—The circumstances of this case have been so fully stated by your Lordships who have already spoken, that it is unnecessary for me to repeat them. I concur in the conclusion arrived at by the Court of Appeal that the findings of the jury as to negligence were not warranted by the evidence, and that there was no evidence of negligence conducing to the plaintiff's injury; but I do not consider that it, therefore, follows that judgment should be entered for the respondents. The action was not one in the superior courts, and it must be governed by the statutes regulating appeals from the county courts. No objection was made at the trial on the part of the respondents that there was no evidence upon which the jury could find there was negligence on their part; nay, more, in the notice of motion, by way of appeal, in the Queen's Bench Division no objection was taken that there was no evidence of negligence.

The question of law raised at the trial, both at the close of the plaintiff's case in asking for a nonsuit, and at the close of the entire case in asking for judgment, was, that, the plaintiff having admitted that he knew the risk and voluntarily incurred it, the defendants were entitled to succeed. The Court of Appeal decided the case upon a question of law not taken at the trial. I can find no reference in any of the judgments in the Court of Appeal as to their competency to entertain and decide upon a point not made at the trial, nor does *Clarkson v. Musgrave* (1) appear to have been cited. It is an express decision, and one in which I entirely concur, that it is a condition precedent to the right of appeal that the question of law upon which it is desired to appeal should have been raised before the county court judge at the trial. If the point, that there was no evidence of negligence, had been made by the defendants at the trial, I am of opinion they would be now entitled to judgment; but, in my opinion, that point is not now open, and the case must be dealt with, assuming the findings of the jury as to the negligence of the defendants. Notwithstanding these findings, the respondents have argued that they are entitled to judgment, inasmuch as the appellant admitted he knew of the risk, and voluntarily incurred it. His evidence on that point was: "I am a navvy, and am accustomed to this particular work. I am at it long enough to know it is dangerous." And again: "I told the crane driver that it was not safe to jib stones over our heads." On the hypothesis that the respondents were guilty of negligence conducing to the accident, which is the result of the findings of the jury unchallenged at the trial, the respondents still rely on the application of the maxim *volenti non fit injuria*, and the decision in *Thomas v. Quartermaine* (3) as precluding the plaintiff from recovering.

The facts of that case are few and simple. A passage ran between a cooling and a boiling vat in the defendant's brewery. The plaintiff went along the passage to pull a board from under the boiling vat, and in so doing he pulled too strongly, and the board coming out suddenly he fell back into the cooling vat and was injured.



The county court judge held that there was no sufficient fence to the cooling vat, and that the condition of the cooling vat was known to both plaintiff and defendant. This latter finding was a mere truism, for both plaintiff and defendant must have seen and known that the cooling vat was not fenced. I concur in the decision of the Court of Appeal, and in the judgments of BOWEN and FRY, L.JJ., in that case. In the first place, the danger from the narrowness of the passage and the unfenced state of the cooling vat, if it was a danger, was patent to the plaintiff, a workman employed there. Neither he nor anyone else complained of danger. There was no evidence that the passage was dangerous in the ordinary use of it. The accident happened in an extraordinary use of the passage, viz., the fall of the plaintiff while pulling with undue force the board. He was not directed to get the board. He did it of himself. There was no evidence, in my opinion, of any negligence of the defendants, and even if there was, it was patent and well known to the plaintiff, who voluntarily and with the fullest knowledge of the full extent of the danger incurred it. The principle, as laid down by BOWEN, L.J. (18 Q.B.D. at p. 697), is clear and conclusive, viz.:

"Where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence."

Apply that principle to the facts of the present case as found by the jury. The appellant did not know that the machinery was not reasonably fit for the purpose; a fellow workman in his presence had complained of the danger of jibbing stones to Riggs, who had acted as ganger, and the appellant had complained to the crane driver, who laughed at him. I have already said that I see no evidence to support the finding that the machinery was not reasonably fit for the purpose, nor of any negligence in its use; but the finding so stands. The appellant may have voluntarily entered on a risky business, but he did not voluntarily undertake it, plus the risk from defective machinery. There must be an assent to undertake the risk with the full appreciation of its extent. In my opinion, the findings of the jury, in answer to questions 2 and 3, of negligence by the respondents in not supplying means of warning when the stones were being jibbed, does not avail the appellant. He undertook a dangerous work of drilling holes, while over his head (unless he moved away) stones were being hauled by a crane. That work he entered upon knowing it was dangerous to that extent. He worked for months knowing there was no special warning to caution him, but running his chance of getting out of the way when the crane would otherwise pass over his head. He was, in my opinion, both *sciens* and *volens* as to all the danger except that arising from unfit machinery. Of that danger he was not aware. I more than doubt if it existed at all; but the right of appeal is a statutable one; the respondents have not brought themselves within the statute in not objecting at the trial to the want of any evidence to support the first finding; while it stands, the *maxim volenti non fit injuria* appears inapplicable. How can the appellant be held voluntarily to incur a danger from unfit machinery, the unfitness of which he was admittedly not aware of? *Thomas v. Quartermaine* (3), for the same reason, is no authority for the respondents' contention. In the result, I am of opinion that the appellant is entitled to succeed on the course the case has taken, and with the limited right of review accorded to the Divisional Court, to the Court of Appeal, or to your Lordships' house.

*Appeal allowed.*

Solicitors: J. H. Bridgford for Longbottom & Sons, Halifax; Watson, Sons & Room for Neill & Broadbent, Bradford.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

BANK OF ENGLAND *v.* VAGLIANO BROTHERS

[HOUSE OF LORDS (Lord Halsbury, L.C., the Earl of Selborne, Lord Watson, Lord Bramwell, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Field), June 16, 17, 19, 20, 23, 24, 26, 27, 1890, March 5, 1891]

[Reported [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353;  
55 J.P. 676; 39 W.R. 657; 7 T.L.R. 333]

*Bank*—*Bill of exchange*—*Forged bill*—*Representation by customer that bill genuine*—*Payment by bank*—*Discovery of forgery*—*Liability of bank to refund amount paid.*

Where by his conduct the customer of a bank, however innocently, misleads the banker into the belief that a bill of exchange which he has accepted and passes to the bank for payment to the payee named thereon is a genuine bill, and the bank, relying in good faith on that representation, pays the bill, the customer cannot, on discovering that the bill was a forgery, recover from the bank the amount so paid.

A clerk of the respondents forged bills of exchange purporting to be drawn by one V. to the order of P. as payee, and by fraud obtained the genuine acceptances of the respondents to these documents. He also forged the endorsement of P. as payee. The respondents advised their bankers that the forged bills (among others) were coming due for payment, believing them to be genuine, and on presentation the bank paid the amount of the bills. In an action by the respondents to recover the amount so paid,

**Held** (LORD BRAMWELL and LORD FIELD dissenting) on the facts as a whole the conduct of the respondents had led the bank to believe that the bills were genuine, and, therefore, the bank was not liable to the respondents for the sums paid upon the forged bills.

*Roberts v. Tucker* (4) (1851), 16 Q.B. 560, distinguished.

*Bank*—*Bill of exchange*—*Payee "fictitious" person*—*Actual person's name forged as payee*—*Right of banker to pay bill to bearer over counter.*

By s. 7 (3) of the Bills of Exchange Act, 1882: "Where the payee [of a bill of exchange] is a fictitious or non-existing person the bill may be treated as payable to bearer."

Where an actual person's name is forged as payee in a bill of exchange, so that he has not and never was intended to have any right to the proceeds of the bill, the person so named is a "fictitious" person within the sub-section, and the banker to whom the bill is sent by a customer for payment is entitled to treat it as payable to a de facto bearer and to pay it over the counter. If it be sought to charge the acceptor on such a bill, knowledge by him that the payee is a fictitious or non-existing person is not necessary to bring the case within the section.

So **held** by LORD HALSBURY, L.C., the EARL OF SELBORNE, LORD WATSON, LORD HERSCHELL, LORD MACNAGHTEN and LORD MORRIS, LORD BRAMWELL and LORD FIELD dissenting.

Per LORD HERSCHELL: A bill within the subsection may be treated as payable to bearer by any person whose rights or liabilities depend on whether it be a bill payable to order or one payable to bearer.

*Bank*—*Bill of exchange*—*Duty of banker*—*Inquiry into genuineness of endorsements*—*Bill regular on face and regularly advised for payment by customer.*

Per the EARL OF SELBORNE: If it were the duty or practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their customers, until they could ascertain by inquiry the genuineness of every

foreign endorsement, it must continually happen that the bills would not be paid at the proper time and place, and bona fide holders might treat them as dishonoured.

[And see per LORD MACNAGHTEN, *infra*.]

*Bank—Duty of Banker—Payment of customer's acceptances—Special contract—Presumption of reference only to genuine bills.*

Per LORD MACNAGHTEN: The relation of banker and customer does not of itself and apart from other circumstances impose on a banker the duty of paying his customer's acceptances [of bills of exchange]. Bankers may refuse to pay their customers' acceptances and such refusal is not inconsistent with the relation of banker and customer or a breach of the banker's duty to his customer. If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, express or implied. Such an agreement, in the absence of express stipulation to the contrary, must have reference solely to genuine bills of exchange. Bankers who undertake the duty of paying their customers' acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete on the face of them. It would be out of the question for a banker to defer payment until satisfied by inquiry and investigation that all the endorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid.

*Statute—Construction—Codifying Act—Consideration of previous state of the law—Bills of Exchange Act, 1882—Not code of existing law—Alteration of existing law.*

Per LORD HERSCHELL: In interpreting an Act which is intended to be a code of law the proper course, in the first instance, is to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. . . . The Bills of Exchange Act, 1882, was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter, it in certain respects. It is not to be presumed that any particular provision was intended to be a statement of the existing law rather than a substituted enactment.

Per LORD MACNAGHTEN: Section 7 (3) of the Act of 1882 appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange.

**Notes.** Applied: *Robinson v. Canadian Pacific Rail. Co.*, [1892] A.C. 481. Considered: *Re English Bank of the River Plate, Ex parte Bank of Brazil*, [1893] 2 Ch. 438. Distinguished: *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557. Applied: *Clutton v. Attenborough*, [1895] 2 Q.B. 306; *River Thames Conservators v. Speed, Dean & Co.*, [1897] 2 Q.B. 334; *Preist v. Last* (1903), 89 L.T. 33. Distinguished: *Vinden v. Hughes*, [1905] 1 K.B. 795. Considered: *Lewis Sanitary Steam Laundry Co. v. Barclay* (1906), 22 T.L.R. 737; *Macbeth v. North and South Wales Bank*, [1908] 1 K.B. 13. Distinguished: *North and South Wales Bank v. Macbeth, North and South Wales Bank v. Irvine*, [1908] A.C. 137. Considered: *Keptitigalla Rubber Estates v. National Bank of India*, [1909] 2 K.B. 1010. Applied: *Hall v. Hayman*, [1912] 2 K.B. 5. Considered: *Wimble v. Rosenberg*, [1913] 3 K.B. 743. Applied: *Sanday v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781. Considered: *Macmillan v. London Joint Stock*



- A *Bank*, [1917] 2 K.B. 439; *Despatie v. Tremblay*, [1921] 1 A.C. 708; *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R.Rep. 66. *Ouellette v. Canadian Pacific Rail. Co.*, [1925] A.C. 569; *Shotts Iron Co. v. Curran*, [1929] A.C. 409. Applied: *Stag Line, Ltd. v. Foscolo Mango & Co.*, [1931] All E.R.Rep. 666. Considered: *Derbyshire Territorial Army Association v. South-East Derbyshire Assessment Committee*, [1935] 2 K.B. 373; *Carpenters Co. v. British Mutual Banking Co.*, [1937] 3 All E.R. 811; *Welham v. D.P.P.*, [1960] 1 All E.R. 805. Referred to:
- B *Scholfield v. Londesborough*, [1895-9] All E.R.Rep. 282; *Holland v. Manchester and Liverpool District Banking Co.* (1909), 14 Com. Cas. 241; *Maclaren v. A.-G. for Quebec*, [1914] A.C. 258; *London Joint Stock Bank, Ltd. v. Macmillan*, [1918-19] All E.R.Rep. 30; *Quebec Railway, Light, Heat and Power Co., Ltd. v. Vandry*, [1920] A.C. 662; *Gerald McDonald & Co. v. Nash & Co.*, [1924] All E.R.Rep. 601; *Auchteroni & Co. v. Midland Bank, Ltd.*, [1928] All E.R.Rep. 627; *Arab Bank, Ltd. v. Ross*, [1952] 1 All E.R. 709.

As to the payment by a bank of accepted bills, see 2 HALSBURY'S LAWS (3rd Edn.) 203-213; and for cases see 3 DIGEST (Repl.) 248-251, 258-261. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

- D (1) *Ireland v. Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 1 Digest (Repl.) 485, 1275.
- (2) *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 3 C.L.R. 1066; 25 L.T.O.S. 272; 3 W.R. 573; 10 E.R. 950, H.L.; 21 Digest (Repl.) 485, 1714.
- E (3) *Staple of England (Mayor, etc., of Merchants of the) v. Bank of England (Governor of)* (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 52 J.P. 580; 36 W.R. 880; 4 T.L.R. 46, C.A.; 3 Digest (Repl.) 132, 27.
- (4) *Roberts v. Tucker* (1851), 16 Q.B. 560; 20 L.J.Q.B. 270; 15 Jur. 987; 117 E.R. 994, Ex. Ch.; 3 Digest (Repl.) 257, 724.
- (5) *Stone v. Freeland* (1769), 1 Hy. Bl. 316, n.; 126 E.R. 187, N.P.; 6 Digest (Repl.) 286, 2097.
- F (6) *Cooper v. Meyer* (1830), 10 B. & C. 468; L. & Welsb. 172; 5 Man. & Ry.K.B. 387; 8 L.J.O.S.K.B. 171; 109 E.R. 525; 6 Digest (Repl.) 286, 2095.
- (7) *Bennett v. Farnell* (1807), 1 Camp. 130, N.P.; 6 Digest (Repl.) 28, 202.
- (8) *Young v. Grote* (1827), 4 Bing. 253; 12 Moore, C.P. 484; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest (Repl.) 255, 714.
- G (9) *Mead v. Young* (1790), 4 Term Rep. 28; 100 E.R. 876; 6 Digest (Repl.) 287, 2105.
- (10) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57, H.L.; 6 Digest (Repl.) 428, 3007.
- H (11) *Arnold v. Cheque Bank, Arnold v. City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 3 Digest (Repl.) 260, 738.
- (12) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 21 Digest (Repl.) 370, 1107.
- I (13) *Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest (Repl.) 366, 1090.

Also referred to in argument:

- Collis v. Emett* (1790), 1 Hy. Bl. 313; 126 E.R. 185; 6 Digest (Repl.) 68, 596.
- Gibson v. Minet* (1791), 2 Bro. Parl. Cas. 48; 1 Hy. Bl. 569; 1 E.R. 784, H.L.; 6 Digest (Repl.) 28, 202.
- Gibson v. Hunter* (1793), 6 Bro. Parl. Cas. 235; 2 Hy. Bl. 187; 2 E.R. 1050; 6 Digest (Repl.) 28, 203.

- Phillips v. Im Thurn* (1866), L.R. 1 C.P. 463; Har. & Ruth. 499; 35 L.J.C.P. 220; 14 L.T. 406; 14 W.R. 653; 6 Digest (Repl.) 28, 199.
- London and South Western Bank v. Wentworth* (1880), 5 Ex.D. 96; 49 L.J.Q.B. 657; 42 L.T. 188; 28 W.R. 516; 6 Digest (Repl.) 68, 598.
- Price v. Neal* (1762), 3 Burr. 1354; 1 Wm. Bl. 390; 96 E.R. 221; 6 Digest (Repl.) 99, 773.
- Baxendale v. Bennett* (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 42 J.P. 677; 26 W.R. 899, C.A.; 6 Digest (Repl.) 68, 600.
- Halifax Union v. Wheelwright* (1875), L.R. 10 Exch. 183; 44 L.J.Ex. 121; 32 L.T. 802; 39 J.P. 823; 23 W.R. 704; 3 Digest (Repl.) 181, 321.
- Orr and Barber v. Union Bank of Scotland* (1854), 1 Macq. 513; 24 L.T.O.S. 1; 2 C.L.R. 1566, H.L.; 3 Digest (Repl.) 283, 846.
- Cocks v. Masterman* (1829), 9 B. & C. 902; Dan. & Ll. 329; 4 Man. & Ry.K.B. 676; 8 L.J.O.S.K.B. 77; 109 E.R. 335; 3 Digest (Repl.) 259, 728.

**Appeal** by the defendant in the action from a decision of the Court of Appeal (COTTON, LINDLEY, BOWEN, FRY and LOPES, L.JJ., LORD ESHER, M.R., dissenting), reported 23 Q.B.D. 243, affirming a decision of CHARLES, J., reported 22 Q.B.D. 103, in favour of the plaintiffs, the present respondents, in a case tried by him without a jury.

The plaintiffs in the action had for many years carried on a large business as merchants and foreign bankers. Their transactions with the defendant, their banker, had prior to November, 1887, when their account was closed, been for a long period of great magnitude. The plaintiffs employed a considerable number of clerks at their office in London, and among them was one Anthony Isidor Glyka. With another clerk named Copchili he managed the foreign correspondence of the firm, and during the whole period of his employment the plaintiffs had entire confidence in him and had no reason whatever to suspect his integrity. Between February and August, 1887, however, Glyka, who had been speculating on the Stock Exchange, had, in order to meet his engagements there, by a series of frauds, obtained the plaintiffs' acceptance to forty-three forged bills, of which he received payment from the defendants to the aggregate amount of £71,500.

The frauds were perpetrated in this way. The plaintiffs had in various parts of the world a large number of correspondents, who were in the habit of drawing bills on them from time to time, sometimes consigning goods against the bills, and sometimes making direct remittances in money. The bills were ordinarily, but not by any means invariably, drawn in sets of two, one being headed "solely for acceptance," and the second, intended for negotiation, bearing the endorsements of the various holders through whose hands it might have passed. The correspondents were in the habit of advising the plaintiffs by letter of their having drawn upon them, giving in each instance the particulars of the draft. These letters of advice, which were for the most part in the Greek language, were generally opened by Glyka or Copchili, and placed by one or other of them before Mr. Vagliano. When he had read them they were brought back to the clerks' office and, after having a summary in English endorsed on them by one or other of the correspondence clerks, were handed to a clerk whose duty it was to enter the particulars in a book called the "bills payable book," and if payable after sight in a book called the "sight bill book." Particulars were also entered in a book called the "bills due book." In due course the bills themselves would reach the hands of the London agents of the payees, by whom those headed "for acceptance only" would be brought to the plaintiffs' office for acceptance, and there dropped into a box at the door marked "for bills only." At 4 p.m. every day this box was cleared by the clerk who kept the "bills payable book." He would then compare the bills with the particulars in the "bills payable book," and if they were in order would stamp across them the word, "Accepted, payable at the Bank of England," and in writing add the number, date of acceptance, and date when due.

In this condition the practice was to take them to Mr. Vagliano's room for

A acceptance, and they were then accepted by him. On the average ten to fifteen bills a day would be thus dealt with. Having been signed, they were placed in a portfolio in a bracket, from which they were subsequently taken and given up to those who called for and described them. When the clerk placed a stamp across a bill he was in the habit of noting in the bill book the name of the agent who had left it, if, as often happened, that name was stamped on the bill; if not, he used  
B to attach a slip to the bill directing the clerk who delivered it out to get the name, and from the slip so filled up would make his note. An accepted bill being thus taken away by the agent of the payee would be placed with the second of the set—if there was a second—and then would be presented with or without the second as the case might be, at the Bank of England for payment. In most cases the bills would be presented through a banker, but on rare occasions they were paid across  
C the counter.

Meanwhile, the bank would, in the ordinary course of business, have been advised by the plaintiffs at the commencement of each month of the bills coming forward for payment, the notice containing in each case the date of the bill, its number, the drawer's name and residence, the date when due, and the amount. With regard to bills which might come forward and be payable during the currency  
D of the month, but had not been included in the monthly list, a similar note of advice in similar terms was always sent. The bills after being paid at the bank were returned at intervals of about a week with a pass-book, which indicated by numbers—but not otherwise—the payments which had been made. The cashier of the firm then checked the bills with the pass-book and with the entries in his cash-book, in order that he might be satisfied that the bills entered by him as  
E having become due, and having been paid on certain days, were, in fact, paid. He was not in the habit of examining the endorsements, his reference to the book being simply to note their numbers and amounts, and solely for the purpose of verification. After having been checked with the pass and cash-books in the manner described the bills were packed up in parcels, labelled and put away, the pass-book being balanced half-yearly.

F Glyka, who was thoroughly acquainted with the routine of the office, had under his management, as one of the foreign correspondence clerks, the correspondence with persons resident in Russia. Among them was a Mr. George Vucina, a merchant and banker in Odessa, who for upwards of twenty-nine years had had constant business relations with the plaintiffs' firm. Practically his credit was unlimited. His drafts on Vagliano in each year were very numerous and amounted  
G to many thousands of pounds. The bills were sometimes drawn to Vagliano's order, but far more frequently to the order of a named payee. Glyka, from his position in the plaintiffs' office, had no difficulty in possessing himself of specimens of Vucina's genuine letters of advice and of his genuine bills. Having done so, he had paper prepared identical in texture and in general appearance with that on which Vucina's business letters were written, and he had also bills prepared  
H identical in all respects with Vucina's genuine bills. To these he proceeded to forge Vucina's name as drawer, and in each case he wrote on the face of the bill the name of "C. Petridi & Co.," a firm who carried on business at Constantinople, and had business relations with Vucina, as payees. In each case he stamped upon the face of the bill the name of "F. Pasqua & Son" as indicating the name of the London firm who had left the bills for acceptance. All the forty-three forged bills  
I except two were drawn at three days after sight, the other two being drawn at one and two months after date respectively. Glyka, having forged a letter of advice from Vucina with reference to one of the bills, would place it in the morning with the ordinary correspondence of the firm, and having prepared the forged draft, dropped it into the bill box for acceptance; Mr. Vagliano would accept it in the ordinary course, and it would be placed in the portfolio to be called for by the supposed Pasqua. From this portfolio Glyka would abstract it, and thus he would obtain a genuine acceptance to the forged draft. He then proceeded to forge the endorsement of "C. Petridi & Co." to one Maratis, of Constantinople. The bills



were then presented at the bank, sometimes by Glyka himself and sometimes by another person on his behalf, and were cashed across the counter. Eventually the forgeries were discovered, and Glyka was tried and convicted and sentenced to ten years' penal servitude. The action was brought to recover the amount so paid upon the forged bills. A

*The Attorney-General (Sir Richard Webster, Q.C.), H. D. Greene, Q.C., Pollard, and R. Bray for the Bank of England.* B

*Sir Charles Russell, Q.C., Finlay, Q.C., and Hollams for the respondents.*

Their Lordships took time for consideration.

Mar. 5, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—The simple question in this case is whether the plaintiffs' bankers have paid away the plaintiffs' money under such circumstances as enable the plaintiffs to refuse to acknowledge the payments as made on their behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not conscious of and certainly never intended to authorise the payment of that sum on his behalf. The authorities to pay, which were relied upon by the banker as justifying the payments, were written documents in the form of bills of exchange, and, though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment. C D

Apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal: *Ireland v. Livingston* (1). I will treat the transaction, for the sake of clearness, as if it were a single payment. Could it be doubted that, if the two parties met, and by word of mouth the customers had said to their banker: "There is a bill coming due tomorrow of such and such an amount; it is drawn on me by a customer of mine, named Vucina, and will be presented for payment at your bank tomorrow," such a statement was calculated to put the banker off his guard, and be likely to induce him to act as he did act? Does it make any difference that the words were not spoken, but upon the face of the document reaching the banker's hands by the act of the customers, in which phrase I include the course of Vagliano's business, said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which upon the face of the instrument Vagliano made to the bank. Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corresponding in all particulars was accredited by Vagliano in writing his acceptance upon it. E F G H

In estimating the effect upon an agent's mind, it must, of course, be remembered that, though I have here for clearness spoken of it as a single transaction, it is a transaction repeated forty-three times and spread over a considerable period. The false documents when paid were duly debited to the customers and duly entered in their pass-book, and so far as the banker could know or conjecture were brought to their knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were by what I have called the act of the customer permitted to reach the bank for payment, they were accompanied by a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of I

A bills about to become due, together with the false documents in question. It seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and I will not dispute it, that the carelessness of the customer or neglect of the customer to take precautions unconnected with the act itself, cannot be put forward

B by the banker as justifying his own default.

In order to make the cases of *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (2) and *Staple of England (Mayor, etc., of Merchants of the) v. Bank of England (Governor of)* (3) authorities in this case, it would be necessary to assume that the plaintiffs in those cases had by some voluntary act of their own given credit and the appearance of genuineness to the particular powers of attorney

C which were forged in those cases; and, if they had, I very much doubt whether the decision would have been what it was, but no such fact appeared; all that the parties whose negligence was relied on had done was to leave their seal carelessly in the custody of the person who abused the trust. These decisions, therefore, do not seem to me to touch this case.

But how can it be said in this case that the default is unconnected with the act?

D The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina, effected by the instrument in question? Was not the customer bound to know the contents of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange

E that it should be suggested that without any responsibility on his part he should be entitled to accredit forty-three documents to his bankers as genuine bills when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all or represented any transaction between Vucina and himself. The bankers paid upon these documents, and they paid a person who was not entitled to receive the payment. There was no person entitled to receive it. The fact that

F it reached their hands as representing a mercantile transaction in which somebody was to be paid was itself a misleading of them, and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it. I have designedly avoided calling these documents bills of exchange. They were nothing of the sort. But if they got into the hands of an innocent owner for value without

G notice, Vagliano would undoubtedly have been responsible upon them, for he had given them a genuineness as against himself by accepting them.

When it is insisted that the bankers are responsible because they did not pay the person indicated as payee, one is induced to inquire whether Mr. Vagliano, or any other merchant, would have expected that any inquiry should be made as to the genuineness of Petridi's signature. Suppose they had been genuine signatures of

H Petridi's, and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that no banker could hesitate to pay such bills as came to him, so accredited as they were by Mr. Vagliano's acceptance,

I without throwing the whole mercantile world into confusion.

I am not intending to throw any doubt upon the propriety of the decision in *Roberts v. Tucker* (4), nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person, the banker pays someone else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid. But what relation has such a decision to a case when a thing which bears the form and semblance of a known commercial document like a bill of exchange gets by the act of the customer into the hands of the banker where there is no real drawer, no

real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who in the proper and ordinary sense of the word is a payee at all? It seems to me that, if all these circumstances, acting upon and inducing the bank to make the payments they did make, are acts which are the fault of the customer, it is the customer, and not the banker, who ought to bear the loss. I think, under these circumstances, the banker did what was usual and customary with bankers and what both customer and banker knew to be usual and customary with bankers as far as the payment without inquiry as to the genuineness of the endorsement by Petridi & Co. was concerned.

But I propose to deal separately with the alleged negligence of the banker, or, at all events, the unusual course pursued by the banker in cashing these bills across the counter and paying to the person presenting the document for payment without inquiry. I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that, on a person presenting himself whose appearance and demeanour were calculated to raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount or a bill, the counter clerk and banker alike would hesitate very much before making payment. However, I will assume that the course pursued in this case was somewhat unusual, and that this is proved by the bankers themselves, though the counter clerk gave a different reason why the clerks called the attention of their immediate superior to the circumstance, and he in turn called the attention of Mr. Vagliano's representative. In doing so, he appears to me to have relieved the banker from any accusation of having hastily or carelessly paid these bills. What could the bankers know of the particular transactions of Messrs. Vagliano? But Mr. Vagliano, when it was communicated to him or to his representative, would be surely the best person to judge whether there was anything calculated to give rise to suspicion in the facts to which I have referred.

It has been sought to minimise the effect of that communication to Mr. Vagliano's representative, first, by treating him as a clerk to whom such a communication ought not to have been made, and secondly, by suggesting that Mr. Ziffo possibly indicated that he was a person not fit to be trusted, since he took a very strange view of what was or was not calculated to cause suspicion and enforce inquiry as to these bills. But what had the banker to do with Mr. Ziffo's capacity for business? He was Mr. Vagliano's confidential clerk, duly accredited as such. After one or two of the bills had been presented and paid in the manner I have referred to, Mr. Disney thinks it right to call the attention of Mr. Ziffo to the fact, and Mr. Ziffo replies to the information that they are presented over the counter and invariably taken in bank-notes: "I suppose if they are properly endorsed you must pay them." Here is information given of the very fact relied on to the confidential representative of Mr. Vagliano, and it is suggested to be negligence in the bank, that after receiving the answer I refer to, they continued to pay these bills when properly advised by Mr. Vagliano himself. I must add here that I think that the witness truly explained his inadvertent use of the word "endorsed," and meant to say "advised."

It appears to me that whatever case might be suggested against the bank is completely answered by the bank having communicated these facts to a person occupying such a position in Mr. Vagliano's house, and that his answer was such as to allay any suspicion or uneasiness on the part of the bank. I have not stopped to examine minutely the contrast between Mr. Ziffo's evidence and the bank's official, Mr. Disney, because if one comes to examine it carefully there is no real contradiction. One witness is positive as to communications actually made, and



A the other only meets that positive assertion by alleging a want of memory of any such communication.

One other point has been made at your Lordships' Bar, but I think under circumstances which do not entitle it to consideration. It is said that the course of post ought to have been known to the banker, and that the date of the endorsements ought of itself to have raised suspicion. Possibly if there was evidence B sufficient to prove exactly what the facts are as to the course of post—and, notwithstanding the evidence of one witness, I am not satisfied that we have the facts accurately as to the course of post—a serious doubt might arise, but it is enough to say for the purposes of this case that the point appears neither to have been pressed nor argued at a time when, by proper evidence, the matter could have been left beyond doubt, and the circumstances of excuse for not observing the dates, if C such excuses existed, could have been properly determined. I can find no evidence that that point was really pressed. It is not noticed in any of the judgments, and though to my mind it is a singular argument coming from the mouth of Mr. Vagliano, whose suspicions one would have thought would have been roused by the dates on the documents afterwards appearing, it is enough for me to say that I decline to consider a topic which has been neither really argued nor properly D fortified by evidence as a material circumstance to consider in this case.

I should be content to rest my judgment here, and to express my opinion that for these reasons the judgment of the court below should be reversed, although I regret to say that on this branch of the case my view is at variance with that of all the learned judges who have hitherto treated this question. I have hesitated long before I was able to acquiesce in the view of LORD HERSCHEL and that of the E Master of the Rolls that the same conclusion could be arrived at by a consideration of the Bills of Exchange Act, 1882. One difficulty I have had in the determination of that question is in applying to the instruments with which I have been dealing an enactment which deals with bills of exchange. For reasons which I have already given, it seems to me difficult to treat them as bills of exchange at all; but as against the person now insisting on their possessing the quality of such F instruments, and remembering that it was his act by which they are put into circulation in that character, it does not seem unreasonable that, applying the doctrine of estoppel to him, one may consider whether as against him they may not possess qualities which, in their inception, they did not possess. Section 7 of the Act, upon two sub-sections of which this question turns, commences thus:

G “(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. (3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.”

In the first instance, before dealing with the application of these sub-sections to the facts in debate, I must say that I cannot acquiesce in the view which the H majority of the Court of Appeal appear to have entertained that they were at liberty to import into sub-s. (3) that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person. It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly I unable to adopt the view that where a statute is expressly said to codify the law you are at liberty to go outside the code so created because before the existence of that code another law prevailed.

To return to the construction of the language of the two sub-sections, for I think both should be read together, it seems to me that what the legislature was enacting was in substance that where a bill was not payable to bearer the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty, but where there was no real payee the bill might be treated as payable to bearer. The language which the

legislature has employed to express this law has been subjected to very minute verbal criticism. If the substance of the matter is looked at, and it is remembered that what the legislature was dealing with was what was to appear upon the face of the instrument, and contemplated the case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, and no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing would apply equally to a real person whose name was forged as to a person who had no existence. In truth, if strictly construed, the words "fictitious person" are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one; but to satisfy the word "fictitious" as applicable to a person is assuming in one part of the proposition what is denied in the other. Some of the characters in SIR WALTER SCOTT'S novels may be fictitious in the sense that no such persons so named ever lived; but if real names are taken and events and conduct and character attributed by the writer to those real names, are the characters less "fictitious" because persons of those names identified with a totally different history and different qualities did in point of fact exist at one time?

One singular result of treating the section in the way that the Court of Appeal have adopted would be that one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not; and this may be done, though it is not necessary to find the forger's intention from the language or anything that appears on the face of the instrument itself, but you may judge from previous commercial transactions of the parties who was likely to be meant as giving plausibility to the forgery. But if it can be alleged, as it can be here, that the forger selected a name which would give plausibility to his forgery, and be likely to deceive those into whose hands his forged instrument should come, that is not the name of a fictitious person, although that person had no power to deal with the bill, and was not in any respect the real payee, any more than if the name had been selected of a person who had never been heard of or existed before, whereas, if it is pure imagination, then it is the name of a fictitious person.

I have come to the conclusion that, however expressed, the real meaning of the sub-section is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase "payee." That cannot mean in truth the payee, because by the hypothesis there is no payee, and dealing, as the statute was, with the form of the instrument, and enacting that, if a name which appeared as payee on the face of the instrument was a fictitious person, the bill may be treated as payable to bearer, it expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly. For these reasons I am of opinion that, on this ground also, the judgment of the court below was wrong and ought to be reversed, and I so move your Lordships.

**THE EARL OF SELBORNE.**—If the bills in question in this case had been genuine, really signed by Vucina in favour of C. Petridi & Co., and if the endorsements only had been forged, the case would have been governed by *Robarts v. Tucker* (4). But the signatures of Vucina were forged; the use of the name of C. Petridi & Co. as payees was part of the fiction; they were not in any true sense payees; and the bills were, nevertheless, accredited by the plaintiffs to the bank as genuine, and as coming forward, like other genuine bills of Vucina, for payment in due course, on days specified in the plaintiffs' letters of advice; and their payment as such, was expressly directed by the plaintiffs. When I speak of the plaintiffs' letters of advice I do not forget that the effect of acceptances payable upon the face of the bills at the Bank of England might, perhaps, have been the same, but in this case there were both; and I think it unnecessary to consider whether the addition of the one form of direction to the other made any difference. If it did not, the effect of the letters of advice cannot on that account be less.

A This state of things appears to me to raise a question which was not decided in *Robarts v. Tucker* (4) or in any other case cited at the Bar. It is (as *Robarts v. Tucker* (4) was) a question between the plaintiffs as principals and the bank as their agent, and not between any parties to the bills. If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not  
B the bank, ought to bear the loss which has been the consequence. Here there was never any real holder of these bills, by whom they could have been endorsed, or any outstanding liability from which a discharge was necessary. Your Lordships have to deal with the case of an agent, not claiming any title to or interest in the bills, but instructed by his principal to pay them. It is convenient to speak of them as bills; but, properly speaking, they had not (though they seemed to have, and were represented by the plaintiffs as having) that character; they were accepted  
C as such; but there was no real drawer and no real payee; and they were never negotiated.

It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the prima facie case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made  
D pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that prima facie case. If the bank  
E acted upon such a representation in good faith, and according to the ordinary course of business, and a loss had in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear. I should be of that opinion, on general principles; and the application of those principles is fortified, to my mind,  
F in this particular case by the circumstances under which the forgeries were committed, and the fact that the plaintiffs had large dealings with Vucina going on at the same time with the forgeries, in the course of which they accepted many of his genuine bills, all which were in like manner accredited to and made payable at the bank; and that there were documents in the plaintiffs' possession (the true and the forged letters of advice from Vucina, and the forged bills themselves, when  
G returned by the bank), from which, if attention had been paid to them, the fraud might have been discovered in an early stage.

I do not see how it can be open to dispute that it was material to the bank to know whether these were genuine or forged bills; or (subject to the consideration of some matters which I postpone) that, in paying the bills as they did without inquiring into the genuineness of the endorsements (which for the present I assume  
H to have been regular upon the face of them), the bank acted in good faith, and according to the usual, and practically necessary, course of business; or that, if the bills had really been Vucina's, and if C. Petridi & Co. had been real payees, no loss would have been incurred. If it were the duty or the practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their  
I customers, until they could ascertain by inquiry the genuineness of every foreign endorsement, it must continually happen that the bills would not be paid at the proper time and place, and bona fide holders might treat them as dishonoured. It was admitted that it is not in the ordinary course of business to make such inquiries, and I should say that business could not go on if it were so.

No doubt there is, in the ordinary course of business, the possible risk, which occurred in *Robarts v. Tucker* (4), of a genuine bill being stolen, and presented for payment with a forged endorsement. Between that case and one like the present there is this very substantial difference—that the acceptor, in that case, has not in



any way contributed to mislead the bankers; and, when there is a real bona fide payee, the acceptor remains liable to him; but if, when there is no such payee, the person who signs as drawer endorses the bill with the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection. The risk of a genuine bill being stolen, and presented with a forged endorsement, is one which, being of rare occurrence, and distributed over a large amount of business, bankers may be willing to run. But they are entitled to judge for themselves what risks they will run, and the customer is not, in my opinion, entitled to tell the banker (in effect) that the risk is an ordinary one, and, when it turns out to be otherwise, to put upon him another, which, if the truth had been known, the banker, with his eyes open, would not have undertaken. When, as in this case, the customer accredits the bills as genuine, and as coming forward in due course against him for payment on certain days, the banker must, I think, be considered to undertake the risk incident to bills of that description, and no more. If this would be true of a single bill, much more of a series of bills of large amount, all successively authenticated to the banker in like manner by the customer who orders them to be paid. The judgment under appeal puts upon the bank a risk which it never was called upon, and never agreed, to undertake.

It seems to me also clear, as a matter of fact and without reference to the question under the Bills of Exchange Act, that the Constantinople firm of C. Petridi & Co. were never, in any true sense, payees of these bills, and that their genuine endorsements could never have appeared upon them without an additional fraud. The suggestions at the Bar, as to conceivable ways in which such endorsements might have been obtained, were, in my judgment, irrelevant to the real facts, with reference to which, and not to merely imaginable possibilities, this case ought to be determined. In *Stone v. Freeland* (5) and *Cooper v. Meyer* (6), a real firm, Butler & Co., and a real person, Woodman, were named as payees; but the courts did not hold that enough to make the firm or the person so named a real payee. If the question were merely one of legal estoppel against the acceptor, it may be true that the estoppel would be only against denying the genuineness of the drawer's signature; or, if the acceptor knew that there was no real payee, against insisting that the bill must receive an endorsement which he knew to be impossible. But these are authorities, relevant so far as general principles are concerned, which even as between parties to a negotiable instrument seem to me to go beyond legal estoppel. I cannot but think it an extension of that doctrine to hold, as was done in *Cooper v. Meyer* (6), that, when the bill is payable to the drawer's order, the acceptor, because he is supposed to know the drawer's signature, is bound by the subsequent endorsement of the person who forged the signature as drawer, as well as by that original signature. And I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations, for which the state of the paper afforded space. The drawer was ignorant of, and could hardly be bound to anticipate, the subsequent fraud.

But, if it were universally true that the liability of an acceptor to a bona fide holder of a bill, in all such cases, depends upon legal estoppel, I do not think it would follow that the discharge of a banker, or other agent employed by the acceptor to pay the bill, must depend, under similar circumstances, upon that principle only. If in the present case the plaintiffs, instead of making their acceptances payable at the Bank of England, had directed, in the same terms, a managing clerk in their own office, ignorant of the fraud, to pay those acceptances, and to take for that purpose the necessary money from their cash-box, and if the clerk so authorised had paid the bills, exactly as the Bank of England did, not indeed to Glyka himself, but to someone acting for him, and presenting them in any manner not irregular, I cannot doubt that the clerk, so acting in good faith, would have been exonerated. A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but beyond this I see no principle for putting him in a worse position than any other

A agent. In *Bennett v. Farnell* (7) LORD ELLENBOROUGH held that, when the payee was fictitious, and the acceptor did not know it, the bill was neither to order nor to bearer, but was completely void. If, in such a case, the acceptor had directed his bankers to pay the bill, and the bankers had paid it in good faith upon an endorsement regular upon its face, though fictitious in fact, the bankers would have been, in my judgment, entitled to credit in account for what they so paid. What-  
B ever might have been, before the Bills of Exchange Act, 1882, the materiality of the acceptor's knowledge or ignorance on such a point, as between himself and a bona fide holder of the bill, I should not have thought it material as between him and his bankers paying the bill under such circumstances.

I have come to this conclusion without resting my opinion upon the statute of 1882. Assuming the present case not to be expressly ruled by that statute, it is  
C also, in my judgment, not ruled by any former authority. And I cannot but think that the statute, so far as it does rule certain other cases in *pari materia* and not well distinguished from this in principle, is as proper to be taken into account as any of the authorities which preceded it as to the acceptor's knowledge or ignorance when there is not a real payee. But it was insisted that, in paying these bills as they did, the bank deviated from the proper course of business, and ought to be  
D held affected with notice that the endorsements were fraudulent. The first point relied upon for that purpose was that the bills, drawn as they were for large sums, were all presented and paid across the counter, and not through any bankers. This was admitted to be "unusual" in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or  
E sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to show that it was irregular according to the law merchant; and if not, and if the payments were bona fide made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk  
F of the bills being treated by bona fide holders as dishonoured. In *Roberts v. Tucker* (4) payment through a banker was no protection to the defendants.

Some of these bills were, in fact, referred by the counter clerks of the bank before payment to Mr. Disney, the principal in the private drawing office of the bank; not, as I understand the evidence, because of any suspicion, but because they had received general instructions that any cheques or bills of large amount  
G should be so referred. Mr. Disney, the truth of whose evidence I see no reason to doubt, thought that, if the bill was advised, as it was, the counter clerk must pay it; and Mr. Ziffo, the plaintiffs' outdoor manager, to whom, on his coming to the bank on other business in June, 1887, Mr. Disney mentioned the fact that such bills had been presented across the counter, and paid in bank-notes, expressed the same opinion. This happened when not more than four of the bills, amounting  
H altogether to £3,000, had been presented and paid. When, from time to time, the plaintiffs' pass-book was sent to them, the bills then paid, and debited in it against the plaintiffs, were returned with it; and they remained from thenceforth in the plaintiffs' possession. It was apparent, upon the face of them, that all those bills had been paid across the counter; but no objection was taken by the plaintiffs, on that or any other ground; and similar bills, to a continually increasing and  
I ultimately very large amount, were afterwards from time to time advised, and came forward and were paid in like manner. I cannot hold that these circumstances are sufficient to deprive the bank of any right which they would otherwise have had to charge those payments to the plaintiffs' account.

The other point urged at your Lordships' Bar, but not apparently before either of the courts below, was that, according to the statement of Mr. Kurz, the plaintiffs' deputy manager, in cross-examination, the course of post between London and Constantinople was four days; and nineteen out of the forty-three forged bills paid by the bank purported to be endorsed at Constantinople on the third day before

the date of acceptance in London. No question was put on that subject to any other witness; and of the dates appearing on the bills the plaintiffs also had notice when they were returned. One of those of which the endorsement was on the third day before acceptance was the fifth in the whole series. I think it would not be right in this state of the evidence, and upon a point which, though open upon the plaintiffs' pleading in their reply, was for some reason not pressed in the courts below, to treat the bank as having had notice that the endorsements were not regular. A B

The judgments in the courts below, of the weight of which, as well as of the opinions agreeing with them which I know some of your Lordships to entertain, I am fully sensible, seem to have been addressed to two questions only, that of the proper construction and effect of s. 7 (3) of the Bills of Exchange Act, 1882, and that of negligence on the plaintiffs' part. As to the Bills of Exchange Act, I am not prepared to say that CHARLES, J., and the majority of the judges in the Court of Appeal were wrong in holding that the words of the statute, "where the payee is a fictitious or non-existing person," do not extend to the case of a real person, falsely represented as payee upon a forged bill, though in principle the cases seem to me much the same. The difficulty, to my mind, arises out of the fact that the legislature has here described "a person" as "fictitious or non-existing," instead of saying "where the payee is fictitious or non-existing," and it has been increased, rather than removed, by reference to other parts of the statute, particularly ss. 5 (2), 24, 41 (1), 46 (2), 50 (2), and 54 (2). I cannot, however, agree with the opinion that in the cases which do fall within s. 7 (3) knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment, be implied from the earlier authorities, which treated knowledge as necessary. Those authorities were, no doubt, within the view of the legislature; and, all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction. I think it right to add that, in point of principle, it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should, in such a case, depend upon the facts rather than upon an inquiry into the acceptor's state of mind. C D E F

As to the other point, my opinion does not rest upon mere negligence, but on what seems to me higher ground. Upon that ground I find myself compelled, notwithstanding my sincere respect for the opinions from which I differ, to give my voice in the appellants' favour. The amount in controversy is large; the question is one of much importance both to the parties and to bankers and their customers generally; and it is not, in my judgment, covered by any previous authority. *Roberts v. Tucker* (4) is, no doubt, law; but I am not for extending it, as it seems to me to be extended by the order under appeal. G

**LORD WATSON.**—The bank and Vagliano Brothers appear to me to have been equally innocent, in this sense, that they entertained no suspicion that the forged documents which have given rise to this action were other than genuine bills of exchange; and also that nothing wittingly done, or omitted to be done by them, in the conduct of their respective businesses, as bankers and financiers, can reasonably be regarded as the proximate occasion of Glyka's forgeries, or of the success which attended them. Which of these innocent parties must bear the loss resulting from Glyka's frauds is the only question to be determined in this appeal. It seems to have been assumed by all the learned judges in the courts below, that, in making payment of the bills in question on behalf of the acceptors, the bank was under the same legal obligation to ascertain the identity of the payee which was held to attach to the defendants in *Roberts v. Tucker* (4). That assumption, which is really the basis of the judgments appealed from, does not appear to me to be well founded. H I



A The decision of the Queen's Bench in *Roberts v. Tucker* (4) has, ever since its date, been accepted in mercantile practice as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers. It casts upon them the whole duty of ascertaining the identity of the person to whom they make payment with the payee whose name is upon the bill. They may pay in good faith to the wrong person, in circumstances by which the acceptor himself, or men of ordinary prudence, might have been misled; but they cannot take credit for such a payment in any question with the acceptor. It has been said by one of the learned judges that the rule is a harsh one, and it is possible that in some instances it may operate harshly; but it appears to me to be settled beyond dispute, and I see no reason for suggesting any doubt that it puts a reasonable construction upon the contract constituted by the agreement of the banker to pay his customers' acceptances when they fall due. In the absence of any special stipulations it construes the arrangement so constituted as importing that, on the one hand, the customer is to furnish or repay to the banker the funds necessary to meet his obligations as acceptor, and that, on the other hand, the banker undertakes to apply the money provided by the customer, or advanced on his account, so as to extinguish the liability created by his acceptance. Accordingly, no payment made by the banker which leaves the liability of the acceptor undischarged can be debited to the latter.

The ratio of the judgment in *Roberts v. Tucker* (4) does not carry the liability of the banker beyond this point—that his undertaking to retire bills genuine in their inception on behalf of acceptors who, by signing in that character, became immediately indebted to the payees, implies an obligation on his part to discharge their debt, which he can only do by making payment to the proper creditor. It would obviously require a considerable extension of the principle in order to make it apply to documents purporting to be bills of exchange, in which the drawer's signature is a forgery, the payee a person who is not intended to be a holder, and the genuine signature of the acceptor has been procured by fraud. His signing such a document creates no legal obligation against the acceptor; although it is possible that he may be estopped from pleading his non-liability, if and when the document has come into the hands of a bona fide holder for value. I venture to doubt whether the payee, whose name was fraudulently inserted, could ever occupy that position; because the occurrence of his own name in the original tenor of the bill would be sufficient notice to him that something was wrong, and called for inquiry. At the time when Glyka's bills were presented for payment, they did not raise, and never had raised, any liability against Vagliano Brothers, although the latter informed the bank that they were liable and willing to pay; and when the bills had been paid by the bank and returned to them, there remained no debt due to Vagliano Brothers, which would have been the consequence of the bank's making an erroneous payment of a genuine bill.

The risk of error attending the payment of bills supposed to be genuine, which are wholly counterfeit with the exception of the drawee's signature, is materially greater than the risk attending the payment of honest bills. In the latter case the danger of imposition can only arise from the document of debt having been stolen or fraudulently obtained from the true owner; whereas, in the former, the document, never having been in the possession of a real owner, will almost, as matter of certainty, be used for the purpose of deceiving the acceptor or the bank acting as his agent. In the ordinary course of business, it is very difficult for a banker, who has no reason for suspecting fraud, to make an exhaustive inquiry in the case of each bill, as to the identity of the person by whom it is presented, without exposing himself to claims of damage.

But experience has shown that the number of genuine bills which get into dishonest hands, and are erroneously paid, is comparatively insignificant, and does not materially affect profits derived from the business of retiring bills on account of the acceptor. Again, it is wellnigh impossible that a regular system of appropriating genuine bills, in all of which the drawee, payee, and acceptor are

the same, and of obtaining payment by means of forged endorsements, could be carried on for any length of time without discovery. If the series of documents forged by Glyka had been genuine drafts by Vucina in favour of Petridi & Co., it is hardly conceivable that even the ingenuity of Glyka would have enabled him to get possession of no less than forty-three of these bills, and to obtain payment of their contents at intervals extending over a period of eight months. In that case it is probable, if not certain, that detection would have followed at an early stage of his frauds; because the real payee would have discovered the loss of each bill as it fell due, and would have taken measures to stop payment. It appears to me to be beyond dispute that the bank paid Glyka's spurious bills under the belief that they were genuine commercial drafts, and that their payment was attended with no greater risk of error than is incidental to the cashing of genuine bills. It would be ridiculous to suggest that the bank would have dealt as they did with these bills, had it not been for the existence of that erroneous belief. The very fact that no payee complained of having lost a bill payable at their office, or of their having made payment to the wrong person, was well calculated to assure the bank that they had made and were making payment of all Vagliano Brothers' acceptances to the proper creditors.

It is, in my opinion, unnecessary to consider what would have been the precise extent of the implied obligation of the bank to Vagliano Brothers, with reference to these forged bills, if the latter had been unconnected with the belief upon which the bank acted, because that belief was induced and warranted by their representations. Their acceptances, if genuine, were in themselves distinct assurances, upon which the bank was entitled to rely, that each bill bearing their signature was a real draft upon them by their correspondent Vucina; and the notes sent by them to the bank, from time to time, directing payment of the bills, were so many renewals of the same representation, strengthened by the further assurance that their acceptances were genuine. Throughout these transactions the bank acted in good faith as the agents of Vagliano; and the errors into which they were betrayed were mainly, if not wholly, attributable to their having treated the bills as genuine, in reliance upon the representations of their principals, which were untrue. I think that, in these circumstances, Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations. These representations were no doubt made in the honest belief that they were true; but that circumstance cannot, in my opinion, avail Vagliano Brothers in the present question with their agents.

These considerations are sufficient for the disposal of this appeal; but, on considering the opinions which have already been expressed, and are yet to be delivered by your Lordships, I think it right to state my opinion with regard to the construction of s. 7 (3) of the Bills of Exchange Act, 1882. Upon that point I concur in the reasoning of LORD HERSCHELL. I think that the language of the sub-section, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing, or, being in existence, has not, and never was intended to have, any right to its contents. The enactment has reference to real bills only, and has no direct application to these documents of Glyka's manufacture, which were not bills in their inception, and never acquired the force of bills by virtue of estoppel. But the fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers' contention that the bank was bound to deal with these documents on the same footing as if they had been real bills, and ought not to have paid except upon genuine endorsements by Petridi & Co. For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

**LORD BRAMWELL.**—The plaintiffs are merchants and agents or bankers for foreign traders. They kept a banking account with the defendant bank. That is to say, they (the plaintiffs) paid to their credit with the bank money, technically

A lent it, and doubtless delivered to them other assets, drew cheques on them, and addressed accepted bills to them for payment. The plaintiffs claim of the defendants a large balance. The defendants admit the credit side of the account, but say they have paid bills accepted by the plaintiffs addressed to them, the defendants. It is immaterial, but this is not technically a set-off, for the defendants never could have maintained an action against the plaintiffs in respect of these payments. The plaintiffs never owed the bank anything. I say this is immaterial, but it is as well to be technical. Set-off or not, there is no doubt but that the defendants have, as they allege, paid bills accepted by the plaintiffs, and addressed payable at the defendants' equal to the amount claimed; but they have paid them to persons who could not have enforced payment of them from the plaintiffs. They were bills on which the plaintiffs were not liable to the holder, and which, if presented to them, they need not and possibly would not have paid. The drawing and endorsements on them were forgeries, or fictitious.

It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills. The first ground on which they claim this right is that the plaintiffs by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part, the part after the first one or two—in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to show that the plaintiffs caused them to pay these bills as they did. It is not enough to show that they gave occasion to their doing so, that different conduct would have prevented the fraud and the payment by the defendants. I think the result of the authorities, *Robarts v. Tucker* (4), *Young v. Grote* (8), *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (2), and *Staple of England (Mayor, etc., of Merchants of the) v. Bank of England (Governor)* (3), is that the conduct of the bank's customer, to enable the bank to charge the customer, must be conduct directly causing the payment.

There is no doubt that there were many ways in which the plaintiffs might have detected the forgeries. The forged letters which advised the forged bills omitted to advise some which were genuine. Yet the latter were accepted by the plaintiffs. The letters of the plaintiffs to Vucina did not mention the forged bills. The plaintiffs signed a letter to Vucina, in which the balance against him was in blank; that balance seems to have appeared in different amounts in the plaintiffs' books at different times. Then the forged bills were all endorsed on the part accepted, unlike the genuine bills. The bills after payment, had they been examined by the plaintiffs, would have shown that they had not been paid through a banker. The endorsements would have been known to the plaintiffs' clerks and the plaintiffs to bear impossible dates. It would have been seen that Pasqua appeared to leave the bills for acceptance, and yet not to be holder for payment. Maratis was a fictitious name, and would not be known to the plaintiffs. Vucina's account became very large, the balance against him unusually large, but no notice was taken; and what was much pressed was that Glyka was enabled to steal, and did steal, the forged bills after their acceptance. It was not the duty of anyone exclusively, apparently, to give out bills accepted to those who called for them. I suppose, as that call might be at any time in the day, any clerk might go to the leather case, take out the bill, and give it out. It was kept in the room where Glyka sat. Whether this was negligence I cannot say. I really do not know; no witness said it was; it may be unusual; I say sincerely, I do not know; I cannot of my own knowledge or reasoning say it was, and there is no evidence.

All these things put together make it wonderful that the fraud could be practised; most wonderful that it could be practised to the extent it was without earlier discovery, but do not, in my opinion, give the defendants a right to charge the plaintiffs with the amounts paid for these bills, as payments caused by them. A great deal has been made of the advice notes the plaintiffs sent to the defendants of bills becoming due, with a request to the defendants to pay them. In my judgment, these advice notes in no way help the defendants. They mean nothing more than the very acceptances themselves meant. The bills are accepted, payable



at the defendants', but to whom? To those entitled to enforce payment. That is all the advice notes mean. Suppose a genuine bill really drawn by Vucina, and really payable to Petridi, and suppose a forgery of Petridi's name, can it be suggested that the advice note would enable the defendants to charge the plaintiffs with that bill if they paid it? Certainly not. With all respect, it is a mistake to suppose that by that, or by the very acceptance itself, any more or other representation is made by the plaintiffs to the defendants than that they, the plaintiffs, are estopped to anyone interested to deny that Vucina drew the bill. The plaintiffs are not estopped from saying that they are not liable to pay the bill unless it is endorsed by Petridi. I am afraid, though, that that memorandum operates strongly on some opinions. A B

The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co., the payees, were fictitious persons within the meaning of the Bills of Exchange Act, s. 7 (3), and that the defendants, therefore, might pay them to a de facto bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is "an Act to codify the law relating to bills of exchange," not to alter or amend it; and by s. 97 the rules of common law, including the law merchant, "save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange." C D  
Were Petridi & Co. fictitious or non-existent persons? There was a firm of that name—a firm as identifiable as N. M. Rothschild & Co., Glyn, Mills, Currie & Co., or the Bank of England itself would be identifiable if their names appeared as payees of a bill of exchange; and, to my mind, that shows they were not fictitious or non-existing persons. It is asked: What if the payee were John Smith? Well, if there were nothing to identify a particular John Smith as payee when all "the surrounding circumstances" were looked at, it may be that he might be treated as a non-existent person. But what if it was shown that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as endorser? Certainly not. But then it is said that that is not the case here; that the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham and so fictitious or non-existent; that Petridi & Co. are not fictitious nor non-existent; that they exist in the flesh, yet they are fictitious qua payees, constructively fictitious; that if Vucina had drawn the bill, Petridi was real and existent, but inasmuch as Glyka did not mean Petridi to have the bill he was non-existent. This beats me. They are at the same time real and unreal. The bill means one thing or another, according to the intent of the drawer; that the drawee has, or has not, a right to Petridi's endorsement, according as that intent is one thing or another. Because the argument would be the same if Vucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Vucina will forgive me. That if Glyka had intended to commit his fraud through the innocent agency of Petridi, Petridi would be real and not fictitious. If the argument is good it would show that a bona fide holder of these bills, not claiming through Petridi, might have enforced payment from the plaintiffs. It is said that such a payment—that is, to himself—is according to the intention of the drawer. So it is of the drawer de facto, but not of him who, by the bill itself, the drawee has a right to suppose is the drawer. The plaintiffs are estopped to deny that Vucina is the drawer, but they are not estopped to deny that Vucina meant that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless endorsed by Petridi. E F G H I

This argument, as I have said, makes the effect of a bill depend, not on the meaning of the writing, but on the intent of the maker. A bill payable to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious at the option of the holder within the Act. But it was shown that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value, and be entitled to maintain an action against the plaintiffs. Would Petridi

A be fictitious then? It is asked: What difference does it make to the plaintiffs that there is a C. Petridi & Co., when, if the payee had been actually fictitious or unreal, and the name was put on the back of the bill, it might be treated as payable to bearer? The answer is obvious. If the payee is a known person, the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's endorsement. He knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be in the hands of a responsible person if a good name is used. His holding and endorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's endorsement. I do not mean could not in point of law, but could not practically. Without that the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it

C had been a strange name it might have attracted attention and caused some inquiry.

An argument is used which, with all submission, I think very feeble. It is said that the statute says "fictitious or non-existing," and that fictitious is needless on the plaintiffs' construction. I do not agree. But what is the value of such an argument? Nothing; unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous; he makes sure by using it.

D A word on *Cooper v. Meyer* (6). It is somewhat remarkable. The question was important; the judgment is singularly short, and nothing is said by PARK, J. I think the decision right. LORD TENTERDEN says, when the drawer is a real person, his endorsement may be disputed, but if there is no such person, and (BAYLEY, J., also says) if the acceptor accepts without knowing there is such a person as the supposed drawer, the acceptor undertakes to pay to the signature of the person

E who actually drew the bills. Further, I should say that, as the bills were accepted for the accommodation of Darby, with no knowledge of any such person as the drawer, the acceptor authorised the endorsement as he authorised the drawing by Darby. The court did not say that no endorsement was necessary, or that anyone but Darby could have endorsed. This case does not help the defendants.

I say, then, that Petridi & Co. were not fictitious or non-existent, and that the

F bill could not be treated as payable to bearer. But supposing it could, by whom could it be so treated? By the holder in due course; by the person who could maintain an action. Not by a man who stole it; not by a man who could maintain no action on it; the enactment is for the benefit of the holder; the honest holder who is embarrassed by the difficulties of there being no actual existing payee. Section 5 (2) says that when drawer and drawee are the same person, or the

G drawee fictitious, or a person not having capacity to contract, the holder may treat the instrument as a bill or a promissory note—surely that means a holder for value. Suppose A. draws on a fictitious person, endorses it to B. for his accommodation, who negotiates it and has to take it up. B. could not say: "The statute says I may treat this as a promissory note." The answer would be: "You are not a holder for value." In the present case the money was always paid by the

H defendants to Glyka, or Glyka's agents. Glyka had no right to "treat" the bill in any way. It was in his possession by a theft. He clearly stole it after it was accepted. The enactment, I say, is for the benefit of the holder, not of the acceptor; it gives rights against him. The plaintiffs could not, even if Petridi is considered as fictitious, treat these bills as payable to bearer. How could they? How can an acceptor treat a bill as payable to bearer? But if he cannot, if the

I section does not apply to him, neither does it apply to his agent for payment, his banker, at whose house it is made payable.

How can it be said that the plaintiffs have given a mandate to the defendants to pay these bills without Petridi's endorsement, to pay them to a person who had no right to receive the money, who could not have compelled the plaintiffs to pay them? These bills, as the acceptance was not "payable at the bank, and not elsewhere," might have been presented to the plaintiffs. Had they been, the plaintiffs could have refused payment, perhaps would. No one could have maintained an action against the plaintiffs on these bills. How can it be right that the

defendants should have paid them? If a clerk of the plaintiffs had paid this bill, I agree that he would not be liable unless suspicion had been created. But his duty differs from that of a banker. The defendants have deprived themselves of this right to refuse payment by electing to pay. Let it not be supposed I find fault with them, but so it is. A

I am of opinion that this case is governed by *Roberts v. Tucker* (4). I own to a prejudice in favour of that case. I do not agree with the notion that a banker is entitled to make inquiries whether he should pay, as there suggested. He must honour or dishonour the bill on presentment. The case was decided on no such ground, but on this—that the customer's mandate is to pay only to such person or persons as can give a discharge of the instrument. I am afraid, however, that a dislike of that case has a good deal to do with opinions unfavourable to the plaintiffs. LORD ESHER says that is a harsh case. I have heard able arguments on both sides. On the one side, that the banker sees the person who presents the instrument; on the other, that the banker's customer knows the parties to whom he gives his acceptance or cheque. There are two remarks to be made. One is, that the banker can bargain with his customer that he will not be liable in such cases as the present. The other is that bankers do not make such a bargain; yet they and banking, I am glad to say, flourish. B C D

I have said nothing of the defendants paying this enormous amount over the counter to strangers. I have no doubt, as a matter of knowledge and of reasoning, that this was most unusual. There is, besides, cogent evidence that it was. The paying cashier inquired of his principal if the bill should be paid when first presented. The principal, according to his own account, thought it a thing to mention to the plaintiffs' clerk when the instances had been few. I have no doubt that (especially when the cases multiplied), instead of a gossiping intimation not enough to reach Ziffo's mind (as CHARLES, J., finds), for the protection of themselves there ought to have been a formal communication to the plaintiffs. If Mr. Disney was satisfied with what he says Ziffo said to him, he is a very strange person. The thing is absurd. "I suppose you must pay if they have been advised." How could the advice that the bills would be presented for payment remove the suspiciousness of the presentment when it took place? True, the plaintiffs might have seen that the bills had been paid over the counter, but they trusted to the defendants having paid properly. E F

But I have not referred to this as a ground on which the defendants should fail. I have no doubt there was gross carelessness, but a carelessness to the bank's own hurt, a carelessness of precautions to their own good. If, however, on some ground which I cannot see, the whole conduct of the parties is to be looked at; if it is to be said that the bank may charge Vagliano with payments they need not have made, then I think that must, at least, be limited to those payments which were reasonably and carefully made, and not to such as those in question. I rely also on, and agree with, the judgments of the judges who have decided in favour of the plaintiffs; also on that of the Master of the Rolls, except that part which holds that *C. Petridi & Co.* were fictitious. This is my opinion, I am glad to think also that of LORD FIELD, and am sorry to think that it is not shared by any other noble Lord. We are probably wrong, but it is some comfort to me to think that the head-note of our opinions may be expressed in the most abstract form—namely: "A banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer." The head-note of your Lordships' opinions should be in a strictly concrete form stating the facts, and that on them it was held that judgment should be for the appellants, and I say this with sincere respect for those who differ from me. G H I

**LORD HERSCHELL.**—I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the court below. The conclusion at which the majority of the Court of Appeal



A arrived with reference to the construction of s. 7 (3) of the Bills of Exchange Act is thus stated :

B "The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term fictitious may be satisfied if it is fictitious as regards himself, or, in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle."

C The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned judges that if the exception was to be further extended it would rest upon no principle, and that they might well pause before holding that s. 7 (3) of the statute was "intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change."

E With sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence.

H I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they do not, of course, exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

I One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter, it in certain respects. And I do not think that it is to be presumed

that any particular provision was intended to be a statement of the existing law rather than a substituted enactment. A

Turning now to the words of s. 7 (3), I confess they appear to me to be free from ambiguity. "Where the payee is a fictitious or non-existent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee. I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the sub-section may be treated as payable to bearer, and I am accepting, too, for the moment, the meaning attributed by the majority of the Court of Appeal to the word "fictitious"—viz., a creation of the imagination, confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer. I find it impossible, without doing violence to the language of the statute, to give any other answer than this—in all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus—where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. B C D

It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, "fictitious must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the word fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is, in fact, a "fictitious" person, in the sense in which that word is being used, can be otherwise than fictitious as regards all the world, how such a payee can be "fictitious" as regards one person and not another. The truth is the words "as regards" the acceptor are treated as equivalent to the words "to the knowledge of," the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of" only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged as upon a bill payable to bearer is being introduced into the enactment. E F

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary, if it be sought to charge the acceptor, to prove in addition that he was cognisant of the fictitious character of the payee. If the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might, perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense or is otherwise than in accordance with sound commercial principle. G H

I will assume that, as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious, from the observations of Lord ELLENBOROUGH in *Bennett v. Farnell* (7) (1 Camp. at p. 180 c.), that by some eminent lawyers at least it was regarded rather as a departure from strict principle, which ought not to be further extended than as an embodiment of sound commercial principle. But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of I

**A** exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment, that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as

**B** directed so as to be able to charge the drawer. It is, in truth, only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with or for reimbursement, if he holds no funds of the drawer at the time of payment. In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or

**C** someone deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment, he will or may remain liable to the real payee, or those claiming under him, and the acceptor having paid otherwise than according to the directions of the drawer, cannot justify the use of his funds in making the payment or claim to be reimbursed by him.

**D** But, now, suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, endorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as certainly did not intend it to be paid only to the payee named, or someone deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person, and

**E** such person only.

What, then, is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act, such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer, then, such a bill could be treated as payable

**F** to bearer. But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded, as his security for payment. The holder in such a case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable

**G** to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity, but to whom? Not to the fictitious payee, or someone claiming through him. Why not, then, to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And, if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him

**H** to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His

**I** position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer. It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer, who knew that the payee was a fictitious person.



I will assume that this was the law prior to the statute. But why should not the legislature have intervened with a positive enactment imposing this liability upon the acceptor, an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought improbable that the legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable, and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the legislature so intended, if this be the plain natural meaning of the words they have used, or for endeavouring so to construe the language as to find in it no more than a statement of the previous law. I have dwelt at some length upon this point, because it appeared to me important to show that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient.

But I desired also to elucidate the principle upon which the enactment was, in my opinion, based, because this is not without its bearing upon the next question to be considered, to which I will now pass. It is to my mind one of greater difficulty. Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, while in the present case "*C. Petridi & Co.*" was the name of a firm having a real existence, so that the payee here cannot be termed a "fictitious" person. But are the words "where the payee is a fictitious person" incapable of legitimate application in any other case than that suggested? The first observation I have to make is that, if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "non-existent" would have sufficed. It was argued that while a fictitious person is one who has never existed, a non-existent person is one who has existed, but whose existence has ceased. But, even if this be admitted, the word "non-existent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed as to that which, having existed, exists no longer.

Without, however, dwelling too much on this point, which may, perhaps, have a historical explanation, let me call attention to the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts after the words: "Pay to the order of" a name which he invents, himself endorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself endorses this bill and puts it into circulation just as he did the other, this bill, as I understand the court below, stands in a different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the Act, are by s. 97 (2) still to apply to bills of exchange. It follows that, according to the view of the majority of the Court of Appeal, the legislature has dealt by express enactment with one case of estoppel—that is to say, where the payee is a "fictitious person" in the sense which they attribute to those words, but has left the analogous case, where, though the payee was not fictitious in that sense, the name was inserted as a mere pretence, and without any intention that payment should be made to the person designated, undealt with, and the rights

**A** and liabilities upon the bill to be ascertained by an appeal to the rules of the common law; certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression) a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer, whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive payment, and in each case himself endorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases—that in the one an endorsement by the named payee is physically impossible, while in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder. It seems to me that it would in each case be reasonable, and on the same grounds, that the acceptor should be liable to the holder of the bill indemnifying himself out of the funds of the drawer or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other interpretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the legislature has left the law in this respect in an unsatisfactory position and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words "Where the payee is a fictitious person" apply only where the payee named never had a real existence? I take it to be clear that by the word "payee" must be understood the payee named on the face of the bill, for, of course, by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts we do not mean that the entry has no real existence, but only that it purports to be that which it is not, that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

**G** In his report of *Stone v. Freeland* (5) the learned reporter speaks of there having been in that case "a fictitious endorsement." The facts were that a bill had been drawn payable to Butler & Co. and endorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings, but the bill had never been in their hands, and appeared to have been endorsed by Cox. In what sense was the word "fictitious" there used? Not, surely, to convey the idea that the endorsement had no real existence, and was a mere creature of the imagination, but that it was put forward as being that which it was not. Those seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in DR. JOHNSON'S DICTIONARY, I find among the meanings given are, "counterfeit," "feigned." It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are "where the payee is a fictitious person," and not "where the payee is fictitious." I do not think there is any substantial difference in the meaning of the two phrases. And I cannot conceive that the legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer. I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, while the bills which have given rise to this litigation were not drawn by Vucina, who purported to be the drawer, his name being forged by Glyka. I think it was hardly contended on behalf of the respondents that this made any difference. The bills must, under the circumstances, as against the acceptor, be taken to have been drawn by Vucina, and if they have been made payable to a fictitious person within the meaning of the statute, I do not think it is open to question that they may, as against the acceptor, be treated as payable to bearer in every case in which they could have been so treated if Vucina had drawn them. If, in the present case, Vucina had himself drawn the bills, and inserted the name of C. Petridi & Co. as payees as a mere pretence, without intending any such persons to receive payment, it follows from what I have said that, in my opinion, they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted.

Assuming, then, that the bills in question are within the sub-section of the Bills of Exchange Act which we are considering, and may, therefore, be treated as bills payable to bearer, the question remains, by whom may they be so treated? By a bona fide holder for value, certainly; and, in considering the construction of the section, I have thus far limited my attention to the case of such a holder. It is the case which ordinarily arises in the course of commercial transactions with negotiable instruments, and it is the one, therefore, which must be taken to have been primarily had in view in framing a law to determine the rights and liabilities in respect of such instruments. But I can see nothing in the words of the enactment to confine their application to this case. It appears to me that the natural answer to the question which I have proposed is this. A bill within the sub-section may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer.

I, of course, exclude the case of one who is a party to, or who has notice of, a fraud. At all events, I can see no reason why a banker, who has been requested to pay the bill by his customer, the acceptor, may not so treat it. Where the bill is, in truth, payable to order—that is to say, where the drawer intends that payment should be made only to the person named as the payee, or to someone deriving title through him, then the direction of the banker must, since the decision in *Robarts v. Tucker* (4), be taken to be a direction to pay to such person only. But, where the payee is a fictitious person, within the meaning of the sub-section, I think the direction to the banker must be taken to be to pay the bearer. It is by reason of his filling that character that the holder is entitled to demand payment of the acceptor. And when a banker has been instructed by the acceptor to pay such a bill on his behalf, it is to the person filling that character that he must be taken to have intended the payment to be made. If the holder were a bona fide holder for value, who, if payment had been refused, could hold the acceptor liable, I do not think this could be doubted; and, where the bill is one which might be treated as payable to bearer by a bona fide holder, so that the direction to the banker to pay the bill is a direction to pay the bearer, I do not think that the banker is any the less entitled to charge the payment of the bill against his customer because the bearer, to whom payment is made, holds it under such circumstances that the acceptor could successfully resist a claim for payment by him. It cannot be doubted that this would be so where a bill was in terms payable to bearer, and I do not think there is any sound distinction in the relative position



A of banker and customer between this case and that of a bill which may be treated as payable to bearer.

I cannot think that the view I have indicated works any injustice. It is too late now to question the decision in *Robarts v. Tucker* (4). It has been long acted upon and regarded as law, though the decision certainly seems to have rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable—namely, to investigate the validity of all the endorsements before he complied with the direction of his customer and paid the bill. In the case there dealt with, however, the complaint of the customer was that the banker had paid the wrong person, leaving him liable to pay the right one. Here the position of the customer is that, in spite of his direction to the banker to pay the bill, he ought not to have made payment to anyone. The conclusion at which I have arrived is exclusively based upon the construction of the terms of the statute, uninfluenced by these considerations; but I am glad to think that it leads to a result which cannot, in my opinion, be regarded as either unjust or commercially inconvenient. The conclusion which I have indicated is sufficient to determine the case in favour of the appellants. I have not found it necessary, therefore, to form a decisive opinion upon the other questions raised; but I do not desire to be understood as dissenting from the view entertained by some of your Lordships, that, apart from the provisions of the statute, the facts of the present case afford sufficient grounds for arriving at the same decision.

**LORD MACNAGHTEN.**—It can hardly be denied that the business of Vagliano Brothers was conducted in rather a loose fashion. There was no check on the clerks. There was no effective supervision over the work of the office. But apart from the error committed in taking the forgeries of a clerk for the signatures of a correspondent whose bills the firm was in the habit of accepting, there was nothing, I think, in the conduct of the business, or in what Vagliano himself did, or omitted to do, which can afford a plausible answer to the plaintiffs' claims. On the other hand, the fact that the sums in question were paid over the counter ought not, I think, to prevent the bank from setting up any defence which would have been available if the money had been paid through another bank. Putting aside these matters, to which a good deal of evidence was directed, the case lies in a narrow compass. But it is one of much difficulty. There is no authority which governs it. Very little assistance is to be derived from reported decisions. And it is by no means easy to apply to Glyka's fabrications rules of law intended for genuine bills of exchange, and principles applicable to honest commercial transactions.

There are, I think, two questions to be considered: (i) Is the bank entitled to be indemnified against the moneys paid in respect of these forged bills, although the bills may not have been paid according to their tenor? (ii) Can the bank treat the bills as payable to bearer, and so justify the payment as being in accordance with their customer's mandate? As regards the first question, the following points are, I think, established: (a) The relation of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances. If authority is wanted for this proposition it will be found in *Robarts v. Tucker* (4), where it was said by the court, that,

"if bankers wish to avoid the responsibility of deciding on the genuineness of endorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the bankers."

That implies that bankers may refuse to pay their customers' acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to his customer. (b) If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement express or implied. And such an agreement, in the absence of express stipulation to the contrary, must have reference solely to genuine bills of exchange. It cannot be supposed to contemplate any dealings with fictitious instruments.

(c) Bankers who undertake the duty of paying their customers' acceptances cannot do otherwise than pay off-hand, and as a matter of course, bills presented for payment which are duly accepted, and regular and complete upon the face of them. It would be out of the question for a banker to adopt the suggestion made by one of the learned judges in *Robarts v. Tucker* (4), and defer payment until satisfied by inquiry and investigation that all the endorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid. (d) In paying their customers' acceptances in the usual way, bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged endorsement. The bill is not discharged; the acceptor remains liable; the banker has simply thrown his money away. That was the effect of the decision in *Robarts v. Tucker* (4). I do not think that that was a harsh decision. Nor do I see how the court could have come to any other conclusion, unless it had taken quite a different view of the customer's mandate and the banker's obligation. At any rate, the ground of the decision is now part of the statute law. The Bills of Exchange Act, 1882, enacts, s. 24, that, subject to certain provisions, which for the present purpose are immaterial, a forged or unauthorised signature on a bill is wholly inoperative, and that no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature except in case of an estoppel. Nothing but legislation could have relieved bankers from the liability attaching to them in accordance with the law as declared in *Robarts v. Tucker* (4). The fact that no such legislation has ever been promoted, or, I believe, advocated, on behalf of bankers in the case of bills of exchange, though the law has been relaxed as regards cheques, seems to show that in the case of genuine bills the liability is of little or no practical importance. (e) The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument. And it is his act of acceptance which sends the bill forward for payment to the banker. (f) In the case of a counterfeit bill, the payee's signature must be forged unless the person named as payee is an accomplice in the fraud. And, therefore, if there is no accomplice, assuming *Robarts v. Tucker* (4) to apply, an acceptance making the bill payable at a bank necessarily entails upon the banker the loss of the sum for which the bill purports to be drawn. The banker has no chance of escape. Relying on his customer's acceptance, he takes it for granted that the bill is genuine. Ignorant of any danger, beyond the possible risk of a theft having been committed and remaining still undiscovered, he pays the apparent holder as a matter of course.

It seems to me that, if these premises are well founded, the bank is entitled to be indemnified by Vagliano Brothers in respect of the money paid on the forged bills which Vagliano accepted and directed the bank to pay. If A. employs B. on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertence or otherwise, introduces among the articles with which B. is to deal a dangerous counterfeit, not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B. against any loss resulting from his dealing with the counterfeit as if it was a genuine article within the scope of his employment. And it cannot, I think, make any difference that B. is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article.

There is, I think, a wide distinction between this case and *Robarts v. Tucker* (4), though in both it was the duty of the bankers to pay bills of exchange accepted by their customers to the person who, according to the law merchant, was capable of giving a good discharge, and in both the bankers were cheated out of their money. In the one case the customer's acceptance introduced to the bank a genuine mercantile instrument, though it had been tampered with by a thief without the fault or knowledge of the customer. In the other, the acceptance introduced a

A fraudulent counterfeit which the customer ought to have detected. In *Roberts v. Tucker* (4) there was presented for payment a genuine bill having a forged endorsement. The bankers paid the wrong man, leaving the bill unpaid and the liability of the customer undischarged. They claimed credit all the same. But they did not pretend that they had done what they were told to do; nor could they allege that their employer had any hand in misleading them. Of course their claim was rejected. In the present case the bankers have not failed in the performance of any duty towards their customer. They undertook no duty, they accepted no mandate, in regard to pieces of paper which are not bills of exchange, and with which the law merchant has no concern. They, too, have been cheated out of their money. Whether they can say that they have done what they were told to do remains to be considered. At least, they can say that their employers were active, though no doubt unconscious, in carrying out the deception which led to their loss.

I now come to the second question, which depends upon the effect of s. 7 (3) of the Act of 1882. The enactment was, of course, not directed to such a case as this. The provisions of the statute were meant for genuine bills of exchange. But if the argument on behalf of the bank is right, it happens to furnish a short answer to a claim which fails on broader and, I think, more satisfactory grounds. On behalf of the bank it was pointed out that these pretended bills being duly accepted and regular and complete on the face of them, were presented for payment apparently in due course; and it was said that, although no doubt at the time they were taken to be payable to order, and to be duly endorsed by the payee, yet when it turns out that the payee was a fictitious person, they may be treated as payable to bearer, and so the payment is justified though all the endorsements are inoperative. On behalf of Vagliano Brothers it was contended that a bill payable to a fictitious person is not payable to bearer unless the acceptor is proved to have been aware of the fiction; and further it was contended that nothing but a creature of the imagination can properly be described as a fictitious person.

I do not think that either of these contentions on behalf of the respondents can be maintained. Before the Act of 1882, the law seems to have been as laid down by LORD ELLENBOROUGH in *Bennett v. Farnell* (7) (1 Camp. at p. 180 c.) that

“a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer nor to bearer, unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor.”

Section 7 (3) of the Act of 1882 enacts:

“When the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.”

As a statement of law before the Act, that would have been incomplete and inaccurate. The omission of the qualification required to make it complete and accurate as the law then stood, seems to show that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange—a change in accordance, I think, with the tendency of modern views, and one in favour of holders in due course, and not, so far as I can see, likely to tend to any hardship or injustice.

Then it was said that the proper meaning of “fictitious” is “imaginary.” I do not think so. I think the proper meaning of the word is “feigned,” or “counterfeit.” It seems to me that the “C. Petridi & Co.,” named as payees on these pretended bills, were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance, they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all, they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity, whereas, in



truth, they were each make-believes for the persons whose names appeared on the instruments. They were not, I think, the less fictitious because there were in existence real persons for whom the names were intended to pass muster. In the result, therefore, I think that on both grounds the bank is entitled to succeed. Nor is that conclusion altogether to be regretted. An opposite conclusion would, I think, go a long way to encourage mischievous negligence on the part of persons called upon to accept bills of exchange. To an acceptor it would be a matter of indifference whether the drawer's signature were genuine or not. If it was genuine, the transaction would be completed in regular course. If it were not genuine, the loss would fall, not on the acceptor whose negligence had led to it, but on the banker who could have no means of detecting the forgery, and must have been thrown off his guard by the carelessness of his employers.

**LORD MORRIS.**—I entirely agree in the conclusion arrived at by LORD HERSCHELL, namely, that whenever the name inserted as that of the payee is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, s. 7 (3), and that the bill may be treated by a legal holder as payable to bearer; and having had the advantage of reading the noble and learned Lord's opinion in print, I concur in the reasoning by which that conclusion is arrived at. That conclusion appears to me not only to embrace the bills the subject of this litigation, but I am of opinion that they are a fortiori, and necessarily, within the statute as bills payable to bearer. The bills were regular in form, with Vucina of Odessa as drawer; Petridi of Constantinople named as payee, and Vagliano as drawee. Vagliano accepts the bills; that acceptance is the only real action of the three parties named in the bills. Vucina drew none of the bills, and knew nothing whatever about them; Petridi had no knowledge of, or any connection of any kind with them; Vucina, though a known existing person, had no reality in regard to them.

The paper writings only became bills as against Vagliano, who by his acceptance is estopped, in the language used in the statute is "precluded" [see s. 54 (2)], from denying they were bills as against the bank who paid them on the faith of his acceptance, and also upon his express requisition to do so. If Vucina was an unreal person, Petridi must be also an unreal person, and, therefore, a fictitious person in regard to the bills. The drawer can only designate the payee; but there was in fact no drawer. Vucina, the alleged drawer, could not and did not name any payee. Glyka, the forger, who wrote the documents in the form of bills of exchange, was not a drawer; he forges the name of Vucina as drawer; that cannot constitute Glyka himself a drawer. Vucina cannot become the alter ego of Glyka because Glyka forged his name; nor can Glyka be the alter ego of Vucina, who never knew of or heard of Glyka's existence, the only person who could call into existence a payee had no legal existence. There never was, in fact, a real bill of exchange, though the acceptor, Vagliano, is bound to know the drawer, and guarantee his existence and handwriting, and is precluded from denying against the holder that it is a bill of exchange. Only to the extent of the estoppel is the document a bill of exchange. In the case of a real drawer, that the payee is a fictitious person (unless it is obvious on the face of the bill) must be proved by the holder; but in the case of an unreal drawer, as a fact, the unreality and, therefore, fictitiousness, of the person named as payee follows necessarily. I am of opinion the judgment of the Court of Appeal should be reversed.

**LORD FIELD** stated the facts and continued: The appellants first contended that the payees named in the drafts were "fictitious persons" within the meaning of s. 7 (3), of the Bills of Exchange Act, 1882, and that the bills were, therefore, according to their tenor and effect in law bills payable to bearer, so that, whatever might have been the original limits of the authority under which the appellants had acted in undertaking the making of the payments complained of, it was

A competent to them, now that the actual facts had been discovered, to show and rely upon them as justifying their right to debit the respondent with the amount. I will deal with that contention first. That the terms of the original mandate, as between the appellants and respondent, were limited to payment to the actual endorsees of the payees named in the instruments is, I think, clear, and was not, if I followed the argument of the appellants correctly, seriously disputed. At the times of acceptance and payment, neither party entertained any suspicion that C. Petridi & Co. were other than what they appeared to be, genuine payees, and Vucina a genuine drawer. The respondent, therefore, had the right to assume that by making the payment to the order of the payees he would acquire a discharge to that amount in his accounts with the assumed drawer Vucina. On the other hand, it appears from the evidence that the bank, on presentation of the acceptances, did no more than refer to the advices and endorsements in order to satisfy themselves that the bills were in order. In other words by accepting the duty of paying the acceptances at maturity, they intentionally undertook the risk which the law merchant has been held, under those circumstances, to impose upon bankers in the case of a genuine acceptance (*Roberts v. Tucker* (4))—a liability the existence of which I understood the appellants did not deny; but they endeavoured to distinguish that case from the present by a circumstance which did not exist in that case—namely, that the respondent in this case had by the letters of advice untrue, although innocently, represented the drawing as genuine, whereas, it being a forgery, the respondents in paying the amount would acquire no valid discharge against any valid drawer. Assuming, however, that the letters of advice amount to such a representation, it does not appear to me that the appellants, in making the payments complained of, relied in any way upon it, nor that the representation goes any further than the acceptance itself, which in *Roberts v. Tucker* (4) was held insufficient to vary the duty of the banker.

The sole question in this case appears to me to be whether, in making the payments to Glyka, the bankers have complied with the direction of their customer. That direction is found in the letter of advice and the acceptance, and I do not see that the terms of the latter differ from the former. The question, therefore, upon this point seems to me to be reduced to this—whether, as alleged by the appellants, the payees were “non-existing or fictitious persons” within s. 7 (3), and, if so, whether as against an acceptor, no party to and ignorant of the fiction, the bills might be treated as payable to bearer so as to justify the payments to Glyka. Upon this point the appellants argued that, as in fact there was no person in existence capable of giving the discharge contemplated by the acceptor, or of making a valid title by endorsement, they were under no obligation to make any inquiries as to the named payees’ endorsement or require it, but were justified, as against the respondent, in making payment to the bearer; that being in law the tenor and effect of the bill.

In support of this proposition they cited various cases decided in the courts of common law for the purpose of showing that where the names, in one case even of known and existing persons, had been inserted as payees fictitiously, and without any intent that they should be actual payees, the courts had treated the bills as payable to bearer. Those cases have been fully discussed and dealt with in the courts below, and it will, I think, appear that in all of them the persons against whom the bills were so treated had been parties to the putting forth of the bills either with knowledge of the fictitious insertion, or with authority to make the instrument (as when accepted in blank) a negotiable instrument for the payment of money to somebody, which a holder in due course must of necessity have the right to enforce against somebody, so that the parties to their emission could not be heard to say that the bills were not payable at all for want of an endorsement by a payee who was never intended to have the power to and could not make any valid endorsement. The case nearest to the present in its facts is *Cooper v. Meyer* (6). There the persons named as payees were known and existing persons, although their names were fictitiously inserted by the drawer as payees without any

intention that they should have anything to do with the bills. But the point decided in that case simply was that, the acceptor for whom the holder had discounted the bill having accepted for the accommodation of the drawer who had been guilty of this fiction, evidence that the handwriting of the endorsement was the same as that of the drawing, was sufficient as against the acceptor, who was precluded from denying the drawing, and, it was said, had given credit to the drawer's handwriting.

Upon the authority of these cases, and what was said to be the true construction of the statute, it was contended that the fraudulent intention of Glyka in inserting C. Petridi & Co. as payees, although unknown to the acceptor, had, as against him, converted an acceptance which was in terms payable to a named payee, "or order," into a liability to pay any bearer. But I fail to see how upon principle the intention of a drawer can alter the terms of a bill in which there is a named and ascertainable payee. All it can do is, where more than one person fulfils the description of the payee in the bill, to say which was the person intended (*Mead v. Young* (9))—and I, therefore, have come to the conclusion, which has been arrived at by LORD BRAMWELL, that the payees in the present case were not "fictitious or non-existent persons," within the meaning of the statute, so as to entitle the appellants to treat the respondent's acceptances as payable to Glyka, or any other bearer. It was not denied that the firm of C. Petridi & Co., who were so named as payees, were existing persons carrying on business at Constantinople, that they were known to be such to Vucina and others, and that the respondent had been in commercial relations with them by paying bills to their genuine endorsements. They are, however, said to be fictitious persons because Glyka intended so to deal with the bills that the fact that their names appeared upon them should remain concealed. What he intended was to obtain the amount of the bills by fraudulently inserting a genuine name as the payee, relying upon his being able in his position in the respondent's counting-house to prevent the discovery of the forgery. But I cannot see how that can render actual existing persons fictitious, within the meaning of the statute. If he had made Rothschild, of Vienna, or Hirsch, of Constantinople, payees, that would have been as fraudulent, but would not have made them fictitious persons. In this view it is unnecessary to consider whether, if the payees had been fictitious persons, within the meaning of the statute, the bill might be treated as against the respondent, who was ignorant of the fiction, as payable to bearer.

But the appellants argued, secondly, that, even if the payments in question could not be justified in themselves, the conduct of the respondent precluded him from complaining of them. They urged that his representation in the letter of advice that the bills were genuine commercial instruments, his instructions to honour them at maturity, coupled with such a lax system of business as enabled a man in the position of Glyka to concoct and carry into effect his extensive frauds; the omission to examine the forged endorsements on the bills when periodically returned by the appellants; the non-observance of the omissions in the forged letters, which ought to have been noticed and so excited inquiry, and the amount of the forged acceptances—£6,000 in June, £19,000 in July, and over £15,000 and £16,000 in August and September—which ought also to have excited attention, amounted to conduct without which the loss would not have happened, and so far conducted to the loss as to render the alleged rule applicable, that where a loss has to fall upon one of two innocent parties, it ought to be held to fall upon the party conducing to it. The appellant's case in this respect is, I think, a strong one, and deserving of great consideration, and, as I look upon their position as one of considerable hardship (for in any view of the case the forgeries by which they were deceived had been concocted and carried out by the respondent's servant, and, as I think, without such care and supervision on the respondent's part as I should like to have seen), I should have been well satisfied if, consistently with what I consider to be the law, I could have held in their favour.



A No doubt in one case (*Lickbarrow v. Mason* (10)), ASHHURST, J., stated, as a broad general principle, that whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it. But more recent decisions, and one of this House of great importance—*Bank of Ireland (Governor & Co.) v. Evans's Charities Trustees* (2)—have either shown that this proposition is not to be understood in all its generality, or cannot be supported; and this was very clearly pointed out in two cases which were not, I think, cited in argument: *Arnold v. Cheque Bank*, *Arnold v. City Bank* (11)—by the judges constituting the Common Pleas Division, who, in a very careful judgment, reviewed all the authorities. It was an action by the drawer to recover the proceeds of a bill which had been received by the defendants upon a forged endorsement, and negligence affording facilities for the fraud was set up, and evidence in support of it tendered at the trial, but rejected by LORD COLERIDGE, C.J. There were several acts of alleged negligence relied upon, some of them of a similar character to some of those relied upon in the present case.

In delivering the considered judgment of the court, consisting of LORD COLERIDGE, C.J., LINDLEY, J., and ARCHIBALD, J., the Chief Justice said, on the second and third points (1 C.P.D. at pp. 586, 587):

D “It was contended by the defendants that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud, by which the defendants were induced to receive it, and that the evidence which was rejected would have shown an almost invariable custom for merchants in America, remitting bills to correspondents in England, to send another independent letter of advice, either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as the *Celtic*, or on subsequent days, which would have arrived in time to have enabled Messrs. Williams & Co. [the endorsees, whose endorsement had been forged], in the event of their not having received the draft in due course, to have communicated with Smith, Payne, and Smith, either by letter or telegram, to have stopped payment. We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs. . . . Reliance was placed on the defendants on the case of *Young v. Grote* (8). That case, no doubt, must be considered as well decided, but various opinions have been expressed as to the real ground of the decision. . . . But we have only to look at the case itself to see that it really proceeded on the authority of the extract from POTHIER, cited in the judgment of BEST, C.J., which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., that negligence, in order to estop, must be negligence in the transaction itself: see per BLACKBURN, J., in *Suan v. North British Australasian Co.* (12). Indeed, in a later case, *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (2), this is stated by PARKE, B., himself to be the true ground of decision.”

Then the Chief Justice, after citing from the judgment of PARKE, B., proceeded (*ibid.*):

I “The rule, which is expressed by ASHHURST, J., in *Lickbarrow v. Mason* (10), ‘We may lay it down as a broad general principle that whenever one of two innocent parties suffers by the act of a third person, he who has enabled one person to occasion the loss must sustain it,’

was, though not expressly referred to, observed and acted on in *Young v. Grote* (8); and it has received illustration and explanation in subsequent cases on the subject, which show that the words ‘enabling a person to occasion the loss’ must be understood to mean, by some act, conduct, or default in the very

transaction in question: see *Freeman v. Cooke* (13). The correct rule seems to us to be that which is thus stated by BLACKBURN, J., in his judgment in *Swan v. North British Australasian Co.* (12), where, referring to the judgment of WILDE, B., below, he says

‘that he omits to qualify the rule he had stated by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy. . . .’

In *Bank of Ireland (Governor & Co.) v. Evans’ Charities Trustees* (2), it was expressly held both that the negligence, in order to operate as an estoppel, must be negligence ‘in or immediately connected with the transfer itself,’ and, further, that it must be also the ‘proximate cause of the loss.’ ”

The principle thus enunciated seems to me to be sound, and, applying it to the present case, I am unable to say that the conclusions arrived at by the judge who tried the case, and by all the judges of the Court of Appeal, are wrong; and I am of opinion, therefore, that both grounds urged by the appellants fail, and that the judgment of the Court of Appeal should be affirmed. Indeed, as has been observed by LORD BRAMWELL, in any view of this part of the case, I cannot see how this objection can avail in respect of the earlier bills, which up to May 14 amounted to £3,000, and up to June 27 to £6,000 more. Nothing is alleged to have been done or omitted, at all events at the first date, which would preclude the respondent from complaining of the prior payments. Taking the view which I do of this case, it is unnecessary for me to advert to the alleged negligence of the bank in continuing to pay such large sums in cash over the counter, and not through a bank, further than to say that there is nothing in the evidence which is very much in conflict relating to the matter, which, in my judgment, relieved the bank from their responsibility in respect of the payments complained of.

*Appeal allowed.*

Solicitors: *Freshfields & Williams; Hollams, Sons, Coward & Hawksley.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*] G

## CARLILL v. CARBOLIC SMOKE BALL CO.

[COURT OF APPEAL (Lindley, Bowen and A. L. Smith, L.J.J.), December 6, 7, 1892]

[Reported [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176]

*Contract—Offer to all the world—Conditional offer—Acceptance by performance of conditions—Waiver of notice of—Acceptance—Consideration—Offer made in advertisement.*

A conditional offer made to all the world by, e.g., an advertisement, is capable of ripening into a contract between the offeror and any person who comes forward and performs the conditions. The performance of the conditions constitutes the acceptance of the offer. It is implied from the nature of the transaction that the offeror has dispensed with any notice of acceptance being given by the offeree before the offeree has performed the conditions and claimed performance of the contract by the offeror. The consideration for such a contract is, on the one side, the inconvenience which the offeree suffers in performing the conditions, and, on the other, the advantage which the offeror has through his offer being accepted.

The defendants, the proprietors of a medical preparation called the Carbolic Smoke Ball, published in a newspaper an advertisement in which they said they would pay £100 reward to any person who contracted influenza after having used one of the balls in a specified manner for a specified period. They also stated that they had deposited £1,000 with a bank to show their sincerity in the matter. The plaintiff, upon the faith of the advertisement, purchased one of the balls, and used it in the manner and for the period specified, but nevertheless contracted influenza. In an action by the plaintiff to recover the £100,

**Held:** the offer in the advertisement coupled with the performance by the plaintiff of the conditions specified therein created a valid contract, supported by consideration, on the part of the defendants to pay the £100 mentioned in the advertisement, and the plaintiff was entitled to recover the £100.

**Notes.** Considered: *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern), Ltd.*, [1952] 2 All E.R. 456; *Entores, Ltd. v. Miles Far East Corpn.*, [1955] 2 All E.R. 194. Referred to: *Re Consort Deep Level Gold Mines, Ex parte Stark*, [1897] 1 Ch. 575; *Stollery v. Maskelyne* (1898), 15 T.L.R. 79; *Johnstone v. Boyes*, [1899] 2 Ch. 73; *Chaplin v. Hicks* (1911), 27 T.L.R. 244; *Reynolds v. Atherton* (1921), 125 L.T. 690; *Rayfield v. Hands*, [1958] 2 All E.R. 194.

As to a contract based on an offer to all the world, see 8 HALSBURY'S LAWS (3rd Edn.) 71-73; and for cases see 12 DIGEST (Repl.) 59-62.

Cases referred to:

- (1) *Williams v. Carwardine* (1833), 4 B. & Ad. 621; 1 Nev. & M.K.B. 418; 2 L.J.K.B. 101; 110 E.R. 590; 12 Digest (Repl.) 77, 421.
- (2) *Brogden v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, 300.
- (3) *Gerhard v. Bates* (1853), 2 E. & B. 476; 22 L.J.Q.B. 364; 22 L.T.O.S. 64; 17 Jur. 1097; 1 W.R. 383; 1 C.L.R. 868; 118 E.R. 845; 12 Digest (Repl.) 199, 1379.
- (4) *Spencer v. Harding* (1870), L.R. 5 C.P. 561; 39 L.J.C.P. 332; 23 L.T. 237; 19 W.R. 48; 12 Digest (Repl.) 62, 332.
- (5) *Harris v. Nickerson* (1873), L.R. 8 Q.B. 286; 42 L.J.Q.B. 171; 28 L.T. 410; 37 J.P. 536; 21 W.R. 635; 12 Digest (Repl.) 59, 322.



- (6) *Victors v. Davies* (1844), 12 M. & W. 758; 1 Dow. & L. 984; 13 L.J.Ex. 214; A  
3 L.T.O.S. 59; 152 E.R. 1405; 12 Digest (Repl.) 587, 4547.
- (7) *Laythoarp v. Bryant* (1836), 2 Bing.N.C. 735; 2 Hodg. 25; 3 Scott, 238; 5  
L.J.C.P. 217; 182 E.R. 283; 12 Digest (Repl.) 173, 1127.
- (8) *Denton v. Great Northern Rail. Co.* (1856), 5 E. & B. 860; 25 L.J.Q.B. 129;  
26 L.T.O.S. 216; 20 J.P. 483; 2 Jur.N.S. 185; 4 W.R. 240; 119 E.R. 701;  
35 Digest 26, 179. B

Also referred to in argument :

- Warlow v. Harrison* (1859), 1 E. & E. 309; 29 L.J.Q.B. 14; 1 L.T. 211; 6  
Jur.N.S. 66; 8 W.R. 95; 120 E.R. 925, Ex. Ch.; 3 Digest (Repl.) 13, 100.
- Guthing v. Lynn* (1831), 2 B. & Ad. 232; 109 E.R. 1130; 12 Digest (Repl.) 55, 301.
- Brogden v. Marriott* (1836), 2 Bing.N.C. 473; 1 Hodg. 383; 2 Scott, 703; 5  
L.J.C.P. 108; 182 E.R. 186; subsequent proceedings, 3 Bing.N.C. 88; 2  
Hodg. 136; 2 Scott, 712; 5 L.J.C.P. 302; 12 Digest (Repl.) 490, 3686. C
- Rourke v. Short* (1856), 5 E. & B. 904; 25 L.J.Q.B. 196; 26 L.T.O.S. 235; 2  
Jur.N.S. 352; 4 W.R. 247; 119 E.R. 717; 39 Digest 409, 435.
- Taylor v. Smetten* (1883), 11 Q.B.D. 207; 52 L.J.M.C. 101; 48 J.P. 36, D.C.;  
25 Digest (Repl.) 494, 521.
- Good v. Elliott* (1790), 3 Term Rep. 693; 100 E.R. 808; 25 Digest (Repl.) 417, 5. D
- England v. Davidson* (1840), 11 Ad. & El. 856; 3 Per. & Dav. 594; 9 L.J.Q.B.  
287; 4 Jur. 1032; 113 E.R. 640; 12 Digest (Repl.) 235, 1765.

**Appeal** by the defendants from a decision of HAWKINS, J.

On Nov. 13, 1891, the following advertisement was published by the defendants in the "Pall Mall Gazette": E

"£100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter. During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball. One Carbolic Smoke Ball will last a family several months, making it the cheapest remedy in the world at the price—10s. post free. The ball can be refilled at a cost of 5s. Address: Carbolic Smoke Ball Co., 27, Princes Street, Hanover Square, London, W." F

The plaintiff, believing in the accuracy of the statements appearing in the advertisement with regard to the efficacy of the smoke ball in cases of influenza, or as a preventive of that disease, purchased one and used it three times every day, as directed by the instructions, for several weeks, from the middle of November, 1891, until Jan. 17, 1892, at which latter date she had an attack of influenza. Thereupon her husband wrote a letter for her to the defendants, stating what had occurred, and asking for the £100 promised by the defendants in the advertisement. The payment of that sum was refused by the defendants, and the present action was brought for its recovery. At the trial before HAWKINS, J., and a special jury the facts were not disputed, and the arguments of counsel on each side on the points of law involved in the case were heard by the learned judge on further consideration. It was denied on the part of the defendants that there was any contract between them and the plaintiff; and, alternatively, that, if there were any, it was void as a wagering contract. Further they alleged that the advertisement amounted to an offer to insure, and that there was no contract of insurance in conformity with the provisions of s. 2 of the Life Assurance Act, 1774. I

HAWKINS, J., gave judgment for the plaintiff and the defendants appealed.

*Finlay, Q.C.*, and *Thomas Terrell* for the defendants.

*Dickens, Q.C.*, and *W. B. Allen* for the plaintiff.

**A** **LINDLEY, L.J.**—This is an appeal by the defendants against a decision of **HAWKINS, J.**, rendering them liable to pay the plaintiff £100 under the circumstances to which I will allude presently. The defendants are interested in selling as largely as possible an article they call the "Carbolic smoke ball." What that is I do not know. But they have great faith in it as an effectual preventive against influenza and colds, or any diseases caused by taking cold, and as also useful in a great variety of other complaints. They are so confident in the merits of this thing that they say in one leaflet that the carbolic smoke ball never fails to cure all the diseases therein mentioned when used strictly according to these directions. Like other tradespeople they want to induce the public to have sufficient confidence in their preparation to buy it largely. That being the position they put this advertisement into various newspapers. It is printed in black-faced type, that is to say, the striking parts of it are. It is, therefore, put in a form to attract attention, and they mean that it should attract attention for the purposes to which I have already alluded. [His LORDSHIP read the advertisement.] The plaintiff is a lady who, upon the faith of one of these advertisements, went and bought at a chemist's in Oxford Street one of these smoke balls. She used it three times daily for two weeks according to the printed directions supplied. But before she had done using it she was unfortunate enough to contract influenza, so that in her case this ball did not produce the desired effect. Whereupon she says to the Carbolic Smoke Ball Co.: "Pay me this reward of £100." "Oh no," they respond, "We will not pay you the £100." She then brings an action, and **HAWKINS, J.**, has held that the defendants must pay her the £100. Then they appeal to us and say that that judgment is erroneous. The appeal has been argued with great ingenuity by the defendants' counsel, and his contentions are reduced in substance to this—that, put it as you will, this is not a binding promise.

I will pass, before I proceed further, to some of the various contentions which were raised for the purpose of disposing of them. I will afterwards return to the serious question which arises. First, it was said no action will lie upon this advertisement because it is a policy of insurance. You have, however, only got to look at it, I think, to dismiss that contention. Then it was said that this is a wager or bet. **HAWKINS, J.**, examined that with his usual skill, and came to the conclusion that nobody ever thought of a bet, and that there is nothing whatever in common with a bet. I so entirely agree with him that I propose to pass that over as not worth serious attention.

Having got rid of the question of a policy, and having got rid of the question of a bet, let us see what we have left. The first observation I would make upon this is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. There can be no mistake about that at all. Read this how you will, and twist it about as you will, here is a distinct promise, expressed in language which is perfectly unmistakeable, that £100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts influenza after having used the ball three times daily, and so on. One must look a little further and see if this is intended to be a promise at all; whether it is a mere puff—a sort of thing which means nothing. Is that the meaning of it? My answer to that question is "No," and I base my answer upon this passage: "£1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." What is that money deposited for? What is that passage put in for, except to negative the suggestion that this is a mere puff, and means nothing at all? The deposit is called in aid by the advertisers as proof of their sincerity in the matter. What do they mean? It is to show their intention to pay the £100 in the events which they have specified. I do not know who drew the advertisement, but he has distinctly in words expressed that promise. It is as plain as words can make it.

Then it is said that it is a promise that is not binding. In the first place it is said that it is not made with anybody in particular. The offer is to anybody who performs the conditions named in the advertisement. Anybody who does perform

the conditions accepts the offer. I take it that if you look at this advertisement in point of law, it is an offer to pay £100 to anybody who will perform these conditions, and the performance of these conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is that celebrated advertisement case of *Williams v. Carwardine* (1), which has been followed by a good many other cases concerning advertisements of rewards. But then it is said: "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to be notified." Unquestionably as a general proposition when an offer is made, you must have it not only accepted, but the acceptance notified. But is that so in cases of this kind? I apprehend that this is rather an exception to the rule, or, if not an exception, it is open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required (which I doubt very much, for I rather think the true view is that which is as expressed and explained by LORD BLACKBURN in *Brogden v. Metropolitan Rail. Co.* (2)), the person who makes the offer receives the notice of acceptance contemporaneously with his notice of the performance of the conditions. Anyhow, if notice is wanted, he gets it before his offer is revoked, which is all you want in principle. But I doubt very much whether the true view is not, in a case of this kind, that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We have, therefore, all the elements which are necessary to form a binding contract enforceable in point of law subject to two observations. First of all, it is said that this advertisement is so vague that you cannot construe it as a promise; that the vagueness of the language, to which I will allude presently, shows that a legal promise was never intended nor contemplated. No doubt the language is vague and uncertain in some respects, and particularly in that the £100 is to be paid to any person who contracts influenza after having used the ball three times daily, and so on. It is said, "When are they to be used?" According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I doubt whether that was meant, and I doubt whether that would not be pushing too far the doctrine as to construing language most strongly against the person using it. I doubt whether business people, or reasonable people would understand that if you took a smoke ball and used it three times daily for the time specified—two weeks—you were to be guaranteed against influenza for the rest of your life. I do not think the advertisement means that, to do the defendants justice. I think it would be pushing their language a little too far. But if it does not mean that, what does it mean? It is for them to show what it does mean; and it strikes me that there are two reasonable constructions to be put on this advertisement, either of which will answer the purpose of the plaintiff. Possibly there are three.

It may mean that the promise of the reward is limited to persons catching the increasing influenza, or any colds, or diseases caused by taking colds, during the prevalence of the epidemic. That is one suggestion. That does not fascinate me, I confess. I prefer the other two. Another is, that you are warranted free from catching influenza, or cold, or other diseases caused by taking cold, while you are using this preparation. If that is the meaning, then the plaintiff was actually using the preparation when she got influenza. Another meaning—and the one which I rather think I should prefer myself—is becoming diseased within a reasonable time after having used the smoke ball. Then it is asked: "What is a reasonable time?" And one of my brothers suggested that that depended upon the reasonable view of the time taken by a germ in developing? I do not feel pressed by that. It strikes me that a reasonable time may be got at in a business sense, and in a sense to the satisfaction of a lawyer in this way. Find out what the preparation is. A chemist will tell you that. Find out from a skilled physician



**A** how long such a preparation could be reasonably expected to endure so as to protect a person from an epidemic or cold. In that way you will get a standard to be laid before a court by which it might exercise its judgment as to what a reasonable time would be. And it strikes me, I confess, that the true construction of this is that £100 will be paid to anybody who uses this smoke ball three times daily, for two weeks according to the printed directions, and who gets influenza, or

**B** a cold, or some other disease caused by taking cold, within a reasonable time after so using it. I think that that is the fair and proper business construction of it. If that is the true construction, it is enough for the plaintiff. Therefore, I say no more about the vagueness of the document.

I come now to the last point, which I think requires attention, i.e., the question of the consideration. Counsel for the defendants has argued with great skill that this is a nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. Counsel says it is no advantage to them how much the ball is used. What is an advantage to them and what benefits them is the sale, and he has put the ingenious case that a lot of these balls might be stolen, and that it would be no advantage to them if the thief or other people used them. The answer to that I

**D** think is this. It is quite obvious that, in the view of the defendants, the advertisers, a use of the smoke balls by the public, if they can get the public to have confidence enough to use them, will react and produce a sale which is directly beneficial to them, the defendants. Therefore it appears to me that out of this transaction emerges an advantage to them which is enough to constitute a consideration. But there is another view of it. What about the person who acts upon

**E** this and accepts the offer? Does not that person put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily at the request of the defendants for two weeks according to the directions? Is that to go for nothing? It appears to me that that is a distinct inconvenience, if not a detriment, to any person who uses the smoke ball. When, therefore, you come to analyse this argument of want of consideration, it appears to me that there is ample

**F** consideration for the promise.

We were pressed upon this point with *Gerhard v. Bates* (3), which was the case of a promoter of companies who had promised the bearers of share-warrants that they should have dividends for so many years, and the promise as alleged was held not to show any consideration. LORD CAMPBELL's judgment upon that is, I take it, unintelligible; and when you come to examine it, I think it is open to the explanation which counsel for the plaintiff gave, that is to say, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and, as the plaintiff was not suing in the name of the original bearer, there was no contract with him. LORD CAMPBELL goes on to enforce that view by showing that there was no consideration shown for the promise to him. I cannot help thinking that LORD CAMPBELL's observations upon consideration would have been very

**H** different if the plaintiff in that action had been an original bearer, or if the court had gone on to show what a "societe anonyme" was, and that this promise was, and had been alleged to be, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the court said that, in the absence of such allegation, they did not know what a societe anonyme was—I mean, of course, judicially—and, therefore, there was no consideration. But here

**I** I cannot see the slightest difficulty, for the reasons I have given, in coming to the conclusion that there is consideration.

It appears to me, therefore, that these defendants must perform their promise, and if they have been so unguarded and so unwary as to expose themselves to a great many actions, so much the worse for them. For once in a way the advertiser has reckoned too much on the gullibility of the public. It appears to me that it would be very little short of a scandal if we said that no action would lie on such a promise as this, acted upon as it has been. The appeal must be dismissed with costs.

**BOWEN, L.J.**—I am of the same opinion. We were asked by counsel for the defendants to say that this document was a contract too vague to be enforced. The first observation that arises is that the document is not a contract at all. It is an offer made to the public. The terms of the offer, counsel says, are too vague to be treated as a definite offer, the acceptance of which would constitute a binding contract. He relies on his construction of the document, in accordance with which he says there is no limit of time fixed for catching influenza, and that it cannot seriously be meant to promise to pay money to a person who catches influenza at any time after the inhaling of the smoke ball. He says also that, if you look at this document you will find great vagueness in the limitation of the persons with whom the contract was intended to be made—that it does not follow that they do not include persons who may have used the smoke ball before the advertisement was issued, and that at all events, it is a contract with the world in general. He further says, that it is an unreasonable thing to suppose it to be a contract, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense, and there is no such provision here made for the checking. He says that all that shows that this is rather in the nature of a puff or a proclamation than a promise or an offer intended to mature into a contract when accepted.

Counsel says that the terms are incapable of being consolidated into a contract. But he seems to think that the strength of the position he desires to adopt is rather that the vagueness of the document shows that no contract at all was intended. It seems to me that in order to arrive at this contract we must read it in its plain meaning as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it upon the points which the defendant's counsel has brought to our attention? It was intended unquestionably to have some effect, and I think the effect which it was intended to have was that by means of the use of the carbolic smoke ball the sale of the carbolic smoke ball should be increased. It was designed to make people buy the ball. But it was also designed to make them use it, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the usage of it should be increased.

The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts influenza, and the defendants say that "contracts" there does not apply only to persons who contract influenza after the publication of the advertisement, but that it might include persons who had contracted influenza before. I cannot so read it. It is written in colloquial and popular language. I think that the expression is equivalent to this, that £100 will be paid to any person who shall contract influenza after having used the carbolic smoke ball three times daily for two weeks. It seems to me that that would be the way in which the public would read it. A plain person who read this advertisement would read it in this plain way, that if anybody after the advertisement was published used three times daily for two weeks the carbolic smoke ball and then caught cold he would be entitled to the reward.

Counsel says: "Within what time is this protection to endure? Is it to go on for ever or what is to be the limit of time?" I confess that I think myself that there are two constructions of this document, each of them contains good sense, and each of them seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic. If so, it was during the epidemic that the plaintiff contracted the disease. I think more probably it means that it is to be a protection while it is in use. That seems to me the way in which an ordinary person would understand an ordinary advertisement about medicine and especially about a specific against influenza. It could not be supposed that after you had left off using it you would still be protected for

A ever as if there was a stamp set upon your forehead that you were never to catch influenza because you had used the carbolic smoke ball. I think it means during the use. It seems to me that the language of the advertisement lends itself to that construction. It says:

B "During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball."

C The advertisement concludes with saying that one smoke ball will last a family several months—which means that it is to be continually used—and that the ball can be refilled at a cost of 5s. I, therefore, have no hesitation in saying that I think on the plain construction of this advertisement the protection was to enure during the time that the carbolic smoke ball was being used. LINDLEY, L.J., thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point, but it is not necessary for me to develop it, because as I read the contract it covered the exact moment during which the disease here was contracted.

D Was the £100 reward intended to be paid? It not only says the reward will be paid, but it says: "We have lodged £1,000 to meet it." Therefore, it cannot be said that it was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon, but counsel for the defendants says that there was no check on the persons who might claim to have used the ball and become entitled to the reward, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check his using it. The answer to that seems to me to be that, if a person chooses to make these extravagant promises, he probably does so because it pays him to make them, and if he has made them the extravagance of the promises is no reason in law why he should not be bound by them.

F It is said it is made to all the world, i.e., to anybody. It is not a contract made with all the world. There is the fallacy of that argument. It is an offer made to all the world, and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the conditions? It is an offer to become liable to anyone, who before it is retracted performs the conditions. Although the offer is made to all the world the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement. This case is not like those cases in which you offer to negotiate, or you issue an advertisement that you have got a stock of books to sell or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers "to chaffer," as a learned judge in one of the cases has said: per G WILLES, J., in *Spencer v. Harding* (4). If this is an offer to be bound on a condition, then there is a contract the moment the acceptor fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century. It cannot be put better than in H WILLES, J.'s judgment in *Spencer v. Harding* (4), where he says (L.R. 5 C.P. at p. 563):

I "There never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons."



As soon as the highest bidder presents himself—says WILLES, J., in effect—the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled. A

Then it was said that there was no notification of the acceptance of the offer. One cannot doubt that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless you do that, the two minds may be apart, and there is not that consensus which is necessary according to the English law to constitute a contract. But the mode of notifying acceptance is for the benefit of the person who makes the offer as well as for the opposite party, and so the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates that a particular mode of acceptance is sufficient to make the bargain binding, it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance. And if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, and the offer is one which in its character dispenses with notification of the acceptance, then according to the intimation of the very person proposing the contract, performance of the condition is a sufficient acceptance without notification. That seems to me to be the principle which lies at the bottom of the acceptance cases, of which an instance is the well-known judgment of MELLISH, L.J., in *Harris v. Nickerson* (5) and LORD BLACKBURN's opinion in the House of Lords in *Brogden v. Metropolitan Rail. Co.* (2) (2 App. Cas. at p. 691). It seems to me that that is exactly the line which he takes. B

If that is the law, how are you to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract the answer from the character of the business which is being done. And in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the conditions, but that, if he performs the conditions at once, notification is dispensed with. It seems to me, also, that no other view could be taken from the point of view of common sense. If I advertise to the world that my dog is lost and that anybody who brings him to a particular place will be paid some money, are all the police or other persons whose business is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Of course they look for the dog, and as soon as they find the dog, they have performed the condition. The very essence of the transaction is that the dog should be found. It is not necessary under such circumstances, it seems to me, that in order to make the contract binding, there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it. A person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. In his offer he impliedly indicates that he does not require notification of the acceptance of the offer. C

Then counsel for the defendants pressed on us very much in a most admirable argument, as it struck me, that this was a nudum pactum, that there was no consideration for this promise. He said that there was no consideration—that taking the influenza was a condition, and using the smoke ball was a condition, and that there was no consideration at all. In fact, he said that there was no request to use, express or implied. I will not elaborate the discussion upon the exact law as to requests in this kind of contract. I will simply refer to *Victors v. Davies* (6). There is also the note in MANNING AND GRANGER, which everybody ought to read who wishes to embark in this controversy—a note by SERJEANT MANNING in 1 Man. & G. at p. 265. The short answer, to abstain from academical discussion, is, it seems to me, that in the present case there is a request to use D

**A** involved in the very offer and the acceptance. What is the definition of consideration? The definition of consideration was given in *SELWYN'S NISI PRIUS*, which is cited by TINDAL, C.J., in *Laythorp v. Bryant* (7) (3 Scott at p. 250). It is any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience is suffered by the plaintiff with the consent, **B** either express or implied, of the defendant. Can it be said here that if the person who reads this advertisement applies thrice daily, or such time as may seem to him to be bearable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise? The law does not require us to measure the adequacy of the consideration. Sufficient if there is an inconvenience sustained **C** by the one party with the consent of the other. That is enough to support a consideration, as A. L. SMITH, L.J., pressed upon counsel from time to time during the argument here. It is enough to my mind that the plaintiff used the smoke ball. That is enough consideration. But the other view is, I think, that she used it, and that her using it was intended to be, and contemplated by the promissors as being indirectly a benefit to themselves, because the use of the smoke ball would **D** promote the sale of the smoke ball.

We were pressed with *Gerhard v. Bates* (3). As to that I have only to repeat what LINDLEY, L.J., has said. In *Gerhard v. Bates* (3), which arose upon demurrer, the point upon which the action turned was that they did not allege that the promise was made to the class of which alone the plaintiff was one, and, therefore, there was no privity between the plaintiff and the defendant. LORD CAMPBELL **E** went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me LORD CAMPBELL's reasoning would not have been sound. It is only to be supported if you read it as emphasising that the parties had not come into the relation of contracting parties. But if so the language was superfluous. The truth is that if you had found a contract **F** between the parties, there would have been no difficulty about consideration. But you could not find such a contract. In the same way in the present case, if you once make up your mind that there was a promise made to the plaintiff, as one of the public—a promise that, if she used the smoke ball three times daily for a fortnight, and contracted influenza, she should have the reward—it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to **G** myself a view of the law on which the opposite could be entertained, when you have once found the contracting parties. If I say to a person: "If you use such and such a medicine for a week I will give you £5," and he uses it there is ample consideration for the promise.

In the present case the promise was put forward, I think, with the intention that it should be acted upon, and it was acted upon. It seems to me that there was **H** ample consideration for the promise, and that, therefore, the plaintiff is entitled to recover the reward.

**A. L. SMITH, L.J.**—The first point in this case is whether the defendants' advertisement which appeared in the "Pall Mall Gazette" was an offer which, when **I** accepted and its conditions performed, constituted a promise to pay, assuming that there was good consideration to uphold that promise; or whether it was only a puff from which no promise could be implied. In other words, as it has been stated to us, whether it was a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. That is the first matter to be determined. Or I might put it in other words, to use the words of LORD CAMPBELL in *Denton v. Great Northern Rail. Co.* (8), whether this advertisement was to be mere waste paper. That is how that learned judge summarised the arguments put forward in regard to the advertisement in that case. In my view, the true reading

of this advertisement is this :

"£100 reward will be paid by the Carbolic Smoke Ball Co. to any person who, after having used the ball three times daily for two weeks according to the printed directions supplied with such ball, contracts influenza, a cold, or any diseases caused by taking cold."

That, I think, is the true meaning of that advertisement, as I understand it. I think it means that if one of the public, as yet not ascertained, but as BOWEN, L.J., and LINDLEY, L.J., have pointed out, will be ascertained by the performing of the conditions, will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay him £100 if he contracts influenza within the period mentioned in the advertisement. Why is there not a request there? In consideration of your using my smoke balls at my request, and paying for them, which is a necessary part of the use, then if you catch influenza within a certain time I will pay you £100. It must not be lost sight of that this advertisement also states that, as security for what is being offered, and as proof of its security, £1,000 is actually lodged at the bank, wherewith to satisfy a possible demand which might be made in the event of the conditions contained therein being fulfilled, entitling a recipient to the £100 offered. How can it be said that such a statement as that embodied a mere expression of confidence in the wares which they had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon if the conditions were performed, and, when accepted, constituted a binding promise on which an action would lie assuming that there was consideration for that promise.

Counsel for the defendants stated that it was a promise in honour or an agreement in honour or a contract in honour. Asked what he meant by that, he said: "It is a nudum pactum." I understand that, if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum. But if he means anything else I do not understand it. I do not understand what a bargain or a promise or an agreement "in honour" is unless it is one on which an action cannot be brought because it is nudum pactum. About nudum pactum I will say a word in a moment. In my judgment, therefore, this point fails. I think that this was an offer intended to be acted upon, and, when acted upon and the conditions performed, gave a right of action to a person performing these conditions.

In the next place, it is said that the promise is too wide, because it is said there is no limit of time within which the person is to catch influenza. I am not going to pause there. As has been pointed out by my brothers who preceded me, there are three possible constructions of this contract. I like the last two, if I may call them so, the best. I like the construction that it means catching influenza during the time you are using the ball, or catching influenza within a reasonable time after the expiration of the two weeks during which you have used it three times daily. It is not necessary to say which is the correct construction of this contract. The third construction is catching influenza during the epidemic. But, whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account. Then it was argued that, if the advertisement constituted an offer which might culminate in a contract if it was accepted, it was not accepted by the plaintiff in the manner contemplated. And it was said that the offer contemplated was such that notice of his acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is that there is no such clause in the advertisement, and, in my judgment, such a clause cannot be read into it. I only wish to say that I entirely agree with what has fallen from my brothers, namely, that this is one of those cases in which a performance of the conditions, the conditions being the use of these smoke balls for two weeks, three times a day, is an acceptance of the offer.



**A** It was then said that there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained from the time of *Williams v. Carwardine* (1), and before that down to the present day. I have nothing to add to what has been said on that subject—that a person becomes a *persona designata*, and able to sue when he performs the conditions mentioned in the advertisement, which gives him a right to the reward therein offered. Then it was said that there was no consideration, and that it was *nudum pactum*. BOWEN and LINDLEY, L.JJ., have both pointed out the considerations. There are two considerations here. One is the consideration of the inconvenience of having to use the carbolic smoke ball for two weeks three times a day. That is a consideration moving from the plaintiff to the defendants. The other consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls by reason of the plaintiff's user of them—ample consideration, it seems to me to support this promise. I have only now to add that, as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

*Appeal dismissed.*

**D** Solicitors: *J. Banks Pittman; Field, Roscoe & Co.*, for *J. E. Foster*, Cambridge.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

**E**

## BURCHARD v. MACFARLANE. Ex Parte TINDALL AND ANOTHER

**F**

[COURT OF APPEAL (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.), May 12, 1891]

[*Reported* [1891] 2 Q.B. 241; 60 L.J.Q.B. 587; 65 L.T. 282; 39 W.R. 694; 7 T.L.R. 526; 7 Asp.M.L.C. 93]

**G**

*Discovery—Witness not party to action—Order against—Order made in Scottish action—Evidence on commission in England—Evidence by Commission Act, 1843 (6 & 7 Vict., c. 82), s. 5.*

An action having been brought in Scotland for breach of warranty on the sale of a ship, a commission was issued, on the joint application of the pursuers and defenders, requiring the chairman and secretary of Lloyd's to appear before a commissioner in London and produce documents in their possession which came within general descriptions in specifications of documents given by the parties. The chairman and secretary having refused to attend before the commissioner, the parties to the action obtained an order from a judge in chambers under the Evidence by Commission Act, 1843, s. 5, ordering the chairman and secretary to appear before the commissioner for examination "as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession answering the description mentioned in the specifications."

**I**

**Held:** the order was in effect an order that the persons to whom it was addressed should attend before the commission, not to give evidence and produce documents as ancillary to their examination as witnesses, but to make discovery of documents; there was no right to discovery as against a witness who was not a party to the action; and, therefore, the order had been made without jurisdiction and was bad.

*Elder v. Carter, Ex parte Slide and Spur Gold Mine* (1) (1890), 25 Q.B.D. 194, applied. A

**Notes.** Considered: *Radio Corp'n. of America v. Rauland Corp'n.*, [1956] 1 All E.R. 549. Referred to: *Spokes v. Grosvenor and West End Railway Terminus Hotel Co.* (1897), 66 L.J.Q.B. 572.

As to the jurisdiction to grant discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 2 et seq.; and for cases see 18 DIGEST (Repl.) 89, 90. For the Evidence by Commission Act, 1843, see 9 HALSBURY'S STATUTES (2nd Edn.) 561. B

Cases referred to:

(1) *Elder v. Carter, Ex parte Slide and Spur Gold Mine* (1890), 25 Q.B.D. 194; 59 L.J.Q.B. 281; 62 L.T. 516; 54 J.P. 692; 38 W.R. 612; 6 T.L.R. 283, C.A.; 18 Digest (Repl.) 90, 738. C

(2) *Lee v. Angas* (1866), L.R. 2 Eq. 59; 35 L.J.Ch. 370; 14 L.T. 324; 14 W.R. 667; 22 Digest (Repl.) 422, 4579.

Also referred to in argument:

*O'Shea v. Wood*, [1891] P. 237; 60 L.J.P. 41; 64 L.T. 233; 7 T.L.R. 329; on appeal, [1891] P. 286; 60 L.J.P. 83; 65 L.T. 30; 7 T.L.R. 437; 18 Digest (Repl.) 77, 621. D

**Appeal** from a decision of the Queen's Bench Division (LORD COLERIDGE, C.J., and MATHEW, J.) affirming an order made by WRIGHT, J., in chambers.

The action was brought in Scotland for breach of a warranty of a ship called the *Lady Octavia*, sold by the defenders to the pursuers. At the request of both parties to the action, the Lord Ordinary granted a commission to examine certain witnesses, and granted diligence against the havers for recovery of the documents specified in the specifications of the pursuers and defenders, to certain commissioners to take the oaths and examinations of the havers resident in Germany, London, Glasgow, and Edinburgh respectively, and receive their exhibits and productions, and ordained E

"Mr. A. H. Tindall, chairman, and Mr. A. G. Dryhurst, secretary, of Lloyd's Register of British and Foreign Shipping, to appear before the commissioner in London and produce any of the documents called for, so far as under their control." F

The specification of documents called for by the pursuers was:

"(1) All correspondence passing between the defenders or Barr, their surveyor, or any person on their behalf, on the one hand, and Emil Padderatz, surveyor at Hamburg to Lloyd's Register of British and Foreign Shipping, or any one on his behalf, on the other, relating to the condition of the vessel known as the *Lady Octavia*, or the surveys of the said vessel in 1889, and in July and October, 1890, between Jan. 1, 1889, and the date of raising this action. G

(2) All correspondence between the said Emil Padderatz, on the one hand, and the London office of the said Lloyd's Register of British and Foreign Shipping or any of the officials of the said register relating to the said matters prior to the said date. (3) All reports obtained by, and all communications addressed to, the said Lloyd's Register of British and Foreign Shipping or any of the officials of the said register in reference to the said vessel during the years 1889 and 1890. (4) Failing principals, copies, drafts, scrolls, or jottings, of any of the above documents are called for." H

The specification of documents called for by the defenders was: I

"All correspondence passing between the pursuers or any one on their behalf, on the one hand, and Lloyd's, or Lloyd's Register of British and Foreign Shipping, or W. H. Tindall, the chairman, and A. G. Dryhurst, the secretary, or any one on behalf of or as representing Lloyd's, or Lloyd's Register of British and Foreign Shipping, on the other hand, relating to the vessel referred

A to on record as the *Lady Octavia* between May 1, 1890, and the date of raising the present action."

A copy of the interlocutor was duly served, and the commissioner cited Mr. Tindall and Mr. Dryhurst

B "to attend to produce the documents mentioned in the specifications served upon you, and give your oath and examination respecting the same on behalf of the pursuers."

Mr. Tindall and Mr. Dryhurst having refused to attend, a summons was taken out under the Evidence by Commission Act, 1848, s. 5, which provides:

C "And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law and equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof: Be it therefore enacted that if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent to or on behalf of any party suing out such commission to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so failing as aforesaid to appear before such commissioner or commissioners and to be examined under such commission; and it shall be lawful for the court, or a judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order."

F WRIGHT, J., made an order at chambers that Messrs. Tindall and Dryhurst should attend before the commissioner at such time and place as he might appoint,

G "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession answering the description mentioned in the specifications [of the pursuers and defenders] of process in the said action, and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications (without prejudice to the said W. H. Tindall and A. G. Dryhurst's objections before the commissioner as to all or any class of documents or document, or to further application by pursuers to a judge in any such case)."

H This order was affirmed on appeal to the Divisional Court (LORD COLERIDGE, C.J., and MATHEW, J.), and Mr. Tindall and Mr. Dryhurst appealed.

*The Attorney-General (Sir Richard Webster, Q.C.), Cohen, Q.C., and James Fox* for the appellants.

*Lyttelton* for the defenders in the Scottish action.

I *Gorell Barnes, Q.C., and Lyttelton* for the pursuers in the Scottish action.

**LORD HALSBURY, L.C.**—An action has been brought in Scotland in respect of a contract for the sale of a ship by the defenders to the pursuers, on the terms that she was to be of a certain register at Lloyd's. It is said that Padderatz, Lloyd's surveyor at Hamburg, was to survey the ship and see if she would justify her register, and it was suggested that Padderatz was induced to concur in a fraud, or to perform his duty negligently, and the pursuers and defenders have by agreement obtained a consent order against the chairman and secretary of Lloyd's



Register that they should appear before a commissioner in London and produce any documents under their control answering to the descriptions in specifications given by the parties to the action. A

First, I find no evidence that there are any such documents in existence as are suggested to be by this order. If they are in existence, they relate to the business of third parties, and not to the rights existing between the pursuers and defenders. They are the correspondence between Lloyd's and Lloyd's agent, though it is true that this correspondence took place with reference to the ship which is the subject of the action in Scotland. The documents, if they exist, belong to Lloyd's and Lloyd's only. Sitting here, I am bound by a decision of the Court of Appeal, and the result of the decision in *Elder v. Carter* (1) is that the inquiry now is whether or not this order is one made really for inspection and discovery, or whether it is for the examination of witnesses in the course of proof for the purpose of establishing the facts. I do not know what facts are to be established. I do not know what documents are asked for. I do not know that the parties have any knowledge of any particular document or any knowledge that any document exists at all, and, therefore, it seems to me that it is inspection and discovery that they want and not proof, and between these two things a broad distinction is drawn in all cases. It will not do to attempt to evade the law by adding at the end of the order that the witnesses are to be examined in respect of the documents in their possession answering to the specification. The real meaning of the order, as I understand it, is that the witnesses are to be examined to ascertain whether they have such documents in their possession. The addition of those words at the end of the order add nothing to the substance of it. If the real object is discovery, the order will not be rendered valid by a limitation being inserted in it that it applies simply to documents relating to a certain vessel, and to documents made in certain years. C

I am of opinion that the order cannot stand; it was obtained by the agreement of the parties to the action against a third party, who is a stranger to the action. Such a person cannot be bound; to enforce such an order would be a gross abuse of private rights. On looking at the Act of Parliament it appears to me that the only process intended to be enforced is the production of documents as ancillary to the examination of witnesses. If there be any difference on this point between the law of England and Scotland, I can only say that, sitting here, I know of none. No evidence has been produced here that in Scotland such a roving commission would be allowed as this which is before us to-day. I do not believe that the power exists in the Scottish courts to enforce upon third parties the production of their documents simply to enable the parties to an action to ascertain whether the third parties have in their possession something which may be useful in the action. I do not believe it exists; but, sitting here, without any evidence being produced, I know nothing about it. E

The result seems to me to be that, looking at the order of the Scottish court, and the order made in England in furtherance of it, we must come to the conclusion that the latter is not justified by s. 5 of the Evidence by Commission Act, 1843, and R.S.C., Ord. 37, r. 7, as it is an order which is practically one for discovery, which would not be made under the circumstances of the case in this country. The appeal must be allowed. F

**LORD ESHER, M.R.**—In this case Messrs. Tindall and Dryhurst are appealing against an order made by WRIGHT, J., under the provisions of s. 5 of the Act of 1843, and the ground of their objection is that the judge had no jurisdiction to make the order. That is the question which we have now to determine. It raises nothing but the true construction of s. 5, and, therefore, I decline to consider any point in the law of Scotland. The order is entitled "in the matter of the Act" and "in the matter of an action pending in Scotland between *Burchard and Others v. Macfarlane and Others*," so that the order is made against two persons, Tindall and Dryhurst who have no relation to the action whatever. Their only connection with it is that possibly they may be called as witnesses. They object to the order G

A as being beyond the jurisdiction of the judge, because it is made on third parties who have nothing to do with the action, with respect to documents which are their sole property and not in any way the property of the parties to the action. They also say, that the order is beyond the jurisdiction of the judge, because it requires them not only to state whether there are in existence such documents as are wanted by the parties to the action, but also to produce them and allow them to be read before it has been determined whether these documents are or are not evidence in the action. What the meaning of this order is I confess I myself have no doubt. It is that Mr. Tindall, chairman, and Mr. Dryhurst, secretary, of Lloyd's Register of British and Foreign Shipping, are to attend before a commissioner at such time and place as he may appoint "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession" answering certain descriptions of a very large kind, "and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications."

Reading the affidavits and the summons, and the order, I have no doubt that the effect of them is that the appellants are to produce their documents in order that the applicants may see and read them. The question is whether such an order is within this Act of Parliament. I am of opinion that it is beyond the jurisdiction of the judge to make the order. It is an order made on third parties for discovery, and it has been absolutely held in England that to make such an order is beyond the jurisdiction of a judge. I shall consider presently whether under this statute the law is not the same. Even supposing that the documents had been identified, and the witnesses were required to produce them for the purpose of being read, not at the trial, but before it, as a preliminary to the trial, I should have said that it would be beyond the jurisdiction of the judge to make such an order.

Let us see whether the same is true on the construction of this statute. In Chancery, before the Judicature Acts, no bill of discovery would have lain against a third person to discover documents in an action between other parties in which he had no interest. A subpoena duces tecum requiring a person to produce documents if he has any would be bad, as it would put on the witness the trouble of looking through what documents he had and coming to the conclusion as to what was relevant to the inquiry. What is a subpoena duces tecum? It is an order from the court requiring a person to produce to the court at the trial a document alleged to be in his possession. He is to produce it to the court, not to the parties; the parties have no right to see the document till it has been produced to the court, and even then subject to the order of the court. When the judge is satisfied that the document is evidence, then he may allow it to be read. Therefore, the suggestion must be that the Act of Parliament gives, as against third parties, a power which did not exist in any court as against them before the Act. The words relied upon in this Act are an order "for the production of any writings or documents to be mentioned in such rule or order." That is as like the words of Ord. 37, r. 7, as can be. That rule says:

"The court or judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced . . ."

I How has that rule been dealt with? It was held by the Court of Appeal in *Elder v. Carter* (1) that when you consider what was the purpose of the rule, although to read it according to the largeness of the words employed would enable the parties to the case to do that which they could not have done before either at law or in equity, that was not the meaning of the rule, and an order under the rule could not be made against a person who was not a party to the action. That judgment is binding on this court, and, in my opinion, it is clearly right.

Turning to s. 5 of the Act of 1843, which is an analogous enactment, the question is whether we are not compelled to hold the same. It seems to me that the statute

applies to an order for the examination of a witness under a commission as though at the trial, the effect of the examination before the commissioner being the same as though it took place before the judge at the trial of the action. Where there is an order that a witness is to be examined before a commissioner, it is under the same circumstances as would arise if he were examined at the trial, and the order that may be lawfully made is for the attendance for examination as a witness as if he were at the trial, and the production of any writings or documents to be mentioned in the rule or order which may be made for his attendance and examination is only equivalent to saying that he must bring the writings or documents as he would bring them with him on a subpoena duces tecum. Here that is evaded. The order is for discovery before examination, instead of for production on examination. The moment it is admitted that he is a third person and is not in possession of the document as the agent of either party, it is clear that he is being asked to produce the document, not to the court for the purpose of the court exercising a discretion over it, or determining the legal right, but that it may be shown to the parties who, until the matter has been determined by a judge, have no right whatever to see it. It seems to me, therefore, that the case is outside the Act of Parliament, and the learned judge had no jurisdiction to make the order appealed against. The appeal must be allowed. A  
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**FRY, L.J.**—The circumstances of this case are fraught with suspicion, but I base my judgment not on that, but on the ground that, as it seems to me, such an order as this cannot be made under the Act of Parliament. The order is obviously one merely for the purpose of discovery. An examination as to documents means as to the possession of the documents, as to what documents are in the custody of the person examined, and as to the description of them. That seems to me to be the natural meaning of the order. On reference to the specifications, to which the order refers, my conclusion is strongly affirmed, because the documents are not clearly indicated there, but the witness is required to determine whether documents relate to the particular vessel, the intention apparently being that the society of Lloyd's Register shall go through all the documents in their custody or power that have passed between themselves and their agents to ascertain whether they have anything related to this vessel. The citation is to the same effect, and there is no evidence that Mr. Tindall or Mr. Dryhurst are persons who could give any evidence with regard to the facts in controversy between the parties in this action. Therefore, I have no doubt that the order really is that Mr. Tindall and Mr. Dryhurst are to come before a commissioner in order to make discovery of documents. It is analogous to a bill of discovery against a mere witness. E  
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Is such an order within the statute of 1843? In my judgment, it clearly is not. That statute enables the court in England, or Scotland, or Ireland, to direct a commission for the examination of witnesses—that is to say, persons who are able to bear testimony with regard to issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties. That observation, in my opinion, applies to the whole of the section, and I think the words at the end, "for the production of any writings or documents to be mentioned in such rule or order," are only ancillary to the examination of witnesses. The words may enable the parties to require the production of the documents which the witness produces as a witness, but they cannot for one moment be stretched so as to enable anyone to obtain discovery against a witness. H  
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Counsel put forward a very ingenious argument. He said that the law of Scotland must govern the Scottish commission in England, and the law of England must govern the English commission in Scotland, and if the law of Scotland enables you to get discovery against a witness in Scotland, you must be able in England to obtain discovery from the witness. There are two answers to that. In the first place, I do not think that is the true meaning of the section, but, even if it were, there is no evidence before us that by Scottish law discovery can be



A obtained against a witness. If that were the Scottish law, it must be borne in mind that the English court must exercise a discretion. I say, without hesitation, that if I were judge at chambers I would never make an order which enabled a Scottish commission in England to obtain discovery from a mere witness. Therefore, I have no doubt that even if counsel was right in his contention, and the law of Scotland is that which, he suggests, an English court should not follow it in granting discovery against a mere witness.

B It is to be observed that by the law of England it is impossible to obtain discovery against a witness. In the old Court of Chancery you might maintain a bill for discovery, but it was necessary to show the interest of the plaintiff in the documents to be discovered, the interest of the defendant in the documents to be discovered, and the right of the plaintiff as against the defendant to the production of the documents that were discovered. Without that, the bill was demurrable. C It is obvious no such bill could ever lie against a witness. In the same manner with regard to a subpoena duces tecum. You could never call on a witness to ascertain whether documents related to the particular matter in controversy. In *Lee v. Angas* (2), a subpoena duces tecum was served upon a witness which described certain documents and then went on to direct him to produce all other D documents in his possession or power in any wise relating to certain matters in question. It was held that as a subpoena duces tecum it was bad, being in fact a bill of discovery against a witness. Then again, under R.S.C., Ord. 37, r. 7, the same observation applies. That rule is undoubtedly conceived in very wide language. It came before the Court of Appeal in *Elder v. Carter* (1), and the court took the view that, as there is no right to discovery against a witness, however E wide the language of the order may be, there was no power to get the relief sought for. It appears to me that if we were to give the slightest countenance to this proceeding we should be doing a great injustice. It has been said, and not without justice, that it is a remarkable thing that A., by making a series of false statements against B., and putting them on the back of a writ or calling them a statement of claim, may obtain inspection of the books of B. That is the law, but F it has never yet been carried to this extent that by making a statement against B., A. can obtain discovery of the books of C. This is an attempt to carry it to that extent, and, in my judgment, it ought to fail.

*Appeal allowed.*

G Solicitors: *Parker, Garrett & Parker; Thomas Cooper & Co.; Nisbet & Hinds.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

ALLCROFT AND OTHERS *v.* BISHOP OF LONDON

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Bramwell, Lord Herschell, Lord Field and Lord Hannen), April 30, May 1, 4, July 20, 1891]

[Reported [1891] A.C. 666; 61 L.J.Q.B. 62; 65 L.T. 92]

*Ecclesiastical Law—Offence—Illegal church ornaments—Representation to bishop—Finality of decision—Public Worship Regulation Act, 1874 (37 & 38 Vict., c. 85), s. 9.*

By s. 9 of the Public Worship Regulation Act, 1874, it is provided that, where a representation under s. 8 has been sent to the bishop of the diocese complaining of any unlawful alteration in, or addition to, the fabric, ornaments, or furniture of the cathedral church, he shall take certain steps and then hear and determine the matter "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken." In the latter case he is to state his reasons in writing.

**Held:** the discretion conferred on the bishop by s. 9 was a general one, and, if, after considering the whole circumstances of the case, including whether further proceedings would inflict mischief on the Church and the religious life of the country, he came to the conclusion that proceedings should not be taken, his decision was not subject to review by the courts.

Per LORD HERSCHELL: When the statute prescribes that the bishop's opinion is to be formed after considering the whole of the circumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear on the particular case, and upon the question whether he ought in that case to prevent proceedings being taken. I dissent entirely from the view that it is for the courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinion.

*Mandamus—Discretion—Statutory discretion—Enforcement of proper exercise.*

Per LORD HALSBURY, L.C.: A mandamus is an appropriate proceeding to remedy the failure of an authority properly to exercise a jurisdiction conferred on it by statute.

**Notes.** As to proceedings under the Public Worship Regulation Act, 1874 (7 HALSBURY'S STATUTES (2nd Edn.) 620), and illegal church ornaments, see 13 HALSBURY'S LAWS (3rd Edn.) 227-229, 332 et seq. For cases see 19 DIGEST (Repl.) 363-366, 460 et seq. As to mandamus, see 11 HALSBURY'S LAWS 84 et seq.; and for cases see 16 DIGEST (Repl.) 315 et seq.

Cases referred to:

- (1) *Phillpotts v. Boyd* (1875), L.R. 6 P.C. 435; 44 L.J.Eccl. 44; 32 L.T. 73; 39 J.P. 244; 23 W.R. 491, P.C.; 19 Digest (Repl.) 255, 190.
- (2) *R. v. Mills* (1831), 2 B. & Ad. 578.
- (3) *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 28 W.R. 726, H.L.; 9 Digest (Repl.) 360, 1526.

**Appeal** from a decision of the Court of Appeal, reported 24 Q.B.D. 213.

The appellants, inhabitants of the diocese of London, made a representation to the bishop, under the Public Worship Regulation Act, 1874, s. 8, that certain figures which had been placed in St. Paul's Cathedral tended to encourage ideas and devotions of an unauthorised and superstitious character, and that superstitious regard and reverence were likely to be and had been paid to them, contrary to the Twenty-second Article of Religion. They further asserted that the figures were unlawful according to the law of the Church of England. The bishop expressed the opinion that proceedings should not be taken on the representation. On July 13, 1888, the appellants applied to the Divisional Court of Queen's Bench, consisting of

- A** LORD COLERIDGE, C.J., and MANISTY, J., for a rule nisi for a mandamus to compel the bishop to proceed, which was granted. The rule came on for argument on June 1, 1889, before LORD COLERIDGE, C.J., MANISTY, J., and POLLOCK, B., when the court made the rule absolute for a mandamus, POLLOCK, B., dissenting. On appeal, the Court of Appeal, consisting of LORD ESHER, M.R., LINDLEY and LOPES, L.JJ., reversed the decision of the court below, and discharged the rule.
- B** The appellants thereupon brought the present appeal to the House of Lords.

*Sir Henry James, Q.C., Fletcher Moulton, Q.C., Danckwerts, and Bovill* for the appellants.

*The Attorney-General (Sir Richard Webster, Q.C.), Sir W. Phillimore and Coward*, for the respondent, were not called upon to argue.

- C** Their Lordships took time for consideration.

July 20, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—Under the Public Worship Regulation Act, 1874, s. 8, certain persons therein described are made competent as complainants if in any cathedral or church alterations or additions to the fabric, ornaments, or furniture thereof have been made without lawful authority, or if any decoration forbidden by law has been introduced into such cathedral or church. The required number of persons competent under the section have in due form made a complaint in which it is stated :

- E** “In or about the month of January, 1888, the dean and chapter of the Cathedral Church of St. Paul introduced into the said church, and set up upon the altar-piece or reredos therein, an image or sculptured subject representing Our Lord upon the Cross, in a conspicuous position immediately above the Communion-table, the figure of Our Lord being of the height of 5 ft. or thereabouts. This image is so constructed as to have the appearance of such an altar crucifix as was used in the Church of England immediately before the Reformation, and so as to answer the purposes for which such a crucifix was intended. At the same period the dean and chapter introduced and set up upon the said altar-piece or reredos an image or sculptured subject representing the Blessed Virgin Mary, with the Child Jesus in her arms, in a conspicuous position a few feet above the said image of Our Lord upon the Cross. The figure of the Virgin is of the height of 5 ft. or thereabouts.”

- G** These representations were duly forwarded to the Bishop of London. The bishop, if he had thought proper, might have taken proceedings thereon as provided by the Act, but he has been of opinion that proceedings should not be taken, and the bishop is the only person who by law has jurisdiction to form an opinion on the subject. There is no right of appeal from his judgment. It is a jurisdiction confined by the legislature to the bishop himself, and there is no power by law to interfere with the judgment which the bishop may form on the subject. By s. 9 it is provided :

- I** “Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion) . . . he shall [certain steps having been taken] proceed to hear the matter of the representation . . . and shall pronounce such judgment . . . as he may think proper, and no appeal shall lie from such judgment . . .”

A peremptory writ of mandamus was obtained on June 1, 1888, directing the bishop to proceed in pursuance of the Act, notwithstanding that on May 23 the bishop had sent, in pursuance of the Act, a statement in writing of the reason for his opinion that proceedings should not be taken on the representation. That statement is as follows :

“We, Frederick, by Divine permission, Bishop of London, having, in pursuance of the provisions of the Public Worship Regulation Act, considered



the whole circumstances attending the above representation, are of opinion that proceedings should not be taken for the following reason: The proposed proceedings have for their object the determination of the question whether a reredos, showing Our Lord on the Cross in a conspicuous position immediately above the Communion-table, and also the Blessed Virgin Mary with the Child in her arms in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law. The main question of principle here at issue has been already decided in the Exeter case (*Phillpotts v. Boyd* (1)). In that case the reredos showed a figure of Our Lord in the act of ascending to Heaven in a conspicuous position immediately above the Communion-table, and this reredos was held to be lawfully erected. The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle laid down in the Exeter case, and whether the reredos now erected in St. Paul's is such an exception. It appears to me impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not. Litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife, it embitters men's feelings, it inflicts much mischief on the Church and on true religion, and it is only tolerable as a preventive of worse mischief that would otherwise follow. It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer it is continued, while the results obtained from it are of exceeding little value. I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which must inevitably be inflicted on them by the litigation itself.—Dated this 23rd day of May, 1888, London House, S.W.—F. London."

I do not deny that, where some authority has been entrusted with a discretion which they decline to exercise a writ of mandamus is an appropriate writ to remedy such neglect of duty, though I very much doubt whether the particular form of peremptory mandamus here awarded could ever be justified under this Act of Parliament. But it is obvious that, to justify any writ of mandamus, it must be made to appear that the bishop has not exercised the jurisdiction which the statute has vested in him. Your Lordships have nothing to do with the question whether his judgment is right or wrong. Your Lordships would be exceeding your own jurisdiction if you were attempting to review a judgment, the jurisdiction to form which the legislature has confided to the bishop and to the bishop alone. I confess I cannot entertain a doubt that the legislature, when using the language, "after considering the whole circumstances of the case," intended to show that the bishop's jurisdiction was not confined to the mere question whether there had been an infraction of the law. They intended to widen and enlarge the considerations which might weigh on the bishop's mind in determining the question whether the proceedings should go on.

It is, perhaps, not unworthy of remark that LORD TENTERDEN, C.J., in *R. v. Mills* (2) uses the very phrase to distinguish a wide and general discretion from that which is confined within narrow limits. He said (2 B. & Ad. at p. 581):

"The justices of the county, into which the apprentice is to be bound, have a general discretion to consider the propriety of the binding. If they had only a particular discretion, and had not exercised it, the court would have compelled them to do so; but here they have a general discretion, after inquiring into all the circumstances of the case, to determine on the fitness of the binding, and, as they have exercised it, there is no ground for a mandamus."

It is, to my mind, obvious that if the only discretion intended to be vested in the bishop was, to use LORD TENTERDEN's language, "a particular discretion," that is

**A** to say, whether the complaint was frivolous or whether there had been really some infraction of the law, it would have been very easy to find appropriate language to give effect to such a provision; but the language of the legislature has, I think, been careful to show that the bishop's discretion is not so fettered, and that the inquiry into all the circumstances of the case is one which may justly include considerations of the good to be done or the mischief involved in proceedings which, **B** unless they obtain the bishop's sanction, cannot proceed.

The reason given by the bishop is said to show that he has not considered all the circumstances of the case. The statement in writing commences with the allegation that he has done so, and it is argued that this cannot be accurate because he states that he has been influenced in deciding the main question principally by *Phillpotts v. Boyd* (1). I am unable to follow the reasoning. The complaint is **C** made of an image or sculptured subject representing Our Lord upon the Cross. It has been in some cases argued that all such sculptured representations are unlawful. The bishop in effect says: "I have considered that question, and *Phillpotts v. Boyd* (1) has decided that all such sculptured representations are not necessarily unlawful." He says, in effect, further on: "I have considered the *redos* now erected in St. Paul's, with a view to see whether there is in it anything which **D** excepts it from the effect of the decision in *Phillpotts v. Boyd* (1);" and he says that it appears to him that the difference between the erections in Exeter and in St. Paul's is not such that it is possible to represent that the one offers serious temptation to idolatry and that the other does not. Rightly or wrongly, the bishop thinks that there is nothing of any importance in the *redos* in question to distinguish it from that which was held to be lawful. I only use that phrase "rightly or wrongly" **E** to emphasise the fact that I am not presuming to enter into the question of the accuracy of the bishop's judgment, over which, as I have said, I have no jurisdiction. The bishop then proceeds to show that the litigation would be mischievous if persisted in; that no important question could be determined by its continuance except one which is already covered by authority, and in his view litigation would be mischievous both to the Church and to the religious life of the **F** country. I am wholly unable to understand how, under such circumstances, it can be contended that the bishop has not considered all the circumstances of the case.

I may say that **LORD HANNEN** and **LORD FIELD** inform me that they entirely concur in the reasons which I have given for my opinion.

**G** **LORD BRAMWELL.**—I am of opinion that this decision should be affirmed. I cannot set any value on the words "whole circumstances of the case." I think the duty of the bishop would be the same without those words as with them. Of course, he is to consider the circumstances of the case—that is the whole, not a part only. *Expressio eorum quæ tacite insunt nihil operatur*. However, I will bear the words in mind. The bishop is to consider the circumstances of the case. **H** It was argued that he need not; that he might say: "I will not consider them," and then he must transmit the representation and proceed as in the statute. There is absolutely no pretence for this contention; he would fail in his duty if he did not consider the case. He is only to transmit the case if he considers he ought. Suppose the words, instead of those used, had been: "If the bishop shall be of opinion that proceedings should be taken, he shall transmit," etc., could there be **I** a doubt that he would have to consider the case? There is, indeed, this difference—that if, as the words stand, he cannot say that proceedings should not be taken, though he could not say affirmatively that they should be, he ought to transmit the representation. For he is not of opinion that he ought not. But that does not show he need not consider the case. He is bound, it is his duty to do so.

Then it was said that there was something he had considered which he ought not to have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am

clearly of opinion it cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. If, indeed, one can suppose the bishop, in such a case as this, refusing to form an opinion, whether by a point-blank refusal, or by such a statement as that he was of opinion proceedings should not be taken because they never should be, it may well be that he might be ordered to do his duty. That would be to consider the case as in the alternative branch of the rule nisi; not to transmit the representation as the rule commands him. How could he, in the case I have put, ask the parties whether they would submit to his directions [see s. 9 of Act of 1874]? I have dealt with this argument, but the question does not arise, for the bishop has considered the circumstances of the case. He has not declined jurisdiction.

Then it is said why, if his decision cannot be reviewed, is he to state his reasons? LINDLEY, L.J., has given an excellent answer to this. It is that he may be under the necessity of forming a careful opinion, and one that will bear public examination. It is like the constitutional duty of judges, who give their reasons for their judgment, though there is no appeal, as in the case of your Lordships, and as formerly the judges of the Superior Court gave on motions for new trials, for example, and other cases, and as they do now, though there was and is no appeal. I believe, if there had been such a law or rule in the Church Discipline Act, 1840, it would have been impossible that the question in *Julius v. Lord Bishop of Oxford* (3) would have arisen. It was asked, what was the use or object of the Act of 1874 if the bishop still has a discretion which cannot be reviewed? I have partly answered that argument already; but if anyone will refer to LORD PENZANCE's opinion in *Julius v. Lord Bishop of Oxford* (3) he will see what might be the application to the bishop, who might make it, and other matters not provided for by the Act of 1840, but provided for in the Act of 1874.

I have one more remark to make. LORD CAIRNS, L.C., said that where there was a discretion the opinion ought not to be criticised. LORD CAIRNS was a great lawyer and a consummate judge, but I differ from him unhesitatingly. I think that it is precisely where there is a discretion that the decision may be criticised. I thought, nay I knew, that the law was being broken, and that there was a refusal to try and stop the illegality. That was wrong, and I said so. It is not a duty in a judge to do that, but it is often done, and with the goodwill and approval of the public, and I would do so in this case if I thought the bishop wrong—that is, if I knew he was not interfering to stop, as in *Julius v. Lord Bishop of Oxford* (3), what he knew was illegal. But I do not; I have absolutely no opinion whether he was right or wrong; I do not understand the matter; it has not been argued before us. I carefully abstain from any indication of an opinion on what may be called the merits, as I think it beside the question before us. These considerations apply to both the cases.

**LORD HERSCHELL.**—The question which arises on each of these appeals is whether a mandamus ought to issue to the Bishop of London commanding him to transmit a copy of the representation of the appellants to the dean and chapter of St. Paul's Cathedral. In the case in which Allcroft and others are the appellants the writ was issued in accordance with the judgment of the majority of the judges who heard the case in the Queen's Bench Division, but the order for the issue of the writ was reversed by the Court of Appeal. The representation made to the bishop was that the dean and chapter had set up upon the reredos an image of Our Lord upon the Cross in a conspicuous position, and also an image of the Virgin Mary with the Child in her arms. It was further represented that each of the images tended to encourage ideas and devotions of an unauthorised and superstitious kind, and that they were additions to the fabric, ornaments, or furniture of the cathedral church, and were decorations forbidden by law. The bishop did not transmit the representation to the dean and chapter, but stated in writing the reasons for his opinion that proceedings should not be taken thereon.



A That it was within his province thus to act, under the provisions of the statute of 1874, could not be denied. The words of s. 9 of the enactment are clear and unambiguous :

B "Unless the bishop shall be of opinion, after considering the whole of the circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion) . . . he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of."

C It is obviously, therefore, a complete answer to the allegation that the bishop has committed a breach of duty in not transmitting the representation to the persons complained of, that he was of opinion, after considering the whole of the circumstances of the case, that proceedings ought not to be taken thereon. But it is said that in the present case it appears, from the reasons he has given, that the bishop's opinion was not formed "after considering the whole circumstances of the case," and that the condition which would alone justify his abstaining from transmitting the representation has thus not been complied with. The appellants insist that if D the bishop considers less than the whole of the circumstances of the case or anything beyond those circumstances in forming his opinion, he is bound to transmit the representation and allow the proceedings to continue, even though he be, in fact, of opinion that proceedings ought not to be taken. And they say that, in the case before your Lordships, it is manifest that his opinion has been based upon considerations outside the circumstances of the case.

E When the statute prescribes that the bishop's opinion is to be formed after considering the whole of the circumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case, and upon the question whether he ought in that case to prevent proceedings being taken. I dissent entirely from the view that it is for the courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinion. If a dozen persons told F to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they had taken into account, I do not believe that any two of them would precisely agree in their statement. Supposing a writ of mandamus were to issue in such a case as this, and that the bishop were to return that he was of opinion, after considering all the circumstances of the case, that proceedings should not be taken, the return would undoubtedly be good G in point of law. It could only be met by a traverse of fact; and a jury would have, I presume, to determine, if the contention of the appellants be well founded, what in their opinion were the circumstances which the bishop ought to have taken into consideration.

H I am satisfied that this could not have been intended by the legislature. It appears to me, I confess, clear that the bishop has been empowered, even where the presentation shows *prima facie* a breach of the law, to say whether under the circumstances the proceedings ought to be permitted. It was contended that inasmuch as the legislature requires the bishop to state the reasons for his opinion, it was intended that these reasons should be reviewed, to the extent at least of seeing that the bishop had considered all the circumstances of the case. I can draw no such conclusion. I think this obligation was imposed upon him in order I to secure, as I think it was calculated to do, a careful consideration of the circumstances of the case, and a conclusion for which, in the bishop's opinion, he was able to disclose adequate reasons. The knowledge that his reasons would be made public and be the subject of criticism, would manifestly tend to prevent capricious and ill-considered action.

Arguments were addressed to your Lordships with a view of showing the inconvenient and mischievous consequences which might flow from such a discretion if uncontrolled; but with this your Lordships have nothing to do; your duty is to administer the law according to its plain interpretation and not to modify it, even

though you should think that by so doing a more just and expedient result would be insured. One can conceive cases, such as were suggested in argument, in which it might be shown that the bishop had not exercised his discretion at all; if, for example, he determined never to permit proceedings under the Act, or laid down some arbitrary rule by which his action was to be governed, independent of the circumstances of the particular representations he might receive, in such an event the courts might well interfere, just as they have done in similar circumstances in the case of justices who were empowered to exercise a discretion; but nothing of the sort was or could be suggested in the present case. It is impossible to read the bishop's statement without seeing that he has honestly considered what appeared to him to be all the circumstances bearing on the question whether proceedings should be allowed to go on.

This being so, it is not for your Lordships, on this application for a mandamus, to consider whether the bishop's reasons are good or bad; whether they ought or ought not to have led him to form the opinion he did. But I think it only right to say that the meaning of that part of his statement which refers to *Phillpotts v. Boyd* (1) has, in my opinion, been misconceived by the appellant. That case did, I think, decide that the introduction of a figure of Our Lord in a reredos as part of a decoration was not of itself necessarily and under all circumstances unlawful. And this is, I think, all that the bishop meant to say in the passage which was so much commented on at the Bar. I am of opinion that the judgment of the court below was right and ought to be affirmed.

*Appeal dismissed.*

Solicitors: *Wainwright & Baillie; Lee, Bolton & Lee.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

## Re NORTH AUSTRALIAN TERRITORY CO., ARCHER'S CASE

[COURT OF APPEAL (Lindley, Bowen and Fry, L.JJ.), November 25, 26, 1891]

[*Reported* [1892] 1 Ch. 322; 61 L.J.Ch. 129; 65 L.T. 800;  
40 W.R. 212; 8 T.L.R. 90; 36 Sol. Jo. 91]

*Company—Winding-up—Misfeasance—Director—Indemnity by promoter against loss on selling qualification shares—Non-disclosure to company.*

In 1887 A., being requested by S., one of the promoters of a company formed to purchase real property acting in the interests of the vendor to the company, to become a director, agreed to do so upon an undertaking by S. that, if A. should desire at any time to part with the shares in the company which he would have to take to qualify him as a director, S. would purchase them from him at the same price which he should pay for them. The company was formed, fifty £10 preference shares were allotted to A. as qualification shares, he paid £500 for them, and from time to time acted as a director. In 1888 he resigned his seat on the board, and shortly afterwards S., at his request, although the shares of the company at that time were valueless, paid him £500 in repayment of the sum which he had originally paid for the shares, and accepted a transfer of them. The arrangement between S. and A. and the payment of the £500 by S. to A. were never disclosed to the board of the company. In the winding-up of the company, the liquidator took out a sum-

**A** mons, under s. 165 of the Companies Act, 1862, [now s. 333 of the Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452] asking that it might be declared that A. was guilty of misfeasance or breach of trust in entering into the agreement with S., and for an order for the payment to the company by A. of £500 and interest.

**B** **Held:** A., as a director, was an agent of the company and as such could not be allowed to make any profit from a transaction within the scope of his agency; in entering into the arrangement with S. and not disclosing it he had been guilty of misfeasance within s. 165; and, therefore, he would be ordered to pay to the company the £500 which he had received from S.

*Re Canadian Oil Works Corpn., Hay's Case* (1) (1875), 10 Ch. App. 593, applied.

**C** *Cavendish Bentinck v. Fenn* (2) (1887), 12 App. Cas. 652, distinguished.

**Notes.** Applied: *Re London and South Western Canal*, [1911] 1 Ch. 346. Referred to: *Rowland v. Chapman*, *Rowland v. Corrie*, *Rowland v. Corrie*, *Rowland v. Brandreth* (1901), 17 T.L.R. 669; *Kregor v. Hollins* (1913), 109 L.T. 225; *Re Etic*, [1928] Ch. 861; *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378.

**D** As to misfeasance proceedings in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 621-628; and for cases see 10 DIGEST (Repl.) 943 et seq.

Cases referred to:

- (1) *Re Canadian Oil Works Corpn., Hay's Case* (1875), 10 Ch. App. 593; 44 L.J.Ch. 721; 33 L.T. 466; 24 W.R. 191, L.J.J.; 9 Digest (Repl.) 513, 3376.
- F** (2) *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 36 W.R. 641, H.L.; 10 Digest (Repl.) 945, 6493.
- (3) *Lister & Co. v. Stubbs* (1890), 45 Ch.D. 1; 59 L.J.Ch. 570; 63 L.T. 75; 38 W.R. 548; 6 T.L.R. 317, C.A.; 1 Digest (Repl.) 549, 1715.
- (4) *Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case* (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 9 Digest (Repl.) 473, 3094.
- F** (5) *Re Caerphilly Colliery Co., Pearson's Case* (1877), 5 Ch.D. 336; 46 L.J.Ch. 339; 25 W.R. 618, C.A.; 9 Digest (Repl.) 513, 3380.

Also referred to in argument:

- Re West Jewell Tin Mining Co., Weston's Case* (1879), 10 Ch.D. 579; 48 L.J.Ch. 425; 40 L.T. 43; 27 W.R. 310, C.A.; 9 Digest (Repl.) 515, 3391.
- G** *Nant-y-glo and Blaina Ironworks Co. v. Grave* (1878), 12 Ch.D. 738; 38 L.T. 345; 26 W.R. 504; 9 Digest (Repl.) 513, 3382.
- Re Carriage Co-operative Supply Association* (1884), 27 Ch.D. 322; 53 L.J.Ch. 1154; 51 L.T. 286; 33 W.R. 411; 9 Digest (Repl.) 475, 3106.
- Re Morvah Consols Tin Mining Co., McKay's Case* (1875), 2 Ch.D. 1; 45 L.J.Ch. 148; 33 L.T. 517; 24 W.R. 49, C.A.; 9 Digest (Repl.) 43, 87.
- H** *Eden v. Ridsdales Railway Lamp and Lighting Co., Ltd.* (1889), 23 Q.B.D. 368; 58 L.J.Q.B. 579; 61 L.T. 444; 54 J.P. 20; 38 W.R. 55, C.A.; 9 Digest (Repl.) 515, 3392.
- Metropolitan Bank v. Heiron* (1880), 5 Ex.D. 319; 43 L.T. 676; 29 W.R. 370, C.A.; 9 Digest (Repl.) 541, 3560.
- I** *Peck v. Derry* (1887), 37 Ch.D. 541; 57 L.J.Ch. 347; 59 L.T. 78; 36 W.R. 899; 4 T.L.R. 84, C.A.; on appeal sub nom. *Derry v. Peck* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 9 Digest (Repl.) 127, 685.
- Re British Provident Life and Guarantee Association, De Ruvigne's Case* (1877), 5 Ch.D. 306; 46 L.J.Ch. 360; 36 L.T. 329; 25 W.R. 476, C.A.; 9 Digest (Repl.) 464, 3034.
- Salford Corpn. v. Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 1 Digest (Repl.) 549, 1718.



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"There is no doubt about the rule of this court that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. It is perfectly settled law that that rule applies with peculiar stringency to the directors of joint stock companies, who are the agents of the company for effecting the sales or the purchases made by the company."

The lord justice goes on to say that the only question is whether Sir John Hay in that case came within that principle.

Counsel for Mr. Archer have argued that that principle is not applicable to this case, and they put it in this way very forcibly. They say that this is a new case, and I think it is as regards the details of it. They say that there was nothing got from the company by Mr. Murray Smith, and through Mr. Murray Smith to Mr. Archer. I do not know whether that was so or not. I am not going to speculate whether it was; but Mr. Murray Smith unquestionably was a promoter acting in the interests of the vendor. Whether Mr. Murray Smith got anything out of this company or not, I do not know. Was he one of those possibly benevolent promoters of whom one can speculate? I never met with one or heard of one, and I never knew a promoter of a company to buy land in a colony from motives of pure benevolence. But we will suppose he did, and we will suppose that Mr. Murray Smith got nothing directly or indirectly out of this company. Still, it cannot be right, considering the position of a promoter and the position of directors, for a promoter to put a director in the position in which Mr. Murray Smith put Mr. Archer. What is the object of having a stipulation in the articles of a company that a director should have qualification shares? It is to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different from what he would if he had no interest in them at all. If there is a board of directors, some of whom have got that interest which they are intended to have, and some of whom have not because they are indemnified against all possible loss, can it be said that a bargain like that is one which is justifiable between a promoter and a director, and which does not bring the director within s. 165 if he receives anything by virtue of that bargain? It seems to me it is entirely fraudulent; fraudulent, I mean, in the sense that it was putting Mr. Archer in a position in which he was never intended to be by the articles or the constitution of this company.

It is said that there was no loss to the company. That is quite true if you look at the matter from one point of view; but it is not true if you look at it from another. It is quite true that the company, having got £500 in respect of those shares, have not lost anything by giving those shares to Mr. Archer. That is perfectly true; but when it is said that there is no loss to the company that is really begging the question. If this money which Mr. Archer got from Mr. Murray Smith ought to be accounted for to the company, the company loses if they do not get it. Then it is said that there is no profit to Mr. Archer. That again depends upon what stage of this proceeding you look. If you look at it from the beginning he has made no profit out of it. He paid £500 for his shares, and has got £500 back. But if you look at his position at the time he got the £500 he made a very large profit. The shares were his; they were not worth £500, they were worth nothing, and he got £500 for them. What is that, if he is accountable to the company in respect of that sum, but the loss caused to the company which they seek to avoid by making him liable? It was said that there is no dishonesty in the case. I do not pursue that further; I have said quite enough about that in my observations respecting the arrangement in general, which is not creditable to say the least of it.

That being the case, why does it not come within the principle to which I have alluded, and which is explained in that passage I read from the judgment of

**A** MELLISH, L.J.? Has not this gentleman obtained from Mr. Fisher in respect of his agency sums which, upon the principle which I have endeavoured to explain, are payable by him to the company? To say that they are the company's moneys is to use an ambiguous expression. In one sense unquestionably they are the company's moneys, that is to say, in the sense that the company are entitled to get them. In another sense, they are not the company's moneys, in the sense that the company cannot follow them, or, in the event of Mr. Archer's bankruptcy, they could not withdraw the money from his assets instead of ranking as creditors against his estate. The difference is explained in *Lister & Co., Ltd. v. Stubbs* (3).

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**E** The present case proceeds upon the ground that Mr. Archer has received money to which the company is entitled, and the observation, therefore, that there has been no loss by the company, or that the liquidator cannot take out a summons under s. 165 unless he shows that the breach of duty has resulted in loss to the assets of the company, and that he has a direct pecuniary interest in the success of the application, is inapplicable to this case. In *Cavendish Bentinck v. Fenn* (2) it was put as a breach of trust—a breach of trust without any loss to the company.

**F** If that be so, of course there was nothing to recover, and the decision of the House of Lords showed that there was nothing to recover. Why? Because Mr. Fenn, not having received anything, ought not to be called upon to pay anything. If you once get the prior conclusion that the person proceeded against has received money to which the company is entitled, and does not pay it over, those observations of LORD HERSCHELL have no real bearing on the case before us. It seems to me,

**G** therefore, that this case is within the principle laid down in *Hay's Case* (1). Although in one sense the company have not lost money, in another sense they have been kept out of that which they have a right to retain and receive; and although in one sense Mr. Archer has not made any profit out of this transaction, in another and a very real sense he has, and that profit belonged to the company and not to himself. I think the learned judge has failed to do what is right in this case, and that Mr. Archer ought to be ordered to repay the money. As regards interest, we think it would be right to give interest from the date of the summons at 5 per cent. per annum. The liquidator is entitled to an inquiry whether Mr. Archer is to pay the whole £500, or only the difference between the actual value of the shares and the £500. The costs will include the costs here and the costs below.

**I** **BOWEN, L.J.**—I am of the same opinion. I will add some observations on the question that has been argued before us, out of respect to the learned judge in the court below, from whom we are differing. Mr. Archer was induced by a promoter of the company, who was acting in the interests of the vendor—induced, that is to say, by a person who stood in a fiduciary relation to the company—to become a director. In order to induce him to become a director, Mr. Murray Smith gave him a promise—afterwards fulfilled—to indemnify him against loss in respect of his qualification shares. The shares, when they were bought by Mr. Archer, were

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valuable things. In the course of time their value fell to nothing, the indemnity was made effective, and Mr. Archer emerged from the transaction, not, indeed, with a profit in one sense, but without the loss which otherwise he would have sustained. A

What is the true course of reasoning on the subject? As it seems to me, it is this. That promise of an indemnity, or that indemnity as I may call it, was a valuable consideration. It was not money, but it was money's worth, the measure and exact value of which depended upon the future, and events which have subsequently happened show that the measure and value of that indemnity was £500. B  
The right to that indemnity when it was given, whether it was destined by fate to become an important thing or a less important thing, belonged to the company; their agent, their director, or the gentleman who was going to become their director, received it in order to induce him to become a director, and he received it from a person standing in a fiduciary relation to the company. What is the law? It is clear and simple. The company ought to have been told of the existence of that indemnity in order that they might elect whether they would let their director keep the advantage or not. As soon as the indemnity became fruitful, the money which arose from it became money for which the director, who had kept it secret, was bound to account to the company. That seems to me the law, and, differing from the learned judge whose judgment is under consideration, I cannot see that it can be truthfully said that there was no loss to the company. It is perfectly true that in one sense there was no loss; but in another sense there was. The loss was that the company did not get the benefit of the indemnity which ought to have been theirs, but that somebody else got it. They did not have accounted for to them the value of this indemnity as soon as it became valuable. They ought to have had it accounted for, and the non-accounting for it was a misfeasance. C  
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E

That I take to be the law, but is it not good sense and business as well as law? A promoter, who is acting in the interests of a vendor, is forming a company. A company is formed by which a director is to be qualified by the holding of fifty shares. What is the object of such a clause? Among others, that the company shall have the security that the director has some interest in the concern while he is acting as director, and that he shall not be simply in the position of a person who is playing ducks and drakes with other people's money. It is, so far, a shield to the company. The promoter who is promoting the company indemnifies the director against any loss on those shares, that is to say, he destroys by his agreement the one element which guarantees the company for the vigilance of their director. The director is a person placed on the board to watch, among other things, the proceedings of the promoter who is acting as agent for the vendor. Is it lawful, is it tolerable in equity or in law, that a promoter should be at liberty to have a director in his pay? Certainly not. But he is really having him in his pay if he is guaranteeing him against loss in respect of shares which the director is bound to hold to qualify himself under articles. As I said during the argument, the director is a watch dog, and the watch dog has no right, without the knowledge of his master, to take a sop from a possible wolf. F  
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The case seems to me to be clear, but the point was taken by Mr. Archer's counsel that there was no evidence here of non-disclosure to the other directors of the receipt of this promise of indemnity. That is a point which would have deserved attention if the case was being tried in the first instance, because the onus of proving misfeasance rests upon those who desire to prove it. But we have the facts illuminated by the light of the letters which passed between Mr. Archer and Mr. Murray Smith. Mr. Murray Smith gave the promise of the indemnity upon the terms that there should be no disclosure of what had been done. Mr. Archer, who accepted the indemnity on those terms, as an honest man must be taken to have carried them out. He does not repudiate the terms of Mr. Murray Smith; he accepts the indemnity and acts upon it. There is not a trace in the correspondence of any disclosure to the board, and when Mr. Archer goes into the box and is examined he does not suggest to his counsel, and his counsel does not I

**A** suggest to him in the questions he puts in examining him, that there ever was a disclosure of this indemnity, a matter which, it was agreed in the first instance, should be buried in silence. It would be puerile to allow a case clear in law against Mr. Archer to be defeated upon the ground that there is here no evidence of non-disclosure. There is evidence of non-disclosure enough to satisfy any court in feeling perfectly safe in acting upon it. I, at all events, have no hesitation in

**B** deciding that point against Mr. Archer, and I think, for the reasons which have been given by my learned brother, that *Cavendish Bentinck v. Fenn* (2) has no application. There is a difference between that case and this in the point he mentioned. I, therefore, agree that the appeal must be allowed with costs.

**C** **FRY, L.J.**—I am entirely of the same opinion. The point which has been much pressed upon us is the want of any evidence of loss by the company as the result of this transaction. On principle, I do not think that that point can be maintained, and I can add nothing useful to what has been said by my learned brethren. But this observation I will make, that the argument appears to me to be inconsistent with two cases.

**D** In *Hay's Case* (1) the company agreed to pay a sum of money to the vendor of the property purchased. On one day they were paying a sum of £58,000 in part payment of that purchase money. Cheques were drawn in favour of the agent of the vendor, and one of those cheques was endorsed over to Sir John Hay. The company, therefore, was making a payment which they were bound to make, and they lost nothing in one sense by Sir John Hay receiving the money. The only loss they sustained was by Sir John Hay not accounting for it when he got it.

**E** It appears to me that there was exactly the same loss in that case, as far as loss is necessary, as there is in the present case. Again, in *Re Caerphilly Colliery Co., Pearson's Case* (5) the same observation can be made. The company there issued for some consideration or the other fully paid-up shares. Some of these shares were given by the promoter of the company to Sir Edwin Pearson. The company, therefore, got all they stipulated for in return for the shares that they issued and

**F** which were in Sir Edwin Pearson's hands, and yet because he ought not to have taken those fully paid-up shares, but ought to have paid the amount which was not payable by reason of the bargain between the company and the promoters, he was held liable to make good and treat the shares as if they were not paid-up at all. It might be said in both those cases (in *Hay's Case* (1) the payment was to the vendor, and in *Pearson's Case* (5) the payment was to the promoter) that the

**G** company lost nothing by the money in the one case and the shares in the other reaching the hands of the directors. But the court said that because the directors were accountable it did.

Those observations appear to me entirely to apply to the present case. It is quite true in this case that the company lost nothing, in this sense, that they received £500 for the shares. But they have not received the £500 which

**H** Mr. Archer has received by virtue of the indemnity which he obtained from the promoter. On principle, I think that those two cases are not distinguishable from the present. With regard to the question that there was a want of evidence in the present case of the non-disclosure of this bargain to the company, I am bound to say that to my mind the *res ipsa* almost convinces one that there was no disclosure. An agreement of this sort from its very nature is intended not to be

**I** disclosed. It is not one of those honest and straightforward transactions which men, who value their character or men of business, might desire to be disclosed. But if further evidence be wanted, I think it is abundantly found in the letter to which reference has been made. I think we should be closing our eyes to what are obviously the real facts of the case, and should be acting as men who were neglecting to take cognisance of the ordinary course of human affairs, and of the ordinary motives by which mankind is actuated, if we did not conclude from the facts before us that there was no disclosure of this letter to the company. With regard to the general law and the other branches of fact I have nothing to add. I can only



express my entire concurrence in everything that has been said by my learned A  
brethren.

*Appeal allowed.*

Solicitors: *Saunders, Hawksford, Bennett & Co.; Mackrell, Maton & Godlee.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*] B

## HOLYWELL UNION ASSESSMENT COMMITTEE AND OTHERS v. HALKYN DISTRICT MINES DRAINAGE CO.

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Macnaghten and Lord Davey),  
November 19, 20, 22, December 17, 1894]

[Reported [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818;  
59 J.P. 566; 11 T.L.R. 132; 11 R. 98]

*Rates—Rateable occupation—Enjoyment of easement—Easement requiring  
occupation of land for its exercise—Right to occupy conferred on grantee.*

Mere enjoyment of an easement over land does not constitute rateable  
occupation of the land, but an easement or incorporeal right may be of such  
a character as requires the occupation of land for its exercise and confers on  
the grantee a right to occupy land during its continuance, and in such a case  
the grantee is in rateable occupation of the land.

Where a company was granted a right to adapt and use a tunnel and open  
cut for drainage purposes,

**Held:** the company was de facto in possession, for a purpose beneficial to  
themselves, of the space in the soil which their drainage works filled, and,  
therefore, they were in rateable occupation although they had no proprietary  
interest in the soil.

*Rates—Rateable occupation—Question of fact—Irrelevance of legal title.*

The question whether a person is in rateable occupation of land is a question  
of fact and does not depend on legal title. The person legally possessed may  
not occupy.

*Rates—Rateable occupation—Joint occupation of premises—Liability of occupier  
in paramount occupation.*

Where persons are in joint occupation of premises he is in rateable occupa-  
tion whose occupation is paramount. It is, therefore, necessary in such cases  
to consider what degree of right each party may have in the premises.

**Notes.** Considered: *Percy v. Hall* (1903), 88 L.T. 830. Applied: *Mitchell Bros.  
v. Workop Union Assessment Committee*, [1904-7] All E.R.Rep. 107; *Young  
v. Liverpool Assessment Committee*, [1911] 2 K.B. 195. Followed: *Morgate Corpn.  
v. Pettman* (1912), 106 L.T. 104. Considered: *Cleveland Bridge and Engineering I  
Co. v. Darlington Union Assessment* (1923), 21 L.G.R. 511. Applied: *Back v.  
Daniels*, [1924] All E.R.Rep. 789. Considered: *Re Southern Rail. Co.* (1935),  
153 L.T. 105; *Westminster Corpn. v. Southern Rail. Co.*, [1936] 2 All E.R. 322;  
*Solihull Corpn. v. Gas Council*, [1961] 1 All E.R. 542. Referred to: *Manchester,  
Sheffield and Lincolnshire Rail. Co. v. Kingston-upon-Hull Guardians, etc.* (1896),  
75 L.T. 127; *Ystradfydwg and Pontypridd Main Sewerage Board v. Newport  
(Mon.) Assessment Committee* (1901), 70 L.J.K.B. 318; *Bootle Overseers v.  
Liverpool Warehousing Co., Same v. Webster*, [1900-3] All E.R.Rep. 262;

- A** *Swansea Union Assessment Committee v. Swansea Harbour Trustees* (1907), 97 L.T. 585; *Winstanley v. North Manchester Overseers*, [1908–10] All E.R.Rep. 752; *Liverpool Corp'n. v. Chorley Union Assessment Committee*, [1911–13] All E.R.Rep. 194; *Re Nott and Cardiff Corp'n.*, [1918] 2 K.B. 146; *Hackney Borough Council v. Metropolitan Asylums Board* (1924), 131 L.T. 136; *Bertram v. Wightman*, [1936] 2 All E.R. 487; *Associated Cinema Properties, Ltd. v. Hampstead Borough Council*, [1943] 2 All E.R. 696; *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218; *Gyton v. Palmour*, [1947] L.J.R. 428; *John Laing & Son, Ltd. v. Kingswood Assessment Committee*, [1949] 1 All E.R. 224.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for cases see 38 DIGEST (Repl.) 476 et seq.

**C** Cases referred to:

- (1) *R. v. Chelsea Water Works Co.* (1833), 5 B. & Ad. 156; 2 Nev. & M.K.B. 767; 2 Nev. & M.M.C. 13; 2 L.J.M.C. 98; 110 E.R. 750; 38 Digest (Repl.) 505, 194.  
 (2) *Pimlico Tramway Co. v. Greenwich* (1873), L.R. 9 Q.B. 9; 43 L.J.M.C. 29; 29 L.T. 605; 38 J.P. 117; 22 W.R. 87; *Ryde, Rat. App.* (1871–85) 97; 38 Digest (Repl.) 495, 140.  
 (3) *Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q.B.D. 267; 54 L.J.M.C. 63; 52 L.T. 793; 49 J.P. 724; 33 W.R. 203; 1 T.L.R. 111, C.A.; 38 Digest (Repl.) 495, 143.

- (4) *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; sub nom. *West Middlesex Waterworks Co. of Proprietors v. Hampton Overseers*, 5 Jur.N.S. 1159; 38 Digest (Repl.) 503, 182.

- (5) *Cory v. Bristow* (1875), 1 C.P.D. 54; 45 L.J.M.C. 145; 33 L.T. 624; 24 W.R. 336, C.A.; affirmed (1877), 2 App. Cas. 262; 46 L.J.M.C. 273; 36 L.T. 594; 41 J.P. 709; 25 W.R. 383, H.L.; 38 Digest (Repl.) 504, 189.

- (6) *R. v. Mersey and Irwell Navigation Co. of Proprietors* (1829), 9 B. & C. 95; 4 Man. & Ry.K.B. 84; 2 Man. & Ry.M.C. 106; 7 L.J.O.S.M.C. 70; 109 E.R. 36; 38 Digest (Repl.) 549, 417.

- (7) *Doncaster Union Assessment Committee v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1894), [1895] A.C. 133, n.; 71 L.T. 585; 10 T.L.R. 567; 6 R. 280, H.L.; 38 Digest (Repl.) 496, 144.

- (8) *Smith v. St. Michael, Cambridgeshire Overseers* (1860), 3 E. & E. 383; 3 L.T. 687; 25 J.P. 133; 7 Jur.N.S. 24; 121 E.R. 486; sub nom. *R. v. Smith*, 30 L.J.M.C. 74; 38 Digest (Repl.) 498, 160.

- (9) *London and North Western Rail. Co.* (1874), L.R. 10 Q.B. 70; 44 L.J.M.C. 29; 31 L.T. 835; 39 J.P. 149; 23 W.R. 160; affirmed (1875), L.R. 10 Q.B. 444; 44 L.J.M.C. 180; 33 L.T. 329; 39 J.P. 692; 24 W.R. 16, Ex. Ch.; 38 Digest (Repl.) 500, 166.

- (10) *Rochdale Canal Co. v. Brewster*, [1894] 2 Q.B. 852; 64 L.J.Q.B. 37; 71 L.T. 243; 59 J.P. 132; 10 T.L.R. 595; 9 R. 680; *Ryde & K.Rat. App.* 143, C.A.; 38 Digest (Repl.) 501, 170.

Also referred to in argument:

- Talargoch Mining Co. v. St. Asaph Union* (1868), L.R. 3 Q.B. 478; 9 B. & S. 210; 37 L.J.M.C. 149; 18 L.T. 711; 32 J.P. 501; 16 W.R. 860; 38 Digest (Repl.) 494, 137.

- Badger v. South Yorkshire Railway and River Dun Co.* (1858), 1 E. & E. 359; 28 L.J.Q.B. 118; 32 L.T.O.S. 207; 5 Jur.N.S. 459; 7 W.R. 130; 120 E.R. 945, Ex. Ch.; 44 Digest 109, 885.

- Southport Corp'n. v. Ormskirk Union Assessment Committee*, [1894] 1 Q.B. 196; 63 L.J.Q.B. 250; 69 L.T. 852; 58 J.P. 212; 42 W.R. 153; 10 T.L.R. 34; 9 R. 46; *Ryde, Rat. App.* (1891–93) 438, C.A.; 38 Digest (Repl.) 497, 152.

*Metropolitan Rail. Co. v. Fowler*, [1893] A.C. 416; 62 L.J.Q.B. 553; 68 L.T. 390; 57 J.P. 756; 42 W.R. 270; 9 T.L.R. 610; 1 R. 264, H.L.; 19 Digest (Repl.) 8, 5. A

*Roads v. Trumpington Overseers* (1870), L.R. 6 Q.B. 56; 40 L.J.M.C. 35; 23 L.T. 821; 35 J.P. 72; 38 Digest (Repl.) 495, 138.

*Watkins v. Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350; 37 L.J.M.C. 73; 18 L.T. 601; 32 J.P. 294; 16 W.R. 1059; 38 Digest (Repl.) 561, 493. B

*Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; 3 C.L.R. 973; 24 L.J.M.C. 146; 25 L.T.O.S. 166; 19 J.P. 375; 1 Jur.N.S. 733; 3 W.R. 518; 156 E.R. 795; 42 Digest 897, 73.

**Consolidated Appeals** from a decision of the Court of Appeal (LORD ESHER, M.R., LOPES and KAY, L.JJ.), reversing a decision of the Queen's Bench Division (MATHEW and HENN COLLINS, JJ.), on a Case Stated by Flintshire Quarter Sessions. C

*Sir Henry James, Q.C., Balfour Browne, Q.C., and Honoratus Lloyd* for the appellants.

*Sir Richard Webster, Q.C., Bosanquet, Q.C., and F. Marshall, Q.C.*, for the respondents. D

Their Lordships took time for consideration.

Dec. 17, 1894. The following opinions were read.

**LORD HERSCHELL, L.C.**—By an Act passed in the year 1875, the respondent Company, the Halkyn District Mines Drainage Co., was incorporated. By s. 6 they were empowered to make and maintain certain tunnels described in the deposited plans and sections, and to enter upon, take, and use, or at their option to purchase, and take an easement in, through, over, or under, or right of using such of the lands described as might be required for that purpose. By s. 7 the company were empowered to purchase or lease a tunnel—known as the Halkyn Deep Level—and also an existing open cut or watercourse, or an easement, in, through, or over, or right of drainage through, or other right of using the same. In the event of the company acquiring the Halkyn Deep Level and existing cut, or any such easement or right, power was given to cleanse, deepen, widen, straighten, enlarge, divert, or improve the same. On Dec. 14, 1882, a deed of grant was made by the Duke of Westminster to the respondent company with the view of carrying out the object of the Act. I shall have presently to examine carefully the terms of this grant, as I think the decision of this case turns almost entirely upon what was its nature and effect. While the negotiations for the deed were proceeding, the respondent company had constructed a portion of the tunnel or level, and since the execution of the deed they have continued the tunnel or level for some distance further. They have also deepened the open cut, and built up the sides of it to prevent the loose ground of the hillside from slipping into it. They have also substantially and permanently repaired the tunnel. In carrying out the works they placed in the tunnel a quantity of iron tubing of oval shape about five feet high, and, as to part thereof, arched the same over with fire bricks, and in other ways supported the roof. E F

Under these circumstances, the question arose whether the respondent company were liable to be rated as occupiers of the tunnels and open cut to which I have referred. Quarter sessions held that they were so liable, subject to a Case which they stated for the opinion of the Queen's Bench Division. MATHEW and HENN COLLINS, JJ., were of opinion that the decision of the sessions was right. On appeal this decision was reversed. The Court of Appeal were of opinion that the effect of the deed was to convey to the respondent company an easement only. If this view be correct, I think there can be no doubt that the conclusion that the respondent company are not rateable necessarily followed. In the Court of Appeal it was, I gather, argued on behalf of the present appellants that the G H I



**A** ownership of the tunnel was by the deed of grant conveyed to them. In consequence, probably, of the line of argument adopted, the case appears to have been treated by the learned judges as one in which the only alternative views were ownership or easement. I do not think that this is so. No doubt, if it could be shown that the respondent company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement, and, **B** being owners, they would, *prima facie*, be the occupiers; they would be so regarded unless the occupation were shown to be in some one else. But even if it be established that on the true construction of the deed they are not owners, it does not follow that they were possessed of an easement only and were not occupiers. There may be occupation without even the existence of the relation of tenant towards the owner of the property. And I think land may be occupied **C** for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated. I will refer later on to the authorities which appear to me to support this view.

I turn now to a consideration of the terms of the grant. It grants, first:

**D** "all such easements in and through and right of drainage through and other and exclusive rights of using (but subject nevertheless and except and reserving as hereinafter mentioned) the Halkyn Deep Level hereinbefore described and shown on the said plan by the colours black and pink as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking or any of such purposes together with power from time to time to uphold, maintain, cleanse, repair, scour, deepen, widen, straighten, alter, enlarge, divert, and improve the said Halkyn Deep Level, when and to such **E** extent as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking."

It further grants:

**F** "full right and liberty at any time and from time to time hereafter to make, form, construct, maintain, and exclusively use (but subject nevertheless and except and reserving as hereinafter mentioned) under or through any land within the said area No. 1, of which the said duke is legal tenant for his own life, or of or to which he is seised or entitled for any greater estate, tunnels in continuation of or in connection with the said Halkyn Deep Level as now existing and shown on the said plan by the colours black and pink, the limit of which land towards the south is shown by a line on the said plan, and to **G** make, construct, execute, and do all such works and things as shall be necessary or convenient for that purpose."

Then follow the words, "and such easements," etc., in precisely the same terms as in the first grant.

**H** Both these grants are made subject to, and there is excepted and reserved from them, what is afterwards mentioned. These exceptions and reservations seem to me to throw much light upon the effect of the grant, and upon the question whether all that passed by it to the drainage company was a mere easement. In the first place, there is excepted and reserved to the duke

"all lead and lead ore which in making or extending the tunnels and works shall be found discovered or gotten."

**I** Next, there is reserved to the duke and his assigns

"the right to use the Halkyn Deep Level and the tunnels to be made by the drainage company as aforesaid for searching for and working the mines and beds of lead, lead ore and blende which can conveniently be sought for, obtained, and gotten by communications with or otherwise by means of the said Halkyn Deep Level and tunnels, or any of them respectively, or any part or parts thereof respectively, and for removing through or by means of the said Halkyn Deep Level and tunnels, or any of them respectively, or any part or parts thereof respectively, and through or by means of any shafts, levels,

and drifts, in use by the said company, all lead, lead ore, and blende, which may be so obtained and gotten, and all débris and waste materials necessary or convenient to be removed in searching for, obtaining, and getting such lead, lead ore, and blende."

If all that was intended to be granted was an easement to allow the drainage water to pass along the tunnels, and the possession of the tunnels remained in the duke (which is the hypothesis contended for by the respondents), it is difficult to understand how these rights, which the duke was to have in relation to the tunnels, were treated as exceptions and reservations out of and from the grant to the drainage company, and were conferred upon the duke in the manner in which they have been by the deed.

The matter does not stop there, because in a subsequent part of the deed there is a covenant by the respondent company, in the following terms:

"And also will from time to time and at all reasonable times permit and suffer the said duke and his assigns or the owner or owners for the time being of the lands shown on the said plan of which the said duke is legal tenant for his own life, or of or to which he is seised or entitled for any greater estate, and his and their agents and surveyors, to go down, dial, and measure all and every or any of the said Halkyn Deep Level and tunnels, and shafts and other works of the said company at all convenient times, and for that purpose to make use of all machinery in and about such works, he or they not unnecessarily obstructing or interfering with the user of the said level, tunnels, shafts, and works, for the purpose of the said company's undertaking, or obstructing or hindering further than need shall absolutely require the said company, their successors or assigns, or their servants, in the prosecution of any of their works or operations."

If the company were to have an easement only, and were not to be in possession of the tunnels and works which they constructed, and the duke was to remain in possession of them, it is difficult to understand why a covenant should be taken to "permit and suffer the duke to go down dial and measure" the tunnels and shafts. It is true that the first grant confers such exclusive rights of using the level as may be necessary or convenient for the purposes of the Act, but they have power to enlarge and divert the level, and for that purpose to enter upon the duke's lands which adjoin or are near to the level. With regard to the new tunnel, as I have already shown, in addition to the grant of easements and exclusive rights, full right is given to make and exclusively use the tunnels, subject only to the exception or reservation in the duke's favour. The exceptions are followed by a proviso

"that the rights under the exceptions and reservations hereinbefore contained shall not be used or exercised so as to obstruct, hinder, delay, or interfere with the prosecution by the said company of any works or operations of the said company under the authority of these presents, or for the purposes of the said Act, or of the said company's undertaking, or to the damage, injury, or prejudice of the said level, tunnels, and shafts, or any other works of the said company, or so as to obstruct or interfere with the free flow of water through the said level or any of the tunnels and levels of the said company, or with the user for the purposes of the said Act, or of the said company's undertaking of the said level, or any of the tunnels, levels, and works of the said company."

This is not all. It is also provided that the rights under the exceptions and reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and such byelaws allowed in manner provided by the Act as shall for the time being be in force. The Act, by s. 45, makes it unlawful for any person without the written consent of the company first had and obtained, and then only subject to such conditions and regulations

A as should be prescribed by the company "to make or form any communication to or with the tunnels and levels or other works of the company." So it is clear that the duke can have no rights in respect of the tunnels except those expressly reserved to him by agreement in the deed of grant. By s. 46 of the Act the company are authorised to make byelaws for the protection of their works, and "for preventing the flow, escape, or percolation of water by any means inconsistent with those prescribed or provided by the company."

B It seems to me clear, therefore, that with regard to these tunnels the rights of the respondents are paramount, and those of the duke are subordinate to them. Upon a careful consideration of the terms of the deed of grant I am unable to adopt the conclusion that it conferred upon the respondents an easement or rights in the nature of an easement only. I think that it gave them the possession of the tunnels of which they thus have the exclusive use for purposes of drainage, and that such rights as remained in the duke were only those expressly reserved to him, and which were subordinate to those possessed by the company. If the possession thus became theirs it is quite immaterial to my mind for the present purpose whether they became the owners or not. Along the tunnel for a considerable distance the company have placed iron tubing; in parts they have placed brick arches; it seems to me that in these parts they occupy land precisely in the same sense as a water company does by its pipes, or a tramway company by its rails, or a telephone company by the supports for its wires. As to those parts of the tunnel which are so occupied, I can see no substantial distinction between the present case and those in which it has been held that water companies, tramway companies, and telephone companies, are rateable. But even as to the part where there is no tubing or arches, I think the respondents are in possession. They may at any time place such works in any parts of the tunnel that they please, and, as I have already pointed out, it rests with them not only in the first instance to determine the direction of the tunnel, but at any time they please to divert it and alter its direction.

F The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of the owner. In *R. v. Chelsea Water Works Co.* (1), a water company to whom the Crown granted the right to lay down their pipes were held by the Court of King's Bench to be occupiers of land, and liable to be rated. In *Pimlico Tramway Co. v. Greenwich* (2), a tramway company was held liable in respect of the occupation of the road by their tramways. They were certainly not the owners of any part of the road; they were merely authorised to lay down the rails thereon. The only right which they possessed was an exclusive right of using those rails by carriages with flanged wheels; the public retained the right to pass over them, and use them in any other way; the company were, nevertheless, held liable to be rated. In *Lancashire Telephone Co. v. Manchester Overseers* (3), a telephone company were held liable to be rated in respect of their wires and poles where the poles were attached to the roofs or walls of houses by the permission of the occupier, who, nevertheless, retained complete control of the building so that the company could only obtain access to the roof by his permission. LINDLEY, L.J., there said:

I "The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements, and have been held rateable."

In the present case, for the reasons I have given, I think that the respondents, and not the duke, were the occupiers of the tunnels and works for rating purposes. It was strongly contended, on behalf of the respondents, that they could not be liable to be rated, inasmuch as they were not in exclusive occupation. There



are many cases where two persons may without impropriety, be said to occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are in a sense in occupation, but the occupation of the landlord is paramount—that of the lodger, subordinate. In the present case, in my opinion, on the true construction of the deed, the possession of the respondents is paramount, and any rights which the duke has are subordinate. The respondents alone have the right of using the tunnels for the primary purpose for which they have been constructed. The duke has no such right, and, in my opinion, the respondents are in occupation of the tunnels and works.

I arrive at the conclusion I have indicated, differing as it does from the Court of Appeal, with the less hesitation, inasmuch as the contention before them appears to have been, on the one side, that an easement only was granted; on the other, that the respondents were owners of the tunnels and works. The view which was presented to your Lordships that the respondents might be in occupation of the land, even though the purpose for which it was to be used was in the nature of an easement, does not appear to have been before them. No reference was made to the works they had actually constructed in the tunnels, or to the cases which I have cited which seem to me to have so direct a bearing upon the question to be determined. I think the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs here and in the courts below.

**LORD MACNAGHTEN.**—If it had not been common ground that the possession of the Halkyn District Mines Drainage Co. was in conformity with their documentary title, it would, I think, have been more than doubtful whether the Court of Appeal were right in treating the question before them as a question of construction. Liability to rates is not a question of title. The question in each case must be whether there is, in fact, such an occupation as according to the Statute of Elizabeth and a course of decisions which have been recognised and established as law carries with it liability for rating purposes. In the present case, however, it is not suggested, on the one hand, that the possession of the company is greater, or, on the other hand, that it is in any respect less, than the possession authorised by the combined operation of the Act of Parliament and the deed of grant. Therefore, I think, it is sufficient, as it certainly is convenient, to limit the inquiry to the consideration of the question what were the rights conferred upon the company, taking for granted that whatever was intended to be conferred has been actually enjoyed.

Then it is necessary to consider both the Act of Parliament and the deed. The Act is, I think, the more important of the two. The learned judges of the Court of Appeal, confining their attention to the deed and scarcely noticing the Act of Parliament, have held that nothing passed but a mere easement. If that be the true view there is no liability to rates, but I cannot help thinking that the company acquired much more than a mere easement or a mere right of passage for the water which it was their object and their statutory duty to clear off. The Halkyn District Mines Drainage Act, 1875, incorporates the company "for the purpose of making and maintaining the tunnels or adit levels and other works therein mentioned," and it expressly authorises the company to make use and maintain the said tunnels or adit levels, with all proper shafts, works, and conveniences connected therewith, and to enter upon, take and use, or (at their option) to purchase and take an easement in, through, over or under, or right of using such of the lands delineated on the deposited plans, and described in the books of reference as might be required for that purpose. The Act proceeds to describe the authorised tunnels, one of which was to join an existing

A tunnel called the Halkyn Deep Level, which communicated with an open cut or watercourse, running into Nant-y-Flint brook. The Act then authorises the company for the purposes of the Act to purchase, lease or otherwise acquire by compulsion or agreement, the Halkyn Deep Level and the said open cut or watercourse, "or an easement in, through, or over, or right of drainage through, or other right of using the same." There follows a section which seems to me to have some bearing on the question before your Lordships. It is s. 8. It authorises the company in the event of their acquiring the Halkyn Deep Level and the said open cut or watercourse, "or any such easement or right as aforesaid," from time to time to deepen, widen, alter, divert, and improve the same.

It will be observed that the statutory powers of the company in this respect are precisely the same, whether they do or do not acquire any proprietary right in the soil. The same observation applies to other provisions of the Act. Section 45 provides that without the written consent of the company, and then only subject to such conditions and regulations as shall be prescribed by the company, no communication shall be made to or with the tunnels and levels, or other works of the company. Section 46 empowers the company to make byelaws for the protection of their works, for the protection of their rights under the Act, and for preventing the flow of water by any means inconsistent with those prescribed or provided by the company. These provisions are general and wholly independent of any question as to the acquisition by the company of any proprietary rights in the soil. It is only necessary to add that the Act empowers the company to make extensions to their works on acquiring by agreement such land or such right in, through, or over such land as may be required for the purpose, and that in consideration of their services the company are authorised to levy tolls within the drainage district. The position of the company was, therefore, assured by the Act subject to their acquiring either such interest in the land, or such rights in, through, or over the land, as might be required for the construction of their works. For all practical purposes the position of the company in regard to their authorised works would be precisely the same, whichever of the two alternatives might be adopted.

Such being the effect of the Act—the company having made some progress with the proposed works—the Duke of Westminster, who was the statutory owner of the land within the drainage area, made a grant to the company on Dec. 14, 1882. So far as the present question is concerned the company did not acquire any proprietary interest in any part of the land which they were authorised to take. Subject to certain reservations, the effect of which will be considered presently, the duke granted to the company all such easements in and through, and right of drainage through, and other and exclusive rights of using the Halkyn Deep Level, the open cut or watercourse, and any tunnels that might be constructed within the drainage area in continuation of, or in connection with the Halkyn Deep Level as might be necessary or convenient for the purposes of the Act, or of the company's undertaking, or any of such purposes. Putting aside for a moment the reservations contained in the deed of grant, can there be any doubt as to the position of the company for rating purposes as regards their authorised works? The numerous cases relating to gas companies, water companies, and tramways, put the matter beyond question. To borrow the language of WIGHTMAN, J., in *R. v. West Middlesex Waterworks Co.* (4), the company are de facto in possession of the space in the soil which their drainage works fill for a purpose beneficial to themselves, and it is immaterial here, as it was there, and the company have no proprietary interest in the soil.

I now come to the reservations contained in the deed of grant. They are three in all. First there is a reservation of certain mineral substances which might be found in the course of making or extending the works. That reservation cannot affect the present question. Then there is a reservation of the use of the drainage works for the purpose of searching for, and working mines and carrying away ore and waste materials. Lastly, there is a reservation of the

use of two specified shafts, the use of which had been granted to the company, and any other shafts which might be made or used by the company. The material reservation is the second. That reservation, if it were unqualified and unlimited as regards the use of it, might no doubt interfere with the operations of the company. But then we find an express proviso and declaration to the effect that the rights under the reservations contained in the deed of grant, shall not be used so as to interfere with the operations of the company under the authority of the deed, or for the purposes of the Act or of the company's undertaking, or with the user for the purposes of the Act, or of the company's undertaking of the drainage works of the company, and that the rights under the reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and the company's byelaws for the time being in force.

It is, therefore, perfectly clear that the rights reserved by the duke were intended to be, and in fact are, secondary, inferior, and subordinate to the rights of the company under their Act. If there is any likelihood of a conflict, the right reserved by the duke must give way. The rights of the company are paramount. They have the sole and exclusive right of using their drainage works so far as those works may be required for the purposes of their undertaking. The deed of grant was not, I think, meant in the slightest degree to derogate from the statutory rights of the company, but simply to enable the company to avail themselves of those rights, and at the same time to reserve for the use of the duke certain rights and facilities qualified and limited in such a manner as to prevent the possibility of their ever coming into competition with the statutory rights of the company. It appears to me that, under the circumstances, such rights of user as are reserved by the duke no more negative the occupation of the company for rating purposes, than the presence of a lodger interferes with the rateability of the householder. I am consequently of opinion that the company are liable to be rated in respect of their occupation for their drainage works, and that the judgment of the Court of Appeal ought to be reversed.

**LORD DAVEY.**—It would appear from the judgments delivered by the learned judges in the Court of Appeal, that the point to which their attention was directed was whether the drainage company had any right of ownership in the tunnels and watercourse in question in the case, or had only an easement or incorporeal right over them, and their decision was against the overseers, the present appellants, on the ground that the company were not owners, but had a mere easement. It may be, that the course which the argument had taken before the Court of Appeal is the explanation of the reasons for the judgments taking that form. I agree with the learned judges in the Court of Appeal that the drainage company are not owners of the soil of the tunnels or watercourse. But that does not seem to me conclusive on the question of their rateability in respect of their occupation. The right of the company may be an easement or incorporeal right, but the easement may be of such a character as requires the occupation of land for its exercise, and confers upon the company a right to occupy land during its continuance. According to a long course of authority, the occupation of land under such circumstances is sufficient for rating purposes, though unaccompanied by ownership of any portion of the soil.

The law was thus stated by WIGHTMAN, J., in *R. v. West Middlesex Waterworks* (4) (1 E. & E. at p. 720) :

"In this case the first question is whether the company are rateable for their mains which are laid under the surface of the highway without any freehold or leasehold interest in the soil thereof being vested in the company; we think they are. The mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill for a purpose beneficial



A to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains although the occupation of such mains may be de facto merely, and without any legal or equitable estate in the land where the mains lie by force of some statute."

B In one of the earliest cases, *R. v. Chelsea Water Works Co.* (1), the waterworks company were held rateable in respect, not only of pipes laid underground, but of a reservoir in the Green Park which had formerly been a pond, and was used by the company as part of their works under a revocable licence from the Crown. The same principle has been applied in *Cory v. Bristow* (5) in this House, to moorings in the Thames maintained there under licence from the conservators, and in the recent cases of *Pimlico Tramway Co. v. Greenwich* (2),  
C and *Lancashire Telephone Co. v. Manchester Overseers* (3), to a tramway laid on a public road, and telephone wires suspended on the chimneys of buildings in a town.

The question whether the company sought to be rated are owners of the soil may be very material in some cases in determining whether they are in occupation or are merely enjoying the same rights as the general public, or a number of other persons, as was held in *R. v. Mersey and Irwell Navigation Co. of Proprietors* (6), and recently in this House in *Doncaster Union Assessment Committee v. Manchester, Sheffield and Lincolnshire Rail. Co.* (7). But, after all, the real question is not whether their rights are corporeal or incorporeal, but whether the company is de facto in occupation of some portion of the soil. I need not state again the facts of this case, but, looking at the description of the works in the Special Case, I cannot doubt that the company occupy with their tunnel  
E the portion of ground in which the tunnel is constructed, and also those portions which are inclosed within the tunnel, and used by the company for the purpose of their undertaking. And I also think with HENN COLLINS, J., that they have a similar occupation of that portion of their works which consists of an open cut or watercourse. I am further of opinion, looking at the provisions of the company's Act of Parliament, that such occupation and right of user was  
F necessary for the execution by the company of the purposes of the Act, and I think it was conferred on the company by the deed of grant from the Duke of Westminster.

But then it is said that the occupation is not exclusive inasmuch as the Duke of Westminster has reserved certain rights to himself and his licensees over the tunnels and watercourses, and in pursuance of such reserved rights the Halkyn Mining Co. have laid a tramway along one of the tunnels, and have placed  
G ventilating pipes there. Two questions arise: What is meant by exclusive occupation when used in connection with the subject of rating? And what are the conditions subject to which the duke exercises his reserved rights? It is clear that exclusive occupation does not mean that nobody else has any rights in the premises. The familiar case of landlord and lodger is an illustration. The cases show that if a person has only a subordinate occupation, subject at all  
H times to the control and regulation of another, then that person has not occupation in the strict sense for the purpose of rating, but the rateable occupation remains in the other, who has the right of regulation and control. This was so held in *Smith v. St. Michael, Cambridgeshire Overseers* (8), in *London and North Western Rail. Co. v. Buckmaster* (9), and in the recent case of *Rochdale Canal Co. v. Brewster* (10). As I took part in the decision of the latter case in the  
I Court of Appeal I will not repeat what was said in the judgments: see also the judgment of LORD BLACKBURN in *Cory v. Bristow* (5), in the Court of Appeal. It is necessary in cases of apparent joint occupation to consider what degree of right each party may have in the premises. In the present case your Lordships will find on reference to the deed of grant of Dec. 14, 1882, that it purports to grant such exclusive rights of using as may be necessary for the company's statutory purposes, but subject and except and reserving as hereinafter mentioned. The reservation to the duke is (i) of all lead, ore, or blende;

(ii) the right to use the Halkyn Deep Level and other tunnels for working and removing the reserved minerals; (iii) a right of user (which is expressed to be subsidiary to the right of user by the company) of any shafts made by the company on payment of a contribution to maintenance and repair; and the reservation is subject to a proviso that the reserved rights shall not be used so as to interfere with the company's operations, and shall not be exercised except subject to the provisions of the Act, and such byelaws allowed in manner provided by the Act as shall for the time being be in force. If your Lordships now turn to the Act you will find that by s. 45 it is made unlawful for any person without the written consent of the company, and then only subject to such conditions and regulations as shall be made by the company to make any communication with the tunnels or levels or other works of the company. And by s. 40 the company is empowered to make byelaws for the protection of the works of the company and other purposes. In these circumstances, I have no difficulty in coming to the conclusion that the exercise by the duke and his tenants and licensees of the rights reserved to them is subordinate to the occupation of the company for the purposes of their undertaking, and does not confer on the duke's tenants or licensees, such an occupation as prevents the occupation of the company being exclusive in the sense in which I have used that expression. Consequently, I am of opinion that the company has a rateable occupation, and that the order of the Court of Appeal should be discharged, and the order of the Divisional Court restored.

*Appeal allowed.*

Solicitors: *Chappell, Griffith & Broadbridge*, for *H. G. Roberts*, Mold; *Chester, Mayhew, Broome & Griffiths*, for *Walker, Smith & Way*, Chester.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## HAMLIN & CO. v. J. C. WOOD & CO.

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), July 29, 30, 1891]

[*Reported* [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286;  
40 W.R. 24; 7 T.L.R. 731]

*Contract—Implied term—Need to have been in contemplation of parties when contract made—Need to be necessary and reasonable.*

There cannot be implied into a written contract any stipulation unless it be such that both parties must have had it in their contemplation at the time of making the contract, and must have intended that such stipulation should be a binding stipulation upon them. It is not enough that the stipulation should be a reasonable one. It must be a necessary, as well as a reasonable, stipulation.

By a written agreement the defendants agreed to sell, and the plaintiffs agreed to buy, all the grains made by the defendants at certain current rates charged each year by specified brewers, from July 10, 1885, to Sept. 30, 1895. The quantity of grains was to be calculated monthly, and payment was to be made on or before the last day in the month following delivery. The contract was duly performed until September, 1890, when the defendants sold their business. In an action for damages for breach of contract the plaintiffs con-

tended that there was to be implied in the contract a stipulation that the defendants would not wilfully do any act, such as selling their business, which would put it out of their power to perform the contract for the specified ten years.

**Held:** it could not be inferred that the parties had intended to import into the contract a stipulation that the defendants would carry on their business for the ten years mentioned in the contract, and, therefore, such a term was not to be implied in the contract and the plaintiffs' claim must fail.

**Notes.** Considered: *Bunning v. Lyric Theatre* (1894), 71 L.T. 396; *Morell v. New London Discount Co.* (1902), 18 T.L.R. 507; *Re Royal Aquarium and Summer and Winter Garden Society* (1903), 20 T.L.R. 35; *Consolidated Goldfields of South Africa v. Spiegel* (1909), 100 L.T. 351; *Biddell v. E. Clemens Horst Co.*, [1911] 1 K.B. 934; *Re Newman. Raphael's Claim*, [1916] 2 Ch. 309; *Bruce Marriott & Co. v. Houlder Line*, [1916-17] All E.R.Rep. 988; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918-19] All E.R.Rep. 151; *Turpin v. Victoria Palace*, [1918] 2 K.B. 539; *Cole v. Kelly*, [1920] All E.R.Rep. 537; *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1918-19] All E.R.Rep. 661; *Moriarty v. Regent's Garage and Engineering Co.*, [1921] 1 K.B. 423. Applied: *Livock v. Pearson* (1928), 33 Com. Cas. 188; *Gaze v. Port Talbot Corpn.* (1929), 93 J.P. 89. Considered: *General Publicity Services, Ltd. v. Best's Brewery Co.*, [1951] 2 T.L.R. 875. Referred to: *White v. Turnbull, Martin & Co.*, [1895-9] All E.R.Rep. 270; *Krell v. Henry*, [1900-3] All E.R.Rep. 20; *Ogdens v. Nelson*, *Ogdens v. Telford*, [1904] 2 K.B. 410; *Douglas v. Baynes*, [1908] A.C. 477; *Lazarus v. Cairn Line of Steamships* (1912), 106 L.T. 378; *Merryweather v. Pearson*, [1914] 3 K.B. 587; *Porter v. Tottenham U.D.C.*, [1914] 1 K.B. 663; *Barnes v. City of London Real Property Co.*, *Webster v. Same*, *Sollas v. Same*, *Kersey & Co. v. Same*, *Oakley, Sollas & Co. v. Same* (1918), 87 L.J.Ch. 601; *Kensington and Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L.J.K.B. 565; *Re Nott and Cardiff Corpn.*, [1918] 2 K.B. 146; *Brodie v. Cardiff Corpn.*, [1919] A.C. 337; *Aktieselskabet Olivebank v. Dansk Svoelvsyre Fabrik*, [1919] 2 K.B. 162; *Armour v. Walford (London), Ltd.*, [1921] 3 K.B. 473; *Joachim v. Swiss Bank Corpn.*, [1921] All E.R.Rep. 92; *Warren v. Agdeshman* (1922), 38 T.L.R. 588; *Cockburn v. Smith* (1923), 40 T.L.R. 113; *Kelantan Government v. Duff Development Co.*, [1923] All E.R.Rep. 349; *Larringa & Co., Ltd. v. Société Franco-Americaine des Phosphates de Médulla, Paris*, [1923] All E.R.Rep. 1; *Trans-oceanica Societa Italiana di Navigazione v. Shipton*, [1923] 1 K.B. 31; *United States Shipping Board v. Durrell*, *Same v. Duffell*, *Same v. Butt*, [1923] 2 K.B. 739; *Tournier v. National Provincial and Union Bank of England*, [1923] All E.R.Rep. 550; *Re Windsor Steam Coal Co. (1901), Ltd.* (1928), 140 L.T. 80; *Bentall, Horsley and Baldry v. Vicary* (1930), 47 T.L.R. 99; *Hall v. Brooklands Auto-Racing Club*, [1932] All E.R.Rep. 208; *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *G. Trollope & Sons v. Martyn Bros.* (1934), 50 T.L.R. 544; *Owen and Smith (trading as Nuagin Car Service) v. Reo Motors (Britain), Ltd.*, [1934] All E.R.Rep. 734; *Lensen Shipping Co. v. Anglo-Soviet Shipping Co.* (1935), 40 Com. Cas. 320; *Matthews v. Hanscombe*, [1936] 1 All E.R. 562; *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; *Hirschhorn v. Evans*, [1938] 3 All E.R. 491; *Adams v. Union Cinemas, Ltd.*, [1939] 3 All E.R. 136; *Way and Waller, Ltd. v. Verrall*, [1939] 3 All E.R. 533; *Broome v. Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1940] 1 All E.R. 603; *Oulu Osakayetio of Oulu, Finland v. A. Laver & Co., Ltd.*, [1940] 2 All E.R. 243; *Adams v. Adams*, [1941] 1 All E.R. 334; *Harris v. Poland*, [1941] 1 All E.R. 204; *Turner v. Stella Bond, Ltd.*, [1941] 1 All E.R. 449; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109.

As to implied terms in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124; and for cases see 12 DIGEST (Repl.) 681 et seq.



Cases referred to:

- (1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (2) *Stirling v. Maitland* (1864), 5 B. & S. 841; 5 New Rep. 46; 34 L.J.Q.B. 1; 11 L.T. 337; 29 J.P. 115; 11 Jur.N.S. 218; 13 W.R. 76; 122 E.R. 1043; 12 Digest (Repl.) 693, 5322.

Also referred to in argument:

- Re Railway and Electric Appliances Co.* (1888), 38 Ch.D. 597; 57 L.J.Ch. 1027; 59 L.T. 22; 36 W.R. 730; 12 Digest (Repl.) 683, 5261.
- Turner v. Goldsmith*, post; [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 12 Digest (Repl.) 701, 5353.
- Rhodes v. Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 12 Digest (Repl.) 700, 5355.
- M'Intyre v. Belcher* (1863), 14 C.B.N.S. 654; 2 New Rep. 324; 32 L.J.C.P. 254; 8 L.T. 461; 10 Jur.N.S. 239; 11 W.R. 889; 143 E.R. 602; 12 Digest (Repl.) 691, 5313.
- Charnley v. Winstanley* (1804), 5 East, 266; 1 Smith, K.B. 433; 102 E.R. 1072; 2 Digest (Repl.) 517, 610.
- Brown & Co. v. Brown, Brown v. Brown & Co.* (1876), 35 L.T. 54; on appeal (1877), 36 L.T. 272, C.A.; 12 Digest (Repl.) 695, 5328.
- Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737; 39 L.J.Ch. 685; 23 L.T. 685; 18 W.R. 1123, L.J.; 10 Digest (Repl.) 975, 6721.
- Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (1876), L.R. 3 Ind. App. 200, P.C.; 1 Digest (Repl.) 631, 2114.
- Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L.J.Ch. 476; 26 L.T. 467; 10 Digest (Repl.) 975, 6722.

**Appeal** by the defendants from a decision of MATHEW, J., on the trial of the action with a special jury, whereby he directed judgment to be entered for the plaintiffs.

The plaintiffs, Hamlyn & Co., were a firm which bought grains from brewers, and sold them in smaller quantities to cowkeepers and others for the purpose of fodder. The defendants, J. C. Wood & Co., were formerly brewers carrying on business in Westminster.

By an agreement in writing between the parties, dated July 14, 1885:

"The said J. C. Wood & Co. hereby agree to sell, and the said Hamlyn & Co. agree to buy, all the grains made by the said J. C. Wood & Co., at the current rates charged each year by the following firms, viz., Messrs. Truman, Hanbury, Buxton & Co., Messrs. Barclay, Perkins & Co., Messrs. Combe & Co., Messrs. Watney & Co., Messrs. Reid & Co., from July 10, 1885, until Sept. 30, 1895, inclusive. In the event of there being any difference in the above firms' rates, then the average price charged shall be taken as the current rate. The quantity of grains to be calculated monthly, and payment for the same to be made at the brewery on or before the last day in the month following delivery, the first payment to be made on or before Aug. 30, 1885, and so on. The quantity of grains to be charged for according to the number of quarters of malt put in the mash tun, and all grains to be considered as ale grains when brewed without black malt. The said Hamlyn & Co. agree to throw the grains out of the mash tub, and empty and clear away the same in a proper and workmanlike manner at their sole expense on the day on which they are made, and to pay for any damage done by carelessness of the persons employed by them; otherwise, the said J. C. Wood & Co. to be at liberty to cart away and dispose of the grains in the best manner they in their opinion can, and such carting and disposal to be made at Hamlyn & Co.'s cost, and any loss made by such sale shall be sustained by the said Hamlyn & Co."

A This contract was duly performed on both sides from July, 1885, down to July 31, 1890, but in August, 1890, the defendants sold to Messrs. Watney & Co. the goodwill of their business as brewers, though not the premises on which the business had been carried on. In consequence of such sale the defendants were unable to perform the contract, and were unable to and did not make or supply to the plaintiffs any more grains. The plaintiffs brought the present action alleging  
 B breach of the contract by the defendants, and claiming £1,500 damages, being the estimated loss of profits on the purchase of the grains for the five years from August, 1890, to September, 1895, at the rate of £300 a year. The defendants in their defence stated that in the agreement they did not undertake to continue to carry on their business for any definite time; that they did not, even while they carried on the business, undertake to make any particular or definite quantity of  
 C grains; and that, consequently, as a matter of law the plaintiffs' action was not maintainable. The defendants counterclaimed for a sum of £97 for grains already sold and delivered, which counterclaim was admitted by the plaintiffs subject to their claim.

MATHEW, J., in summing up the case to the jury, put to them the question what was the meaning of the contract. In doing so he said he thought it desirable to  
 D do what he had often done before with the sanction of superior authority, namely, to ask business men, such as the jury were, what their view of such a contract was. The jury found a verdict for the plaintiffs on the claim for £350, and for the defendants on the counterclaim for £97. On a submission by the defendants that, notwithstanding the verdict of the jury, judgment ought to be entered for the defendants, MATHEW, J., said that the defendants were perfectly at liberty, if they  
 E chose, to sell their business and so deprive themselves of the power to carry out their contract, but, if they did so, they broke their contract, and there must be judgment for the plaintiffs for the amount assessed by the jury. The defendants appealed.

*Finlay, Q.C., and George Sills for the defendants.*

F *R. T. Reid, Q.C., and Ernest de Witt (Clarence Hamlyn with them) for the plaintiffs.*

LORD ESHER, M.R.—The question we have to decide is whether we agree with MATHEW, J., in the indication of his views of the case. A large number of cases have been cited, but, in my opinion, it is useless to quote such cases for the  
 G purpose of showing that in this or that particular case some implication was or was not drawn. The only use of quoting such a case is, where the case is one in which a rule is laid down as to these implications, which the court will act upon in dealing with other cases which may be before the court. I have always understood the rule as to such implications to be that you cannot import into a written contract any such stipulation unless it be such that both parties had it in their contemplation at the time of making the contract; in other words, that both parties,  
 H looking at the matter in a reasonable and businesslike way, must have intended that that stipulation should be a binding stipulation upon them both. It is not enough to say that the implication is a reasonable one to make under the circumstances. It must also be a necessary implication, as well as a reasonable one. That rule has been expanded by BOWEN, L.J., in *The Moorcock* (1), where he says (14 P.D. at p. 68):

I "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe, if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will

be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication, is to give such business efficacy to the transaction, as must have been intended at all events by both parties, who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

I think that is an expansion of the rule I have already enunciated. When you have to imply a stipulation into a written contract it is the court which must imply it, and not the jury, who have nothing to do with the construction of written contracts, but have merely to find the facts if they are asked to do so.

To see if the stipulation is implied in the present case we must first see what the stipulation is. It is an admitted fact that there is no express stipulation of the kind relied on, so that the plaintiffs are compelled to fall back upon an implied stipulation. What is the stipulation the plaintiffs wish to import into this case? They say: "We do not ask the court to imply a stipulation that the defendants contracted to carry on their business for ten years so as to produce grains to sell to the plaintiffs; but we do ask the court to imply a promise to us by the defendants that they (the defendants) would not do anything wilfully to get rid of their business, and so prevent them carrying out their contract with us." If you cannot imply the first of these stipulations it would be extraordinary to imply the second. The defendants stipulate expressly that they agree to sell "all the grains made by them." What is the meaning of that clause? It must mean "made by them in their business as brewers." The plaintiffs agree to buy all those same grains. The one party then agrees to sell those grains, and the other agrees to buy those grains for the ten years; that is, the defendants agree to sell, and the plaintiffs agree to buy, all the grains made by the defendants for ten years. The plaintiffs are business men; what do they gain by this contract? If it is construed against their contention, still do they make nothing out of it? What is their advantage? Their advantage consists in this, that they think it profitable to get all those grains for ten years in preference to any other purchasers. If the agreement had been that the plaintiffs were to pay a sum down and then to have the grains for ten years, so that if they did not get the grains for ten years they would not get what they had paid for, that case would be different; but in this case the plaintiffs are not to pay for those grains which they do not get; they are to pay only for the quantity of grains which they may obtain from time to time. That payment may be taken as a fixed sum, and the plaintiffs would have to pay that fixed sum for such grains as they got; if they got none, they would have nothing to pay.

Such being the terms of the contract, then comes the question: Can the court, looking at this contract in a reasonable and businesslike way, say it is a necessary implication that both parties must have contemplated as an element in the contract that these brewers would carry on their business for ten years? Can the court say it is a necessary implication that the defendants undertook that they would not sell their business during the ten years, at whatever loss they might carry it on, or however advantageous might be the terms which they were offered for it? Or, again, can the court say that, although the defendants do not undertake that they will carry on the business for the whole of the ten years, yet they do undertake that they will not wilfully put an end to the business during that time? I do not say that these two things are just the same, but I think they are as like each other as twin brothers. I think that such an implication as that is beyond all bounds, and I think the court ought not to make such an implication in this case. That being so, I wilfully abstain from going into the cases to see what the courts did or what implications they made in other cases, and I give no opinion about those cases.



A If that implication is not made in this case, there is no breach of the contract by the defendants, and, therefore, I dissent from the view taken by the learned judge below, and for these reasons I think judgment ought to be entered for the defendants.

B **BOWEN, L.J.**—With great respect to the learned judge in the court below, I must say that I differ entirely from the conclusion to which he came. I agree with what the Master of the Rolls has said, and I object on principle to examine a number of cases to see what the courts may have held in similar cases as to implications arising from expressions used in those contracts. It may be necessary in some cases, in order to give effect to a transaction, that the law should imply a stipulation not wilfully to put an end to a business, although the parties themselves C had not made any such stipulation in their agreement. The question now is whether such an implication is necessary in this case, or whether the contract may not be capable of a reasonable construction without such implication. I feel no doubt at all that to impose this new term upon the parties would be to impose a term which was not in the contemplation of the parties at the time of the making of the contract. I will not repeat what I said in *The Moorcock* (1), and, for the D reasons given by the Master of the Rolls, I think we ought not to make the implication we are asked to make in this case.

E **KAY, L.J.**—When parties have reduced to writing the terms upon which they agree, especially in the case of mercantile contracts, it seems to me that it would be a very strong and dangerous thing to import into the written contract a term F which is not in that contract. Here it is admitted that there has been no breach of an express provision of the contract. That contract merely amounts to an engagement by the defendants to sell to the plaintiffs all grains made by them in their business as brewers for ten years, not for a sum paid down, but at a current price to be ascertained in the manner provided for in the agreement. The defendants for a time carried out this contract by selling grains to the plaintiffs, but G within the ten years they sold their business, and the purchasers refused to adopt the contract. The plaintiffs thereupon brought this action, and in effect they say to the defendants: "True you have not said that during the period of the ten years you would not sell the business, but that term is implied in the contract."

I agree with what has been said by the Master of the Rolls, that you ought not to interpret into a contract an implied condition unless there is a necessary implication H to or inference that the parties intended to import it into their agreement. To state the rule in wider terms than this would, it seems to me, be going beyond what could be justified on principle. All the cases that have been cited are merely instances where the case falls on one side or the other of this line, and in the cases where the implication was made it was because the court was of necessity led to imply a term in order to carry out what was clearly the intention of the parties. Another limitation I take to be established by the language of Cockburn, C.J., in *Stirling v. Maitland* (2), when he says (5 B. & S. at p. 852):

I "I look on the law to be that, if a party enters into an arrangement, which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative."

In the present case it seems to me to be very reasonable indeed to conclude that all that either party intended was that, if the defendants carried on their business as brewers for ten years, they would sell to the plaintiffs all the grains produced in their business during that time, if they so long carried on the business, at the current prices ascertained as mentioned in the contract. It might have been different altogether if the defendants had been paid for the supply of the grains for the whole of the ten years. I will not express any opinion as to what the effect of

such a contract would have been, but in that case it would have been much more difficult for the defendants to succeed, and the argument in favour of the plaintiffs would have been very much stronger than in the present case for implying an agreement by the defendants that they would not by any wilful act prevent themselves from carrying out the contract for ten years. Here, if we were to imply the condition that we are asked to imply, we should be doing what the parties had never intended. I am not satisfied that either party ever intended that the defendants should not sell the business for the ten years. I think, therefore, upon these grounds that the case does not come within the principle upon which such implications are made, and, in my opinion, judgment ought to be for the defendants.

*Appeal allowed.*

Solicitors: *Lumley & Lumley; Pownall, Son, Cross & Knott.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## Re BRIDGEWATER NAVIGATION CO.

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), February 27, 28, March 9, 1891]

[Reported [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576;  
7 T.L.R. 360]

*Company—Winding-up—Surplus assets—Distribution—Reserve funds—Not required for purposes for which set aside.*

The capital of a company consisted of 100,000 ordinary shares of £10 each and 30,000 preference shares of £10 each, carrying a preferential dividend of 5 per cent. The articles gave the directors power to set aside out of the profits of the company such sums as they should think fit for a reserve fund, and provided that, subject thereto, the profits should belong to the shareholders. Acting under these powers the directors set aside out of the profits earned by the company three reserve funds for three specified purposes, but when the company went into liquidation, on the sale of its assets to another company, these funds had not been required for the purposes for which they had been set apart.

**Held:** (i) when the reserve funds were formed they consisted of undistributed profits; carrying such profits to reserve did not change their character, still less their ownership; and when the purposes for which the money had been set apart failed it became divisible, not as capital, but as undrawn profits to which the ordinary shareholders were entitled; (ii) furthermore, the ordinary shareholders were entitled to have an account taken from the date of the last balance-sheet to the date of sale, in which the amounts actually received on the sale of the plant, fixtures, etc., and also the amounts actually realised and paid in respect of the debts owing to and by the company, must be inserted instead of the estimated amounts thereof as in former balance-sheets; and the balance of profits shown upon the account ought to be paid to the ordinary shareholders, as the difference between the estimated and ascertained value must also be treated as undrawn profits and not as capital.

- A Notes.** Applied: *Bishop v. Smyrna and Cassaba Railway* (No. 2), [1895] 2 Ch. 596. Considered: *Re Odessa Waterworks Co.*, [1901] 2 Ch. 190, n.; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86. Distinguished: *Re Madame Tussaud*, [1927] 1 Ch. 657. Approved: *Scottish Insurance Corpn., Ltd. v. Wilsons and Clyde Coal Co.*, [1949] 1 All E.R. 1068. Considered: *Dimbula Valley (Ceylon) Tea Co., Ltd. v. Laurie*, [1961] 1 All E.R. 769. Referred to: *Re Armitage, Armitage v. Garnett*, [1893] 3 Ch. 341, n.; *Re Eastern and Australian Steamship Co.* (1898), 3 R. 370; *Re Spanish Prospecting Co., Ltd.*, [1908-10] All E.R. Rep. 573; *Re National Telephone Co.*, [1914] 1 Ch. 755; *I.R.Comrs. v. Burrell*, [1924] All E.R. Rep. 672; *Re Railways Act, 1921, Re Standard Charges Schedule* (1925), 94 L.J.K.B. 364; *Re Catalinas Warehouses and Mole Co.*, [1947] 1 All E.R. 51; *Re Isle of Thanet Electric Supply Co.*, [1949] 2 All E.R. 1060.
- C** As to distribution among contributories on a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 678-682, 748, 749; and for cases see 10 DIGEST (Repl.) 1065 et seq.

Cases referred to:

- D** (1) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 9 Digest (Repl.) 638, 4249.
- (2) *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, 7391.

Also referred to in argument:

- E** *Re Alsbury, Sugden v. Alsbury* (1890), 45 Ch.D. 237; 60 L.J.Ch. 29; 63 L.T. 576; 39 W.R. 136; 2 Meg. 346; 40 Digest (Repl.) 723, 2132.

**Appeal** by the liquidator of the Bridgewater Navigation Co. from a decision of NORTH, J., regarding the rights of shareholders on the winding-up of the company.

*Napier Higgins, Q.C.*, and *S. A. Sampson* for the liquidator.

- F** *Cozens-Hardy, Q.C.*, and *Leigh Clare* for the ordinary shareholders.  
*Buckley, Q.C.*, and *Swinfen Eady* for the preference shareholders.

*Cur. adv. vult.*

March 9, 1891. The following judgments were read.

- G LINDLEY, L.J.**—The question raised by this appeal is how a portion of the surplus assets of this company, the Bridgewater Navigation Co., remaining after payment of all its debts and liabilities and paid-up capital ought to be divided between the ordinary and the preference shareholders.

- The company was formed in 1872 with a nominal capital of £500,000, divided into 500 shares of £1,000 each, which were afterwards altered into 50,000 shares of £10 each, and this capital was increased by the creation of 80,000 new shares of £10 each. In 1874 a special resolution was passed authorising the creation of preference shares, and in 1880 30,000 preference shares of £10 each were issued. The preference consisted of a preferential dividend of 5 per cent. In 1885 the Manchester Ship Canal Co. was authorised to buy the undertaking and working plant of the company for £1,710,000. In 1887 the Bridgewater Navigation Co. was wound-up voluntarily, with a view to the distribution of this purchase money and the ultimate dissolution of the company. Up to December, 1886, the accounts of the Navigation company were regularly made up on the footing that the company was a going concern. On Aug. 4, 1887, the company stopped business. The purchase made by the Manchester Ship Canal Co. has been carried out; the purchase money has been paid; the debts and liabilities of the Bridgewater Navigation Co. have been discharged; and the shareholders, both ordinary and preference, have been repaid their respective paid-up capitals; but there is still a surplus for division. The House of Lords



has already decided that the whole of this surplus does not belong to the ordinary shareholders as profit, and that

"after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase money)"

the surplus in question ought to be divided between both classes of shareholders in proportion to their shares. There still, however, remains for determination two questions, viz.: (i) whether certain reserve funds are to be treated as undrawn profits, and ought to be divided among the ordinary shareholders exclusively, or whether these reserve funds are to be treated as assets divisible among both classes of shareholders; and (ii) whether, in ascertaining the profits for the period between Dec. 31, 1886, and Aug. 4, 1887, the outstanding debts due to or from the company, and the company's plant and machinery, are to be estimated below their real value, as they always are when the company is a going concern, or whether these debts, etc., are to be taken at their actual ascertained amounts and value.

The first matter for determination is, whether the decision of the House of Lords has or has not settled the questions now raised. Certainly they were not pointedly before the House; the controversy in the litigation set at rest by the House of Lords related to a totally different matter, and although there is some little ambiguity in the wording of the formal order of the House, I agree with NORTH, J., that the questions which have now arisen have not yet been decided.

There were three reserve funds of the company—depreciation of steamers, £30,000; an insurance fund, £10,000; and a canal and river improvement fund, £3,500. None of these sums is actually set apart from the other assets of the company; they do not exist in the form of moneys carried to separate accounts and separately invested; the property representing them consists of the company's corporeal assets, and is mixed up with and not to be distinguished from other property of the same kind. On the other hand, it has been established beyond doubt that all these sums have been deducted from profits which the ordinary shareholders might have divided among themselves, but which it was considered judicious not to divide so long as the company was carrying on business. The sums in question are simply the undrawn profits of the ordinary shareholders.

With regard to the canal improvement fund and the insurance fund, there is really no controversy respecting either their origin or the purposes for which they were created, or their non-requirement for those purposes. With respect to the insurance fund, the truth is that the company did not insure at all. They set apart some of the divisible profits in order to meet contingencies which are generally provided for by effecting insurances, but that is all. The sums set apart for that purpose were and remained undrawn profits, and nothing else. With respect to the depreciation fund, the deposition of Mr. Collier (the accountant, secretary, and manager of the company) and the directors' reports and accounts establish that this fund originally consisted of undrawn profits, and that the value of the plant and machinery has been kept up out of revenue, and that this fund is not in fact required to make good any depreciation. The burden of showing this to be the case is, I think, on the ordinary shareholders; but, considering the evidence to which I have alluded, considering that Mr. Collier's evidence on this head is corroborated by several statements and entries showing that revenue was expended for purposes for which the depreciation fund might have been applied, considering that his evidence on this point has not been challenged by cross-examination and has not been met by any evidence to the contrary, I am of opinion that the truth of what I have above stated has been established.

It remains, however, to be considered whether these undrawn profits have been capitalised or so dealt with that they have become the property of both

A classes of shareholders instead of the property of the ordinary shareholders only. Carrying undrawn profits to a suspense account or to a reserve account does not necessarily change their character, still less their ownership; they remain the undrawn profits of those persons to whom they belonged, dedicated, no doubt, to certain purposes and applicable to those purposes, but not otherwise altered in their character or ownership. If the purposes for which such profits  
B are set apart fail, or if the profits are not required for such purposes, they become divisible, not as capital, but as undrawn profits. When capital and profits belong to the same persons and in the same proportions, it becomes unimportant to distinguish the one from the other, and capitalisation for convenience may be inferred from slight evidence. But when capital and profits belong to different persons, or to the same persons in different proportions,  
C the effect of capitalising profits is to change their ownership, and an intention to do this must be shown before conversion of profits into capital can be properly inferred. Moreover, this is a matter on which a majority cannot bind a minority unless expressly empowered to do so by the constitution of the company, either as originally framed or as subsequently modified by some authority binding on all. As a matter of law there can, I think, be no doubt on this point after  
D the decision of the House of Lords in *Bouch v. Sproule* (1), particularly after what was said by LORD BRAMWELL.

As a matter of fact, this company has acted on this view, for in 1885 it divided among the ordinary shareholders £13,283 which had been previously standing to the credit of reserve funds, and part of this sum was taken from the depreciation fund. The moneys standing to the credit of the three reserve  
E funds in question were not profits earned between December, 1886, and August, 1887; they were profits earned in previous years; but on the winding-up of the company the question to be determined is to whom such profits belong, not when they were earned. I cannot agree with NORTH, J., that there is any distinction between the three funds in question. He has given the canal improvement fund to the ordinary shareholders, but not the other two reserve funds.  
F He appears to have considered that they were not profits, but sums which had to be taken into account before the profits could be ascertained. This, however, is a mistake. The company was under no obligation to insure or to create an insurance reserve fund, and if it did not choose to insure, and suffered no losses, the divisible profits would be increased. As regards the depreciation fund, if the company chose, as in fact it did, to keep up the value of its plant, etc.,  
G and also to set apart some of its profits to meet unforeseen contingencies, such setting apart was not a necessary proceeding in order to ascertain the divisible profits, but they would have been larger by the amount carried over to the fund. The funds in question have not in fact ceased to be undrawn profits; they have not been capitalised or otherwise converted into assets to which the preference shareholders have any claim.

H I pass now to the second question. While the company was carrying on business the debts owing by it were over-estimated, the debts owing to it were underestimated, and the value of its plant and machinery was also underestimated. This was done from motives of prudence. The preference shareholders were not in any way prejudiced by it; they had their 5 per cent. The ordinary shareholders suffered by it, as, if the directors had been less cautious,  
I the divisible profits would have been larger. But the necessity for this caution ceased when the company ceased to carry on business. There is no reason now for estimating anything; the actual value of everything is known; and the ordinary shareholders, therefore, contend that in taking the accounts from December, 1886, up to August, 1887, these items should be taken at their actual ascertained values, and not at estimated values as heretofore. NORTH, J., has decided this point against them on the ground, as I understand it, that the difference between the estimated and actual values is not a profit of the period in question. But granting this to be so, nevertheless the profits of the whole trading, less 5 per

cent. on the preference shares, belong to the ordinary shareholders, and unless the actual values of the assets and liabilities are taken the result will be to give to the preference shareholders some portion of the profits which belongs to the ordinary shareholders. The difference between the estimated and ascertained values really represents undrawn profits, and the only question is whether the ordinary shareholders have lost their right to them. It was strongly urged that the court could not decide this point in favour of the ordinary shareholders without opening up the past accounts and disturbing the previous balance-sheets. But this is not true. No past account will be re-opened, no former balance-sheet will be disturbed.

The problem now to be solved has never yet arisen for solution. The problem is no longer what is to be done in the way of dividing the profits of a going concern; the problem now is how much of the whole assets of the company belongs to one class of shareholders, and how much to another; and if it appears that some of those assets consist of the undrawn profits of one of those classes, such undrawn profits ought to be distributed among the members of that class, unless some sufficient reason to the contrary can be shown, and in this case there is no such reason. I am, therefore, of opinion that the order appealed from must be varied by giving effect to the principles which I have endeavoured to explain. The costs of all parties ought to be treated as costs of the winding-up, and to come out of the funds to which both classes of shareholders are entitled. **LOPES, L.J.**, desires me to say he concurs.

**KAY, L.J.**—The Bridgewater company were incorporated in 1872, and by their arts. 83 to 85, it was provided that no dividend should be paid except out of the profits arising from the business of the company as shown upon their balance-sheets; that the directors might set apart out of the profits reserve funds for various purposes and might invest the same and the interest of such investments should be dealt with as profits; and that, subject to this and to any arrangement for remunerating officers by commission, the entire net profits “of each year” should belong to the shareholders and be divided among them. The original capital of the company was 100,000 ten pound shares, on each of which £3 10s. was paid. Subsequently they issued 30,000 additional £10 shares, which were paid in full, and the holders of these shares were entitled to a preference dividend of 5 per cent., but had no preference as to capital. After payment of such preference dividends, all the remaining profits would be divisible among the ordinary shareholders.

On Aug. 6, 1887, the Bridgewater company sold their undertaking to the Manchester Ship Canal Co. under the powers of the Manchester Ship Canal Act, 1885, and on that day their business ceased. The sale was to take effect as upon Aug. 4, 1887. The price they obtained was much more than sufficient to repay all the paid-up capital. The preference shareholders have received their capital with a 5 per cent. dividend; the ordinary shareholders have received their capital and all the declared dividends, the last of which was at the rate of 8 per cent. upon an account made out to Dec. 31, 1886. There still remains a large part of the purchase money which has to be divided. The House of Lords decided in *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.* (2) that such part of this as is an accretion to capital ought to be divided among all the shareholders in proportion to the number of shares they hold, and not in proportion to the amounts paid up on those shares.

There were still some questions to be determined as between capital and income, and these were brought before **NORTH, J.**, and now come before us by way of appeal from his decision. The first I will deal with relates to three funds set apart out of revenue under the power to which I have referred, viz.: (i) canal and river improvement fund; (ii) insurance fund to cover risks on the Mersey; and (iii) depreciation of steamers. Each of these funds had been set



A apart some years ago, and the amounts increased out of revenue from year to year; but in February, 1886, it appearing by the balance-sheet made out to Dec. 31, 1885, that capital was indebted to income in a sum of more than £30,000, the directors recommended that £13,282 6s. 6d., part of these reserved funds, which, in view of the sale of the undertaking to the Ship Canal company, they state was not required, should be distributed to the shareholders by way of  
B bonus, and this was accordingly done by taking the whole of the first two mentioned reserved funds and £3,500 of the steamers depreciation fund. This transaction was authorised by a general meeting, and it proves conclusively that the shareholders did not consider that the act of reserving these funds had converted them from income into capital.

After this division, funds were again carried from revenue to each of these  
C reserve accounts, and the dividend declared in 1887 upon the account made up to Dec. 31, 1886, was of course diminished by the amounts so reserved. NORTH, J., has held that the first reserve—the canal and river improvements—must be treated as income to which the ordinary shareholders are entitled. But as to the other two reserve funds he has come to a different conclusion. These he holds to be sums which have to be taken into account before you can  
D say what the profits actually are. Taking the insurance fund as an illustration, the learned judge says that, in the ordinary course, premiums would have been paid out of income to an insurance company, but this company chose to be their own insurers. If a vessel were lost, so much of the property of the company would be gone; and, to prevent such diminution, the same sum (that is, I understand, the amount of the premiums) which would otherwise be payable  
E is taken out of the profits and put into the general funds of the company. This, if I rightly follow it, is a decision that as premiums of insurance would ordinarily be payable, and the amount reserved represented such premiums, it was proper to deduct that amount in calculating the real profit. But this is in fact crediting this reserve fund to capital and treating it as such, which the company, by their division of the very reserve in 1886, have demonstrated that they did not  
F intend. If there had been a loss, then to the extent of any such loss, the reserve fund might be treated as capital; but no loss in fact occurred. The capital was not diminished by any such accident, and the result is that this company did not in fact insure, but created an insurance fund, which was reserved out of income, in order to recoup any such accidental loss of capital as would ordinarily be insured against. But this fund was not wanted for that  
G purpose, and, accordingly, not having lost its character as income, it seems to me that it should now be treated as those portions of the reserve fund which were not actually required were treated in 1886, and should be divided among the ordinary shareholders. Precisely the same considerations apply to both the other reserve funds. If they were not wanted for the purposes for which they were set apart, they are still income divisible among the ordinary share-  
H holders. I agree with NORTH, J.'s view that this is so as to the canal improvement fund.

With respect to depreciation of steamers fund, there is a little more difficulty. If it could be shown that there was an actual depreciation by wear and tear, accidental injury, or the like, and that the steamers had not been kept up to  
I their original value out of current revenue, then this depreciation fund might be applicable to make up that deficiency; and to the extent to which it was so applicable it might be proper to treat it as part of the capital. But the evidence of Mr. Collier, who was accountant, secretary, and manager of the Navigation company for many years, shows, I think, when fairly read, that the value of the steamers was in fact kept up, and that this reserve was made, not on account of any depreciation in fact, but to provide for the possibility of loss in case of the sale of the undertaking as a going concern, or the plant being brought under the hammer. His evidence is confirmed by Mr. Banner, the

accountant, who, from an inspection of the books, states that the balance-sheets and accounts submitted to the shareholders from time to time had been prepared and presented on the footing of the plant and works of the company being fully and efficiently maintained in good order and repair out of current revenue. This is corroborated by Halliday, another accountant; and, upon looking through the balance-sheets and reports, I find continual mention of repairs and some purchases of steamers charged against revenue which seem to justify their statements. There is no counter-evidence on this point whatever, nor was there any cross-examination upon this subject. The result is that no depreciation has in fact occurred. The contingency which this fund was reserved to meet has not happened, and this fund must be treated as income divisible which, like all the others, has now been realised.

The remaining question for decision relates to the mode in which the account of profits should be taken for the interval between the last balance-sheet and Aug. 6, 1887, when the sale was completed. This was done in the former balance-sheets by first setting down all capital moneys received by shares, borrowings, or otherwise, and on the debtor side of this account were set down the various items of expenditure under the heads (i) "Cost of purchase, of navigations, land, building, etc.;" (ii) "New works;" (iii) "Plant, fixtures, etc." When the expenditure did not equal the receipts, the undertaking was indebted to capital in the amount of the balance, and this had to be deducted before the amount available for dividend could be ascertained. But by reason of large repayments of borrowed money in later years the balance was the other way. Capital had become indebted to revenue, and the amount to be credited to revenue on this account, according to the balance-sheet of Dec. 31, 1886, was £30,000. But this amount was arrived at not quite accurately. Although the other items of expenditure were literally set down, that for plant was made subject to a deduction of £2,298 for assumed depreciation, so that what was debited to the capital account was not its cost, but was an estimate of its value. This deduction of £2,298 reduced by the same amount the balance to be credited to revenue. By s. 22(2) of the Manchester Ship Canal Act, it was provided that the price thereby fixed was to include the working plant as shown and described in the stock account of 1884, and, if this exceeded or was less than its value, an equivalent compensation should be made on the one side or the other. No valuation has been required. The plant, therefore, should be taken at the figure in the stock book for 1884. If this was the same as or greater than the amount stated in the balance-sheet for 1886 without deducting the £2,298, it may be said that in effect since that balance-sheet the stock has been realised at the larger amount; and it is now claimed that the £2,298 deducted from revenue by way of precaution should be recouped by inserting in the account to be taken up to Aug. 6, 1887, the amount at which the plant has been taken over, and I think that this claim is well founded.

There are two other items—one the debts due from the company, the other the debts due to the company. The amount of the former is actually less than appears in the last balance-sheet; the latter are greater in amount. These two differences, it is claimed, should be treated as accretions to revenue up to Aug. 6, 1887. Suppose a debt due from the company had been set down at £6,000, but had been satisfied in the current year by a payment of £5,000, the difference, £1,000, would have been a benefit to revenue to that amount. So if a debt due to the company had been estimated as worth only £5,000, but £6,000 had been recovered, the additional £1,000 would also have increased the revenue of the period in which it was got in. In short, in making up this final balance-sheet it is no longer necessary or proper to put in estimates of the outstanding debts due to or from the company. The debts have been paid and realised respectively, and the actual amounts are known, and these amounts, whether less or greater than the last estimate, should come into the final account just as

**A** they would have done if the payment had been made in any year of the current business.

Solicitors: *Cunliffes & Davenport*, for *Lingards*, Manchester; *Cunliffes & Davenport*, for *T. E. Sampson*, Liverpool; *Burgess & Cosens*, for *Arthur Buckley*, Manchester.

**B** [Reported by W. C. Biss, Esq., Barrister-at-Law.]

**C**

## R. v. LERESCHE AND ANOTHER (JUSTICES OF LANCASHIRE)

[COURT OF APPEAL (Lopes and Kay, L.JJ.), June 15, July 21, 1891]

**D** [Reported [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384]

*Husband and Wife—Summary proceedings—Desertion—Discontinuance of cohabitation under separation deed—Offer by wife to resume cohabitation refused by husband—Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict., c. 52), s. 1.*

**E** A husband and wife agreed to live apart under a separation deed by which the husband covenanted to pay seven shillings a week to a trustee for the wife. The husband ceased to make the payments under the deed, and shortly after the wife asked to be allowed to resume cohabitation with him. The husband refused, and the wife obtained an order from magistrates for the payment by the husband of seven shillings a week maintenance under s. 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886.

**F** **Held:** to constitute desertion under the Act of 1886, the parties must have been living together as man and wife when desertion took place; accordingly, the husband's refusal to resume cohabitation did not amount to desertion within that Act, and the magistrates' order was wrong.

**G** **Notes.** The Married Women (Maintenance in Case of Desertion) Act, 1886, has been repealed. See now ss. 1 and 2 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

**H** Distinguished: *Chudley v. Chudley* (1893), 69 L.T. 617. Explained: *Bradshaw v. Bradshaw*, [1895–9] All E.R.Rep. 1155. Distinguished: *Cowley v. Cowley* (1897), Times, Feb. 3. Considered: *Huxtable v. Huxtable* (1899), 68 L.J.P. 83. Applied: *Synge v. Synge*, [1900–3] All E.R.Rep. 452. Considered: *Jackson v. Jackson*, [1924] P. 19. Referred to: *Wilkinson v. Wilkinson* (1894), 58 J.P. 415; *Wassell v. Wassell* (1899), 68 L.J.P. 127; *Kay v. Kay*, [1904–7] All E.R.Rep. 429; *Harriman v. Harriman*, [1908–10] All E.R.Rep. 85; *Papadopoulos v. Papadopoulos*, [1935] All E.R.Rep. 311; *Pardy v. Pardy*, [1939] 3 All E.R. 779; *Shaw v. Shaw*, [1939] 2 All E.R. 381; *Williams v. Williams*, [1939] 3 All E.R. 825; *Weatherley v. Weatherley*, [1946] 2 All E.R. 1.

**I** As to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 27 DIGEST (Repl.) 333 et seq. For the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1 and s. 2, see 40 HALSBURY'S STATUTES (2nd Edn.) 395, 399.

Cases referred to:

(1) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, 2784.

(2) *Pape v. Pape* (1887), 20 Q.B.D. 76; 57 L.J.M.C. 3; 58 L.T. 399; 52 J.P. 181; 36 W.R. 125; 4 T.L.R. 76, D.C.; 27 Digest (Repl.) 354, 2922.



Also referred to in argument :

*R. v. Birtwistle, etc., Justices* (1889), 58 L.J.M.C. 158, D.C.; 27 Digest (Repl.) 696, 6653.

*Crabb v. Crabb* (1868), L.R. 1 P. & D. 601; 37 L.J.P. & M. 42; 18 L.T. 153; 16 W.R. 650; 27 Digest (Repl.) 290, 2360.

*Keech v. Keech* (1868), L.R. 1 P. & D. 641; 38 L.J.P. & M. 7; 19 L.T. 462; 27 Digest (Repl.) 343, 2844.

*Ward v. Ward* (1858), 1 Sw. & Tr. 185; 27 L.J.P. & M. 63; 31 L.T.O.S. 238; 6 W.R. 867; 164 E.R. 685; 27 Digest (Repl.) 843, 2840.

*Gatehouse v. Gatehouse* (1867), L.R. 1 P. & D. 331; 36 L.J.P. & M. 121; 16 L.T. 34; 27 Digest (Repl.) 357, 2954.

*Dagg v. Dagg* (1882), 7 P.D. 17; 51 L.J.P. 19; 47 L.T. 132; 30 W.R. 481; 27 Digest (Repl.) 445, 3767.

**Appeal** by the husband from a decision of the Divisional Court (DAY and LAWRENCE, JJ.), refusing to issue a mandamus to the justices to call on them to state a Case for the opinion of the court under the Summary Jurisdiction Act, 1857, s. 4, and the Summary Jurisdiction Act, 1879.

The following statement of facts is taken from the judgment of the court: The husband and wife agreed in 1890 to live apart, and a separation deed was executed reciting this agreement. The husband therein covenanted with the wife, and with a trustee in the usual way, that she might live apart, and that he would pay to the trustee 7s. a week for her separate use, and the trustee covenanted that she would not molest the husband. The husband after a time discontinued the payment of 7s. a week, and, on Jan. 12, 1891, an action was brought against him by the trustee for the arrears. He suffered judgment to go by default, but did not satisfy the judgment. A judgment summons was taken out, and the husband was ordered to pay the amount of the judgment by instalments. These instalments were not paid, and an order for commitment was made, execution of which was suspended for a time. On April 6, 1891, the wife went to the husband's house and asked to be allowed to resume cohabitation with him. He refused, and would not admit her into the house. On April 24, she took out a summons before the magistrates at Manchester, under s. 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, as "a married woman deserted by her husband," for maintenance. The magistrates ordered him to pay 7s. a week, and refused to state a Case for the opinion of the court under the Summary Jurisdiction Act, 1857, s. 4, and the Summary Jurisdiction Act, 1879. The husband applied to the Divisional Court to grant a rule nisi calling on the magistrates to state a Case. The Divisional Court refused the rule on the ground that the question sought to be raised was not a question of law, but a question of fact, in respect of which the decision of the justices was final and conclusive. There was then an appeal from the refusal of the Divisional Court to grant a rule nisi to the Court of Appeal. That Court granted a rule nisi, which now came on for argument.

*Trevor White* for the husband.

*Atherley Jones* for the wife.

*Cur. adv. vult.*

July 21, 1891. **LOPES, L.J.**, read the following judgment of the court, in which he stated the facts, and continued: I am of opinion that, in this case, a question of law did arise in respect of which the magistrates should have stated a Case, and that the rule should be made absolute. To avoid the scandal, expense and delay which would arise in sending the matter back to the magistrates to state a Case, which would go to the Divisional Court, and perhaps cause an appeal to this court, counsel, at our suggestion, agreed to treat the facts which appeared in the affidavit of the magistrates as containing an accurate and sufficient statement of the facts, which should be regarded in all respects as if it were a Case Stated by the

**A** magistrates under the Summary Jurisdiction Act, 1857, s. 4, and the Summary Jurisdiction Act, 1879.

The question whether or not the wife has been deserted by the husband within the meaning of s. 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, is, as a general rule, a question of fact for the justices to determine. A husband deserts his wife if he wilfully absents himself from her society in spite of her wish. Desertion may be inferred from certain acts in one case which in another would not justify the same inference. There must be a deliberate purpose of abandoning the conjugal society. Such abandonment need not be for any specified period. If a husband had quite recently left his wife, stating that he did not intend to return, and was found living with another woman, there would be abundant evidence of desertion on which the justices could act. To constitute desertion the parties must be living together as man and wife when the desertion takes place. As was said in *Fitzgerald v. Fitzgerald* (1), desertion implies an active withdrawal from a cohabitation that exists.

**B** This brings me to the case now before the court. The husband and wife at the date of the alleged desertion were living apart under a separation deed. Cohabitation had ceased by mutual consent. It was, therefore, impossible that the husband could desert his wife. So far, this case is governed by *Pape v. Pape* (2), with which decision I entirely agree. But it is said that, assuming that there was no desertion up to the time of the wife seeking to resume cohabitation, his refusal to again cohabit with his wife amounted to desertion or constructive desertion. It is clear that cohabitation was not resumed. The husband unequivocally refused to cohabit, and would not allow his wife to enter the house. What, then, is the effect of the wife's offer and wish to resume cohabitation, and the husband's refusal? *Fitzgerald v. Fitzgerald* (1) answers this question. It is there said (L.R. 1 P. & D. at p. 698):

**F** "If the state of cohabitation has already ceased to exist whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'"

**G** I am of opinion, therefore, that the refusal of the husband to resume cohabitation did not amount to desertion within the statute in question. It follows, therefore, that the decision of the magistrates was wrong.

*Appeal allowed.*

**H** Solicitors: *Radford & Frankland* for *Bowden & Walker*, Manchester; *Chester & Co.* for *Lawson, Coppock & Co.*, Manchester.

[Reported by ADAM H. BITTLESTON, ESQ., Barrister-at-Law.]

## ALLCHURCH AND ANOTHER v. HENDON UNION ASSESSMENT COMMITTEE

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), July 9, 1891]

[Reported [1891] 2 Q.B. 436; 61 L.J.M.C. 27; 65 L.T. 450;  
56 J.P. 117; 40 W.R. 86; 7 T.L.R. 634]

*Rates—Assessment—Building occupied in parts—Separate occupation by tenants.*

The appellants were tenants of a house, one having the exclusive occupation of the ground floor and the other having the exclusive occupation of the first floor. There was a staircase leading from the front door to the first floor, but the appellant occupying that floor usually used an external staircase leading into the back yard. The appellants jointly used the back yard and the water-closet in it. They were jointly assessed and rated as joint occupiers of the house, and the assessment was confirmed by the respondents. On appeal,

**Held:** as each of the appellants had the exclusive occupation of his part of the house, they were occupying separate tenements capable of being rated, and, therefore, they should be rated separately.

**Notes.** Considered: *White and Hales v. Islington Corpn.*, [1909] 1 K.B. 133. Referred to: *Crow v. Hilleary*, [1913] 1 K.B. 385; *Helman v. Horsham and Worthing Assessment Committee*, [1949] 1 All E.R. 776.

As to the hereditament to be assessed for rates, see 32 HALSBURY'S LAWS (3rd Edn.) 81 et seq.; and for cases see 38 DIGEST (Repl.) 506 et seq.

**Appeal** by the respondents from the decision of the Queen's Bench Division (A. L. SMITH and GRANTHAM, JJ.), affirming on a Case Stated a decision of the Court of General Quarter Sessions for the county of Middlesex.

A rate for the relief of the poor for the parish of Hendon was made by the churchwardens and overseers of that parish on Dec. 7, 1889, in which the appellants were jointly assessed and rated as joint occupiers of a house and yard, No. 2, Belle Vue Road. The assessment was duly confirmed by the respondents. The appellants appealed to the General Quarter Sessions of the county of Middlesex, against the rate on (among others) the following grounds: First, that they were rated in respect of property of which they were not occupiers, and from which they derived no benefit; secondly, that they were jointly rated in respect of property which they did not occupy jointly, and in which they had no joint interest or benefit; thirdly, that the same rate was made on each of them in respect of the whole of the premises, whereas they each occupied a distinct portion thereof as a separate tenement only, and were liable, if at all, to be rated separately in respect of such separate tenement only; fourthly, that the rate was made on them jointly in respect of the whole of the premises, whereas they each respectively occupied only a distinct portion thereof as a separate tenement, and they did not occupy the premises nor any part of thereof jointly, and they were not liable to be rated jointly, and were liable, if at all, to be rated and assessed separately in respect of such separate tenements only.

The house contained nine rooms, four being on the ground floor and five on the first floor. The front door opened into a passage which communicates with the ground floor rooms, and also, by means of an internal staircase, with the first floor rooms. There was a small garden in front of the house, and behind the house a yard in which was the only water-closet. The back yard and water-closet were reached from the ground floor by a door which opened into one of the ground floor rooms, and from the first floor by a door which opened into one of the first floor rooms, and from which there was a staircase. It was usual for the occupier of the upper floor to reach the street from the back yard without passing through the house. The house was supplied with water from one cistern, which served both tenants, who could each draw water in his own kitchen independently of the other.



A The rooms on the ground floor all opened on to the passage, and the rooms on the first floor on to the landing at the top of the staircase. Except by the staircase, there was no internal access between the upper and lower floors. The house was let to the appellants, each being a weekly tenant paying 5s. 6d. a week rent, and each had a separate letting, rent-book and key. By arrangement between the tenants and the landlord, the latter paid all tenants' rates and taxes. The appellant B Parrott had the exclusive use and occupation of the rooms on the ground floor, and the appellant Allchurch had the exclusive use and occupation of the rooms on the first floor. The back yard and water-closet were jointly used. By arrangement between the appellants, the wife of Allchurch cleaned the internal staircase, and the wife of Parrott the passage on the ground floor. There was no bell to the front door, and, by a mutual understanding, one knock on the door was answered by C Parrott or one of his family, and two knocks by Allchurch or one of his family. The tenant of the ground floor had never been in the first floor rooms, nor had the tenant of the first floor himself ever used the inside staircase. The wife and children of the first floor tenant usually used the back entrance by the outside staircase, but a person calling on either tenant came to the front door, and letters for both were delivered there. The landlord did not reside in the house, nor retain D any control or dominion over it, nor render any services to the tenants. The tenant of the ground floor had the only key of the front door. The tenant of the upper floor had the only key of the door leading to the separate staircase. The furniture in and on the respective floors belonged to the respective tenants thereof. There was no division of the yard at the back. It was necessary to get into the yard in order to reach the water-closet, which was used by both tenants, and cleaned by E them alternately. Each tenant kept his coals in bins on his own floor.

The appellants contended that each tenant was the sole and exclusive occupier of a separate tenement or hereditament capable of being rated, and each tenant should have been separately rated in respect of the part of the house occupied by him as a separate dwelling, and that the rate was, therefore, bad. The respondents F contended that the appellants were rightly jointly rated as joint occupiers of the house. The court of quarter sessions decided in favour of the appellants, and ordered that the rate so far as it affected the appellants be quashed, subject to this Case Stated.

*Staveley Hill, Q.C., and Page for the respondents.*

*Lumley Smith, Q.C., and Bartley Denniss for the appellants.*

G **LORD ESHER, M.R.**—The argument in this case is made to depend on this, that, because there was no structural division in the house, the occupation of each part of it is to be treated as if there was a joint occupation by the people who in fact occupy separate portions. The phrase "structural severance" has nothing to do at all with occupation. It was invented at a time when the judges were labouring, under the Statute of Elizabeth and the Franchise Acts, to determine H what was an occupation which would give a liability to be rated, and what would give the right to the franchise. That phrase was in use for a long time, so much so that the legislature had to deal with it, and in fact has had to do away with it, so that, in dealing with occupation as a foundation for any right or liability, the phrase is got rid of, and it is necessary to look at the occupation and see what it is I that is occupied.

The question now is: what is the occupation here, because the occupier is the person to be rated. What do each of the appellants here occupy? One occupies the rooms on the ground floor of the house, and that is a separate occupation because nobody else has any right to interfere with it. The other occupies another portion of the house, and his occupation is a separate one and no one can interfere with it. Therefore, each one is a separate occupier of a part of the house, and they are each to be rated in respect of his occupation. Neither of them can be rated as an occupier of any part of the house with which he has nothing to do, as to which

he has no right at all, and which he cannot even enter on without trespassing. A  
The occupation of each is clearly separate. It would be a misuse of words, it  
would be untrue, to say that each occupies the whole house. As to the staircase,  
if both appellants have the right of using it, it seems to me that neither of them is  
in possession of it, but only the landlord. The landlord has given to each appellant  
the right of occupying some parts of the house, and he has not given them the right  
to occupy the whole house jointly. R

The question is merely one of occupation, and you must find out what it is that  
each appellant occupies. You find that each appellant occupies a something which,  
whatever it be, is a thing in respect of the occupation of which he is liable to be  
rated. If his occupation is a separate one, he is separately occupying something in  
respect of which he is liable to be rated, and he, in respect of that separate occupa-  
tion, must be the only person. So that the proper way of rating the appellants was C  
to rate each of them in respect of that separate part of the house, or whatever it is,  
which he separately occupies; the thing which he occupies being something which  
makes the person who occupies it liable for rates. The judgment of the Divisional  
Court is, therefore, right, and this appeal must be dismissed.

But it is said that this will give trouble to overseers. Perhaps so; but they must  
take the trouble of rating people according to their true liability. They must not D  
only look at the outside of a house, they must go in and inquire how it is occupied.  
The whole matter of structural separation is an exploded phrase and an exploded  
doctrine for all purposes whatever, and the phrase should never again be used.  
**BOWEN, L.J.**, has just left the court, but he heard the whole of the argument,  
and he agrees with the reasons which I have given in my judgment, and with all  
that I have said. E

**KAY, L.J.**—I agree, and I must say that I am glad that the conclusion seems  
to be inevitable, because any other would be productive of great injustice. To  
make the occupier of the ground floor liable for the rates of the first floor, on which  
he cannot go without trespassing, would be a very great injustice. In the same way,  
to make the occupier of the first floor liable for the rates of the ground floor, into F  
no part of which he can go except possibly the staircase which leads to the outer  
door, would be equally unjust. That they have a common use of the staircase  
cannot make each occupier occupy jointly with the other the other man's part of  
the house. I entirely agree with what the Master of the Rolls has said. The  
appeal must be dismissed.

*Appeal dismissed.* G

Solicitors: *Warburton & De Paula; D. R. Soames.*

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

## THE MARPESSA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Jeune, J.), July 28, 29, August 11, 1891]

[Reported [1891] P. 403; 61 L.J.P. 9; 66 L.T. 356; 40 W.R. 239;  
7 Asp.M.L.C. 155]

*Shipping—Collision—Damages—General average—Jettison of cargo.*

In a collision between a Dutch steamship and an English steamship the former was sunk, and, in order to reach a port of safety, the latter had to jettison part of her cargo. The owners of the Dutch ship brought a collision action against the owners of the English ship, who counterclaimed, and the Dutch ship was found alone to blame. On the reference as to damages, the owner of the English ship claimed the balance due in general average from ship to cargo, the amount due from cargo to ship having been deducted.

**Held:** since it was the relation between ship and cargo out of which the obligation to make general average contribution arose and not the antecedent collision that was the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution, the claim must be disallowed.

**Notes.** Considered: *The Minnetonka*, [1904-7] All E.R.Rep. 873; *Morrison Steamship Co., Ltd. v. Owners of Cargo Lately Laden on S.S. Greystoke Castle*, [1946] 2 All E.R. 696.

As to general average, see 35 HALSBURY'S LAWS (3rd Edn.) 502 et seq.; and for cases see 41 DIGEST 592 et seq.

Cases referred to:

- (1) *Schmidt v. Royal Mail Steamship Co.* (1876), 45 L.J.Q.B. 646; 4 Asp.M.L.C. 217, n.; 41 Digest 597, 4221.
- (2) *The Daring* (1868), L.R. 2 A. & E. 260; 37 L.J.Adm. 29; 41 Digest 948, 8411.
- (3) *Wright v. Marwood* (1881), 7 Q.B.D. 62; 29 W.R. 673; sub nom. *Wright v. Marwood, Gordon v. Marwood*, 50 L.J.Q.B. 643; 45 L.T. 297; 4 Asp.M.L.C. 451, C.A.; 41 Digest 592, 4163.
- (4) *Burton v. English* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 41 Digest 596, 4218.
- (5) *Bradburn v. Great Western Rail. Co.* (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 23 W.R. 48; 17 Digest (Repl.) 108, 222.
- (6) *Jebsen v. East and West India Dock Co.* (1875), L.R. 10 C.P. 300; 44 L.J.C.P. 181; 32 L.T. 321; 23 W.R. 624; 2 Asp.M.L.C. 505; 41 Digest 461, 2929.

Also referred to in argument:

- The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; affirmed sub nom. *Gracie (Owners) v. Argentino (Owners)*, *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp.M.L.C. 433, H.L.; 17 Digest (Repl.) 80, 27.
- The Star of India* (1876), 1 P.D. 466; 45 L.J.P. 102; 35 L.T. 407; 25 W.R. 377; 3 Asp.M.L.C. 261; 41 Digest 803, 6630.
- The Northumbria* (1869), L.R. 3 A. & E. 6; 39 L.J.Adm. 3; 18 W.R. 188; 3 Mar.L.C. 314; 41 Digest 812, 6739.
- The City of Lincoln* (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 38 W.R. 345; 6 Asp.M.L.C. 475, C.A.; 41 Digest 770, 6248.
- The Betsy Caines* (1826), 2 Hag. Adm. 28; 166 E.R. 154; 41 Digest 802, 6629.
- The Pactolus* (1856), Sw. 173; 28 L.T.O.S. 220; 5 W.R. 167; 166 E.R. 1079; 41 Digest 806, 6668.

**Petition** by the defendants in objection to the registrar's report in a collision action in personam.



On June 25, 1890, a collision occurred between the plaintiffs' steamship the *Prinz Frederik* and the defendants' steamship the *Marpessa*. The *Prinz Frederik* was sunk. Subsequently to the collision the *Marpessa*, in order to enable her to reach a port of safety, was obliged to jettison part of her gear and cargo. This loss of cargo and the damage to the *Marpessa* formed the subject of general average. A provisional adjustment was made by which £722 19s. 4d. was found due from the ship to the cargo, and £408 1s. 7d. from the cargo to the ship, the result being a balance of £314 17s. 9d. due from the ship to cargo. The *Marpessa's* cargo was carried under bills of lading which relieved the shipowners from liability for the loss of and damage to the cargo. An action was brought by the plaintiffs, who were a Dutch company, and the defendants counterclaimed and obtained bail under s. 34 of the Admiralty Court Act, 1861. The owners of cargo on the *Marpessa* were not parties to the action. The *Prinz Frederik* was found alone to blame both by the Admiralty Court and the Court of Appeal, and the amount of the defendants' damages was referred to the registrar and merchants for assessment. At the reference, the defendants originally claimed, inter alia, an item of £884 18s. 11d., the value of the jettisoned cargo, but subsequently amended their claim by substituting for the £884 18s. 11d. an item of £722 19s. 4d., being the ship's contribution in general average to the cargo. The registrar disallowed this item, and the defendants appealed from that decision, claiming to be allowed either £722 19s. 4d., or in the alternative the sum of £314 17s. 9d., being the balance due from ship to cargo.

*Barnes, Q.C.*, and *Pyke* for the defendants.

*Myburgh, Q.C.*, and *J. P. Aspinall* for the plaintiffs.

*Cur. adv. vult.*

Aug. 11, 1891. **JEUNE, J.**, stated the facts, and continued: The question is whether, in estimating the damages due to the *Marpessa*, the sum of £314 17s. 9d. is to be included. The argument for the claim is very simple. It is said that the general average loss was caused by the collision, and, therefore, that the wrong-doing ship is liable to make good the sum which the *Marpessa* had to pay by way of general average contribution. It is admitted that there is no precedent of any such claim ever having been allowed. It is hardly suggested that such a claim has ever been made. It is said that it is made in the present instance because, the wrong-doing ship having been sunk, the cargo-owners can bring no action against the owners in their country, as the law of the country does not permit it, and it is said that they are not likely to be able to sue the owners in this country. It is not probably, however, the first time that such a set of circumstances has arisen, and, even if it were, the principle contended for is one of general application; nor, it is to be observed, was the present claim that first put forward in this proceeding. Originally the claim was for the total value of the cargo jettisoned, then an amendment was asked for to allow the £722 19s. 4d. to be claimed, as being the total sum due from ship to cargo. Before me, the claim was limited to the sum of £314 17s. 9d., being the amount due from ship to cargo on the balance of account between them.

The answer to the claim put forward appears to me to be not, as was suggested, that loss by collision is an exception in the bill of lading, because the bill of lading is not concerned with liabilities to contribution in general average: *Schmidt v. Royal Mail Steamship Co.* (1); nor, as was also suggested, that the court would be compelled in this and in all similar cases to determine the amount of the general average contribution, because the court is compelled to do this if the matter incidentally arise in a case properly before it: *The Daring* (2); but that the loss sustained by the ship, by having to make the general average contribution in question, was not caused by the collision, though of course it would not have occurred had not the collision happened. Whether the rule that loss by general average must be borne proportionately by those interested arises from an implied

A contract to contribute inter se, as was suggested by BRAMWELL, L.J., in *Wright v. Marwood* (3) (7 Q.B.D. at p. 67), or whether, as SIR BALIOL BRETT, M.R., held in *Burton v. English* (4) (12 Q.B.D. at pp. 220, 221),

"it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean,"

B or whether, as BOWEN, L.J., said in the same case (*ibid.* at p. 223),

"In the investigation of legal principles the question whether they arise by way of implied contract or not often ends by being a mere question of words,"

it seems to me clear that it is the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution. It is an instance of the old distinction between *causa causans* and *causa sine qua non*.

C One consideration in particular appears to me to support this view. In this case, the balance of contribution as between owners of ship and owners of cargo was against the owners of ship; but the balance might have been the other way, and there must always be a balance of contribution in favour either of ship or of cargo.

D where the general average loss extends to both. I put, therefore, to senior counsel for the defendants what appeared to me to be a crucial question, viz., if the balance on general average contribution had been due to the ship from the cargo, would it be reckoned in diminution of the damages? Counsel, I think, preferred to say that it would. If so, it appears to me that a principle similar to that on which it has been held that the benefit of an insurance cannot be claimed by a wrong-doer

E (*Bradburn v. Great Western Rail. Co.* (5) and *Jebsen v. East and West India Dock Co.* (6)) is fatal to his contention. Junior counsel for the defendants, on the other hand, said unhesitatingly that such balance could not be brought in to lessen the damages, that the ship could recover the full actual loss to it, that the cargo could recover the full actual loss to it, and that, besides, one or other could recover the amount of the payment which on the balance of account one or other must, in

F almost every case, have to make, and he did not shrink from the conclusion that the wrong-doer must thus in almost every case of the kind pay more than the total amount of the actual damage caused. I cannot think that that is the law; indeed, if it be, it is unaccountable that shipowners and cargo-owners have, since the institution of the Admiralty Court, neglected so obvious a method of profiting by collision. I must, therefore, decide against the present claim.

G Solicitors: *Clarkson, Greenwell & Co.; Gellatly, Son & Warton.*

[*Reported by J. P. ASPINALL, Esq., and BUTLER ASPINALL, Esq.,*

*Barristers-at-Law.*]

## GREENWOOD v. TURNER

[CHANCERY DIVISION (Kekewich, J.), February 6, 1891]

[Reported [1891] 2 Ch. 144; 60 L.J.Ch. 351; 64 L.T. 261;  
39 W.R. 315]*Specific Performance—Sale of land—Purchaser in possession—Acceptance of title—Option to give up possession or to pay purchase-money into court.*

The defendant, while in possession of property under an underlease from S. expiring on June 24, 1890, on Aug. 22, 1889, contracted to purchase the property from S.'s lessors (the plaintiffs), accepted the title, and paid a deposit. The day fixed for completion by the contract was the date of the expiration of the lease, and the defendant was to pay interest on the purchase-money in default of completion. The defendant, although he remained in possession, refused to complete or to pay the balance of the purchase-money. He claimed to be in possession under the sublease and not under the contract, and offered to pay rent at the rate reserved by his lease or to bring the amount into court. The plaintiffs brought an action for specific performance, and moved for a four-day order on the defendant to pay the balance of the purchase-money and interest into court.

**Held:** the defendant must have the option of retiring from possession or of paying the balance of the purchase-money into court within one month from the date of the hearing of the motion, and, therefore, the motion failed.

Dictum of COTTON, L.J., in *Lewis v. James* (1) (1886), 32 Ch.D. at p. 380, applied.

**Notes.** Applied: *Re Cassano and Mackay's Contract* (1919), 64 Sol. Jo. 259. Considered: *Pearlberg v. May*, [1951] 1 All E.R. 1001. Referred to: *Cook v. Andrews* (1896), 66 L.J.Ch. 137.

As to payment of interest and payment into court in an action for specific performance, see 36 HALSBURY'S LAWS (3rd Edn.) 341 et seq.; and for cases see 42 DIGEST 558 et seq.

Cases referred to:

- (1) *Lewis v. James* (1886), 32 Ch.D. 326; 56 L.J.Ch. 163; 54 L.T. 260; 50 J.P. 423; 34 W.R. 619, C.A.; 42 Digest 558, 1231.
- (2) *Cutler v. Simons* (1816), 2 Mer. 103; 35 E.R. 880, L.C.; 42 Digest 561, 1266.
- (3) *Pope v. Great Eastern Rail. Co.* (1866), L.R. 3 Eq. 171; 36 L.J.Ch. 60; 15 L.T. 239; 12 W.R. 192; 40 Digest (Repl.) 201, 1634.
- (4) *Clarke v. Wilson* (1808), 15 Ves. 317; 33 E.R. 774, L.C.; 42 Digest 560, 1249.
- (5) *Tindal v. Cobham* (1835), 2 My. & K. 385; 4 L.J.Ch. 98; 39 E.R. 991; 42 Digest 560, 1251.
- (6) *Gibson v. Clarke* (1813), 1 Ves. & B. 500; 35 E.R. 195, L.C.; 42 Digest 561, 1263.

Also referred to in argument:

*Crutchley v. Jerminham* (1817), 2 Mer. 502; 35 E.R. 1032, L.C.; 42 Digest 561, 1268.

**Motion.**

By an agreement in writing, dated Aug. 22, 1889, and made between the plaintiffs, Henry Charles Greenwood and John Charles McMullen, trustees of the will of Mary Ann McMullen deceased, of the one part, and the defendant, Thomas Turner, of the other part, and duly signed by the defendant, the plaintiffs agreed to sell and the defendant agreed to purchase a freehold messuage called Elm House, Lavender Hill, Surrey, with its outbuildings, gardens and appurtenances, and the fee simple and inheritance thereof, for £5,000, subject to a sub-



A sisting lease of the premises to one Frederick William Steward for the term of fourteen years from June 24, 1876, at the annual rent of £185. By the terms of the agreement, the sum of £4,750 (being the amount of the purchase-money over and above a deposit of £250 which was paid by the defendant to the plaintiffs on or before the execution of the agreement) was to be paid on June 24, 1890, and on payment thereof, a proper assurance of the purchased premises was to be executed to the defendant; and it was provided that if, from any cause whatever, the purchase should not be completed on June 24, 1890, the defendant should pay interest on the unpaid purchase-money at the rate of 4 per cent. per annum from that day until completion. The plaintiffs deduced a good title to the hereditaments, and they alleged that the defendant had, long before June 24, 1890, accepted their title, and that, after the defendant accepted the plaintiffs' title, the plaintiffs by their solicitor pressed the defendant to forward the draft of the conveyance in pursuance of the agreement, but that he had never done so. The defendant had not paid his unpaid purchase money of £4,750, or any part thereof, or any interest thereon, and he refused to complete his purchase, or to pay the unpaid purchase-money, notwithstanding many requests by the plaintiffs. The plaintiffs brought an action against the defendant claiming specific performance by the defendant of the agreement, and payment by the defendant of the unpaid purchase-money of £4,750 and the interest thereon; also damages and costs. A motion was now made on behalf of the plaintiffs that the defendant, having accepted the title to the hereditaments the subject of the action, and being in possession thereof, might be ordered within four days after service of the order to be made on the motion to lodge in court to the credit of the action the sum of £4,750, being the unpaid balance of his purchase-money for the premises, together with interest thereon at the rate of 4 per cent. per annum from June 24th, 1890, to the date of payment, the amount thereof to be verified by affidavit, or that such further or other order might be made with reference to the defendant's occupation of the premises as to the court should seem meet. According to the evidence filed in support of the motion, at the date of the contract of Aug. 22, 1889, of which specific performance was claimed in the action, the defendant was in occupation of Elm House as under-lessee of Frederick William Steward, and which, therefore, was to expire, and did expire, on June 24, 1890. Ever since the last-mentioned date the defendant had been, and still was, in actual possession of the premises; no part of the purchase money of the premises beyond the deposit of £250 mentioned in the contract for sale had been paid; and the defendant had not paid any rent in respect of his occupation of the premises since June 24, 1890, nor any interest on his purchase-money, and no arrangement had been made or proposed by him with reference to his occupation thereof. The defendant filed an affidavit in opposition to the motion in which he stated that he was tenant of Elm House under a lease thereof dated June 15, 1882, and made between Frederick William Steward of the one part and himself of the other part, whereby Elm House was granted to him for a term expiring on June 24, 1890, at an annual rent of £160, and that he had continued to remain in possession on the expiration of such lease, but not under the agreement for sale and purchase. The defendant also stated that he was ready and willing to pay rent at the rate aforesaid from June 24, 1890, to Frederick William Steward or the person entitled thereto, or to bring the amount thereof into court without prejudice to the defence raised in the action.

*Warmington, Q.C., and Dauney for the plaintiffs.*

*Theobald for the defendant.*

**KEKEWICH, J.**—I feel strongly tempted to make this order, because I cannot help thinking that the purchaser has retained possession as long as he could, and but for this action, would have retained it still; that is to say, he is

endeavouring as far as possible to have the benefit of the contract and yet retain the purchase-money. If I could find any authority to that effect I should act on it with great readiness. But my recollection of the practice of the court and the cases combine to prevent me from making the order. If I did so I should be establishing a new rule. In *Lewis v. James* (1), COTTON, L.J., states the rule, which is well known, and I only take it from that case because it expresses the rule in plain words and in better language than I could frame. He says (32 Ch.D. at p. 330):

"This is in some respects like a case where a purchaser being in possession is required to pay into court, if he remain in possession, the purchase-money agreed upon, but it is well known that in such a case under ordinary circumstances an option is given to the purchaser to go out, and the order only is that if he continue in possession he must pay the price into court."

His Lordship then refers to two cases, *Cutler v. Simons* (2) and *Pope v. Great Eastern Rail. Co.* (3), the latter illustrating a large class of cases where the purchaser remains in possession and is doing something which is inconsistent with the property remaining intact or with restoring it in its original state, and the court on that ground orders payment into court. The lord justice refers to the principle of those cases as being what I have already stated, and he does not refer to any other exception from the ordinary rule. I turn to the other cases which have been referred to, and in all of them I find that the purchaser has had the option of retiring from possession.

It is said that, in all these cases, there was an objection to the title. There was an objection in *Clarke v. Wilson* (4) and in *Tindal v. Cobham* (5); and in *Gibson v. Clarke* (6) there were very special circumstances, for the purchaser had been let into possession in the confidence that a good title would be made out, and the confidence was not made good. LORD ELDON said that he must pay the money or restore the land; and the order, made by agreement, was that the purchaser should restore possession, accounting for the rents, without prejudice to any question between the parties. I find no rule, nor anything approaching to a rule, that, where a purchaser has taken and remains in possession, although the possession was under the contract, he is bound to pay the money into court, unless under such circumstances as I have mentioned. If I were to hold that he had no option, I think that I should be extending the rule. I therefore, refuse to make an order for payment into court. The defendant must have the option of retiring from possession.

*Warmington, Q.C.*, asked for interest on the purchase-money according to the terms of the contract.

*Theobald* argued that that would be inconsistent with the option allowed to the defendant, and that at all events such an order ought not to be made on the motion.

**KEKEWICH, J.**—Such an order was made in *Tindal v. Cobham* (5) and in *Gibson v. Clarke* (6). The defendant is claiming to have the benefit of six months' possession for nothing. The order will be that the defendant elect either to pay the purchase-money into court by Mar. 6, i.e., within one month, or to give up possession on that day. If he gives up possession, then he must pay to the plaintiffs interest at 4 per cent. on the purchase-money from June 24, 1890, to March 6, 1891.

Solicitors: *Edward Hilder; Pontifex, Hewitt & Pitt.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

# A Re SARTORIS'S ESTATE. SARTORIS v. SARTORIS.

[COURT OF APPEAL (Lindley, Bowen and Fry, L.J.J.), November, 1891]

[Reported [1892] 1 Ch. 11; 61 L.J.Ch. 1; 65 L.T. 544;  
40 W.R. 82; 8 T.L.R. 51; 36 Sol. Jo. 41]

**Trust—Protective trust—Forfeiture of protected life interest—Making of receiving order.**

The income of property had been given by will to a debtor for life or until he should assign, charge, or otherwise dispose of the income or some part thereof, or become bankrupt, "or do or suffer something whereby the said income, if belonging to him absolutely, or some part thereof, would become payable to or vested in some other person." A receiving order had been made against the debtor but no further bankruptcy proceedings, except a meeting of creditors, had been taken. The trustees had retained all the income accrued due since the receiving order, claiming that the protected interest had determined.

**Held:** although an order appointing a receiver did not vest the debtor's estate in the receiver and the debtor was still the proper person to sue for the income, nevertheless the order had the effect of an injunction preventing the debtor from receiving it; accordingly, the income was no longer "payable" to the debtor; and the protected interest had determined.

**Notes.** The Bankruptcy Act, 1883, ss. 9, 54, 70, have been repealed and replaced by the Bankruptcy Act, 1914, ss. 7, 53, 74.

Explained and Followed: *Re Laye, Turnbull v. Laye*, [1913] 1 Ch. 298. Considered: *Re Baring's Settlement Trusts, Baring Bros. & Co., Ltd. v. Liddell*, [1940] 3 All E.R. 20. Distinguished: *Re Harris, Cope v. Evans*, [1945] 1 All E.R. 702. Considered: *Re Pozol's Settlement Trusts, Westminster Bank, Ltd. v. Guerbois*, [1952] 1 All E.R. 1107.

As to protective trusts, see 34 HALSBURY'S LAWS (3rd Edn.) 603 et seq.; as to interests determinable on bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 413; as to the effect of a receiving order, see *ibid.* 319. For cases see 4 DIGEST (Repl.) 187, 5 DIGEST (Repl.) 717. For the Bankruptcy Act, 1914, ss. 7, 53, 74, see 2 HALSBURY'S STATUTES (2nd Edn.) 336, 388, 402.

Cases referred to:

(1) *Rhodes v. Dawson* (1886), 16 Q.B.D. 548; 55 L.J.Q.B. 134; 34 W.R. 240, C.A.; 4 Digest (Repl.) 186, 1687.

(2) *Re James, Clutterbuck v. James* (1890), 62 L.T. 454; 6 T.L.R. 240; 5 Digest (Repl.) 717, 6232.

Also referred to in argument:

*Re Moon, Ex parte Dawes* (1886), 17 Q.B.D. 275; 55 L.T. 114; 34 W.R. 753; 2 T.L.R. 506, C.A.; 5 Digest (Repl.) 716, 6227.

*Re Sacker, Ex parte Sacker* (1888), 22 Q.B.D. 179; 58 L.J.Q.B. 4; 60 L.T. 344; 37 W.R. 204; 5 T.L.R. 112, C.A.; 4 Digest (Repl.) 121, 1082.

*Samuel v. Samuel* (1879), 12 Ch.D. 152; 47 L.J.Ch. 716; 41 L.T. 462; 26 W.R. 750; 44 Digest 1232, 10654.

*Metcalfe v. Metcalfe* (1889), 43 Ch.D. 633; 59 L.J.Ch. 159; 61 L.T. 767; 6 T.L.R. 92; affirmed, [1891] 3 Ch. 1; 60 L.J.Ch. 647; 65 L.T. 426; 7 T.L.R. 558, C.A.; 5 Digest (Repl.) 706, 6165.

**Appeal** by the debtor, A. C. F. Sartoris, from a decision of CHITTY, J. (64 L.T. 730) holding that he had forfeited his protected life interest under the will of his father, E. J. Sartoris.

E. J. Sartoris, by his will dated July 19, 1887, appointed his brother A. Sartoris and O. Green executors thereof, and devised and bequeathed all his real and



personal estate, not otherwise disposed of, unto the plaintiffs H. Sartoris and H. E. Gordon, upon trust for sale and conversion, and for investment of the proceeds as therein directed, and it was declared that the plaintiffs should stand possessed of the residuary trust moneys, and the stocks, funds, shares, and securities in or upon which the same should from time to time be invested (thereinafter called "the residuary trust funds"), upon trust to pay the income of the residuary trust funds to the testator's son, the defendant Algernon Charles Frederick Sartoris, during his life or until he should

"assign, charge, or otherwise dispose of the said income, or some part thereof, or become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person (which of the said events should first happen);"

and if the trust thereinbefore declared should determine in the lifetime of A. C. F. Sartoris then in trust during the remainder of the life of A. C. F. Sartoris to pay and apply the income thereof for the maintenance and support or otherwise for the benefit of all or such one or more exclusively of the other or others of A. C. F. Sartoris and his wife and issue for the time being in such manner in all respects as the trustees of the will should in their uncontrolled discretion think fit.

The testator died on Nov. 23, 1888, and his will was duly proved on Jan. 23, 1889. The total income of the testator's residuary trusts funds was approximately £6,000 per annum. The wife of the defendant A. C. F. Sartoris, by whom he had three children then living, survived the testator, and was living at the date of the present proceedings.

On a petition filed Oct. 28, 1890, a receiving order in bankruptcy against the defendant A. C. F. Sartoris was made by the Hampshire County Court, holden at Southampton, on Nov. 28, 1890. The first meeting of creditors of A. C. F. Sartoris was held on Dec. 29, 1890, and adjourned till Jan. 26, 1891, and was again adjourned pending the present proceedings. A. C. F. Sartoris had not been adjudicated bankrupt. At the date of the receiving order no income of the testator's residuary estate was in the hands of the plaintiffs available for payment in accordance with the trusts of the will, but income had since accrued due therefrom, and had been paid to them.

An originating summons was taken out by the plaintiffs, to which A. C. F. Sartoris, his wife, their three infant children, and the official receiver in bankruptcy of the Hampshire County Court were defendants, asking how the plaintiffs were to deal with the accruing income of the residuary trust funds, this point depending upon the question of law, whether, by reason of a receiving order being made, any one of the events specified in the will had happened whereby the estate of A. C. F. Sartoris had become determined. The summons was heard before CHITTY, J., on June 9, 1891, when his Lordship decided that since the receiving order the income was no longer "payable to" A. C. F. Sartoris; and that his life interest had consequently determined (64 L.T. 730). From that decision A. C. F. Sartoris now appealed.

*Sidney Woolf, Q.C., and R. Ringwood* for A. C. F. Sartoris.

*L. H. Jenkins* for Mrs. Sartoris and her three children.

*C. A. James* for the trustees of the will.

**LINDLEY, L.J.**—In this case we have to consider the effect of a clause in a will. By his will, the testator devised and bequeathed certain property to trustees, and by the clause in question directs the trustees to pay the income to his son A. C. F. Sartoris

"during his life or until he shall assign, charge, or otherwise dispose of the said income, or some part thereof, or become bankrupt, or do or suffer something whereby the said income, if belonging to him absolutely, or

**A** some part thereof, would become payable to or vested in some other person (which of the said events shall first happen)."

What has happened is this. A. C. F. Sartoris did not assign, charge, or otherwise dispose of the income, or any part of it, nor did he become bankrupt; but the question is whether he has done or suffered anything whereby the income, if belonging to him absolutely, would have become payable to some other person. A receiving order in bankruptcy was made against him in November, 1890, and a meeting of creditors was held, but nothing further has been done. He has not been adjudged a bankrupt, and no trustee has been appointed, but the receiving order still subsists.

**B** The question is whether, having regard to the receiving order, the income is still payable to the debtor. The material sections of the Bankruptcy Act, 1883, are ss. 9, 54, and 70. Section 9 states the effect of a receiving order, and provides that an official receiver shall be thereby constituted receiver of the property of the debtor. Section 54 makes the property of the debtor vest in the official receiver on the debtor being adjudged bankrupt. Section 70 (1) enacts that it shall be the duty of the official receiver, "pending the appointment of a trustee, to act as interim receiver of the debtor's estate." Section 70 (2) is important.

**D** It says that,

"for the purpose of his duties as interim receiver or manager, the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court."

**E** We are asked to say that, notwithstanding the appointment of the receiver for the purpose of receiving the debtor's property, the income is still payable to the debtor, because the receiver cannot sue for it, and the debtor is still the proper person to sue. The debtor's estate, it is true, does not vest in the receiver, and the distinction between the position of an official receiver and that of a trustee in bankruptcy was pointed out at some length in *Rhodes v. Dawson* (1). But it does not follow that, because it was there held that the liquidating debtor is the proper person to sue for the income, the order for the appointment of a receiver means nothing at all. The duty of the receiver is to receive the debtor's estate, and it must be remembered that an order of the High Court appointing a receiver has the effect of an injunction, and prevents the person against whom the order is made from receiving the money which the receiver was appointed to receive. The fallacy of the argument of A. C. F. Sartoris is in supposing that, because the estate has not vested in the official receiver, and the debtor is the proper person to sue for it, the debtor is still the person entitled to receive the income.

**G** It is an entire misapprehension to suppose that the order appointing the receiver means nothing at all, and that, after it is made, it is still the right of the debtor to receive his assets. With regard to *Re James, Clutterbuck v. James* (2), that was evidently decided by KEKEWICH, J., on the assumption that under the Scottish law no person was in fact appointed to receive. The decision of CHITTY, J., is quite right and the appeal must be dismissed with costs.

**BOWEN, L.J.**—I am of the same opinion.

**I** **FRY, L.J.**—I agree.

*Appeal dismissed.*

Solicitors: *Oliver Green; Ramsden & Co.*

[*Reported by E. A. SCRATCHLEY, Barrister-at-Law.*]

# Re AKERMAN. AKERMAN v. AKERMAN.

[CHANCERY DIVISION (Kekewich, J.), July 2, 1891]

[Reported [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194;  
40 W.R. 12]

*Will—Debt owing to testator—Debts owing from specific devisees and legatees—  
Other debts owing from beneficiaries entitled to share of residue—Debts  
statute-barred.*

A testator made various specific devises and bequests and directed that the proceeds of the sale of his residuary estate (which consisted of realty and personalty) should be divided in stated proportions. It was alleged that some of the specific devisees and legatees and some of the residuary beneficiaries owed debts to the testator which (if they were owing), were statute-barred at his death.

**Held:** (i) the specific devisees and legatees were each entitled to take the property specifically given without first making good what, if anything, they owed to the testator's estate; and (ii) the residuary beneficiaries, on the other hand, had to bring into account any money they owed the estate with interest at 4 per cent. from the date of death on the principle that a person who owes money to an estate, and who is, therefore, bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass unless he first makes the contribution which completes it.

**Per Curiam:** In this respect, a pecuniary legatee is in a different position from a specific legatee.

**Notes.** Considered: *Re Taylor, Taylor v. Wade* (1894), 8 R. 186; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66. Distinguished: *Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69. Explained: *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806. Considered: *Re Melton, Milk v. Towers*, [1916-17] All E.R.Rep. 672; *Re Savage, Cull v. Howard*, [1918-19] All E.R.Rep. 700. Referred to: *Re Palmer, Palmer v. Clarke* (1894), 13 R. 220; *Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Re Brown and Gregory, Shepheard v. Brown and Gregory, Andrews v. Brown and Gregory*, [1904] 1 Ch. 627; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Peruvian Railway Construction Co.* (1915), 85 L.J.Ch. 129; *Re Smelting Corpn., Seaver v. Smelting Corpn.*, [1915] 1 Ch. 472; *Re Dacre, Whitaker v. Dacre* (1916), 85 L.J.Ch. 274; *Re National Livestock Insurance, Re National General Insurance*, [1917] 1 Ch. 628; *Re Fenton (No. 2), Ex parte Fenton Textile Association, Ltd.*, [1930] All E.R.Rep. 27; *Picken v. Lord Balfour of Burleigh*, [1945] Ch. 90.

As to legacies to debtors, see 16 HALSBURY'S LAWS (3rd Edn.) 321-322; and for cases see 23 DIGEST (Repl.) 448.

Cases referred to:

- (1) *Re Cordwell's Estate, White v. Cordwell* (1875), L.R. 20 Eq. 644; 44 L.J.Ch. 746; 23 W.R. 826; 23 Digest (Repl.) 450, 5185.
- (2) *Cherry v. Boulbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, 3967.
- (3) *Courtenay v. Williams* (1844), 3 Hare, 539; 13 L.J.Ch. 461, L.C.; affirmed (1846), 15 L.J.Ch. 204; 6 L.T.O.S. 517, L.C.; 23 Digest (Repl.) 449, 5179.

Also referred to in argument:

*Ballard v. Marsden* (1880), 14 Ch.D. 374; 49 L.J.Ch. 614; 42 L.T. 763; 28 W.R. 914; 23 Digest (Repl.) 448, 5162.



- A *Harvey v. Palmer* (1851), 4 De G. & Sm. 425; 18 L.T.O.S. 5; 15 Jur. 982; 64 E.R. 897; 4 Digest (Repl.) 454, 3978.  
Priddy v. Rose (1817), 3 Mer. 86; 36 E.R. 33; 43 Digest 921, 3612.

B **Adjourned Summons** taken out by Henry Akerman, asking that it might be determined whether the applicant and the other sons of the testator, or any or which of them, ought to be charged with any and what sums lent by the testator to them respectively; and whether they ought to bring into account as against their respective shares of the testator's residuary real and personal estate, or of any specific property by the said will given to them, any and what sums due from them respectively to the testator at the date of his death.

- C Henry Akerman, by his will dated Oct. 28, 1886, appointed his wife and his son James his trustees and executors, and after making various bequests and devises (including specific devises of freeholds to his sons William, Henry, James, and George and a bequest of certain leaseholds to his son William), devised a farm and lands in the county of Bucks to his trustees upon trust to let, sell, or lease the same, and in the event of the same being let to pay the income to his children (other than his daughter Eliza) in equal shares, and in the event of a sale to pay and apply the net proceeds to or for the benefit of his seven children in the same manner as was directed with respect to the shares of his children in his residuary real and personal estate. The testator devised and bequeathed all his residuary real and personal estate to his trustees upon trust to sell and convert the same into money and out of the proceeds to pay the testator's debts, funeral and testamentary expenses, and the pecuniary legacies, and to hold the net proceeds as to three-sevenths thereof upon certain trusts for his son Edward and his two daughters and their issue, and to pay the remaining four-sevenths to the testator's sons Henry, William, James, and George in equal shares as tenants in common. The testator made two codicils to his will, which are not material to this report, and by a third codicil, dated Oct. 26, 1889, after reciting that he had sold his farm and lands in Bucks for £4,000, bequeathed £2,000 part thereof to his wife and directed the remaining £2,000 to remain as part of his residuary estate. The residuary estate of the testator consisted principally of certain building land and the said sum of £2,000.

- F The testator died on June 23, 1890. At the time of his death the testator held acknowledgments or promissory notes respectively signed by his four sons James, Henry, William, and Edward, for various sums advanced to them. These advances were made considerably more than six years previously to the date of the testator's death, and the debts were accordingly barred by the Statute of Limitations. The question was also raised whether the testator had not by his conduct released the debts created by these advances, and whether any sums were in fact due from his sons to the estate, and an inquiry was directed to ascertain the facts. By two agreements, dated Mar. 18, 1889, and Nov. 27, 1889, made between the testator and his son George, the latter admitted his indebtedness to the testator in various amounts. Edward was adjudicated bankrupt on Sept. 17, 1869, and obtained his discharge on Jan. 1, 1870; the advances made to him by the testator were anterior to the date of his bankruptcy.

- H *Warmington, Q.C.*, and *Butcher* for the applicant.  
*P. S. Stokes* for the executrix.  
I *Dunham* for James and William Akerman.  
*Duncan* for other beneficiaries.  
*Upjohn* for George Akerman.  
Edward Akerman in person.

**KEKEWICH, J.**—The questions which have been argued in this case directly affect the testator's three sons, Henry, William, and James. They also affect the fourth son George, but indirectly, because if Henry, William, and James, or any one or more of them, have to contribute to the testator's estate by reason

of being indebted thereto, George would have a larger fund out of which he would take his share. These questions do not affect Edward, who is also mentioned in the will; he became bankrupt before the death of the testator, and no one has attempted to argue that his debt, which it is admitted then existed, was subsisting at the time of the testator's death. I may, therefore, leave George and Edward out of consideration. A

The other sons, Henry, William, and James, all take specific devises or legacies, and it has been suggested rather than argued that they cannot take the properties specifically given to them without first making good what they owe to the testator's estate—that is, that there should be a deduction in each case from the specific devise or legacy of the amount which is due to the estate from the devisee or legatee. No authority has been cited for this suggestion, and it seems to me contrary to all authority. B

A specific legacy is a thing to be taken apart and given to the legatee; it is to be extracted from the estate before the residue can be ascertained. On the other hand, a debt is part of the residue; it has to be paid, so far as it can be recovered, in order that the residue may be constituted. The distinction is clear between pecuniary and specific legacies in reference to such a debt. C

As regards the residuary estate, apart from the argument that there is no debt at all due to the estate from the testator's sons, it is not contended that a debtor to the testator's estate must not make good his debt before he takes his share of the residue; and if the case fell within the ordinary rule that a debtor cannot claim a part of the residue without making good what he owes to that residue, there would be no difficulty in dealing with this case. D

The difficulty is that here there is included in the residue not only ordinary personal estate but also real estate. There is a general gift of the residuary real and personal estate to the trustees of the testator, who in this case are the same persons as the executors of the will, in trust to sell and convert the property into money, and out of the proceeds of sale to pay the testator's debts and funeral and testamentary expenses and the pecuniary legacies, and then to divide the residue among the children of the testator in the shares indicated. E  
In other words, it is strictly residue which is to be divided; it is what remains of the property after satisfying specific legacies, and that is to be dealt with as residue should be dealt with, namely, in the payment of debts, funeral and testamentary expenses and pecuniary legacies, and the ultimate residue is to be divided in that character. The argument is that though as against the executors and as against the personal estate what is due must be brought in so as to constitute residue, yet as against the proceeds of real estate that rule does not apply. No case has been produced in which the general rule has been held to apply to such a case, perhaps for the reason hinted at by BACON, V.-C., in *Re Cordwell's Estate, White v. Cordwell* (1). I think that I must decide this case on general principles. F

LORD COTTENHAM, L.C., in *Cherry v. Boulton* (2), remarked that the word "set-off" is very inaccurately used in a case of this kind. I would venture to add to that remark that the term "retainer" is also inaccurately used in cases of this kind. Neither of these words can properly be used, and both produce confusion. The principle which is applicable will be found laid down in *Cherry v. Boulton* (2), and also in *Courtenay v. Williams* (3), and it is that a person who owes an estate money—that is, who is bound to increase the general mass to be distributed by the contribution of the amount due from him—cannot claim an aliquot share of the mass without bringing in the contribution which completes it. Nothing is retained by the representatives of the testator, and nothing is strictly set off. The contributor is paid by holding in his own hand a part of the mass, which, if the mass had been first completed, he would be able to recover back. That is a right on his part to pay himself out of the fund in his hands rather than a set-off. As WIGRAM, V.-C., says in *Courtenay v. Williams* (3) the legatee has assets of the testator in his hands, and must pay his legacy I

- A** pro tanto out of those assets. Why should not that principle be applied to a case like this, where all the property is put together and all given to the same persons, upon the same trusts for payment of debts and division among the same persons? The contributor to the mass is in the same position whether the mass be held by trustees or executors; it would be introducing a mere technicality and preventing the proper application of a principle to say that
- B** because the person to distribute the mass is a trustee and not an executor the contributor is to get off paying his debt, and is to have an aliquot share of the mass and also the amount which he should have contributed to it.

I am not deciding a case where there is a mere gift of real estate made directly to the legatee or through a trustee, and whether by means of a trust for sale or otherwise. I am here dealing with the case of a general fund made up of the

**C** proceeds of the sale of real estate and the conversion of personal estate, and the principle laid down in *Courtenay v. Williams* (3) seems to me to be directly in point. I, therefore, think that, if there is a debt payable by a residuary legatee under the circumstances in this case, that debt, for the purposes of computation, must be included in the residue and treated as part of the share of residue going to the legatee debtor.

- D** Then I am asked to decide that the testator's sons do not owe anything to his estate. In each case the IOU's given by them are for debts which were statute-barred at the date of the testator's death. That does not prevent the application of the rule. There is, however, some evidence that the testator did not intend to enforce these IOU's; but I think that there is not sufficient evidence at present to exonerate these legatees. An inquiry must be directed
- E** whether there were any and what debts due from them to the testator at the date of his death, and I further hold that if they do owe those sums, those sums with interest from the testator's death and not before must be deducted from their aliquot shares. These will be a declaration that the plaintiff and the other two sons ought to bring into account as against their respective shares of the testator's real and personal estate any sums due by them respectively
- F** to the testator at the date of his death with interest at 4 per cent. from that date.

Solicitors: *A. T. Trehearne; J. J. Chapman; Woodard & Hood; T. W. Copeland.*

[*Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.*]



# Re SLEVIN. SLEVIN v. HEPBURN

[COURT OF APPEAL (Lindley, Bowen and Kay, L.J.J.), March 13, 14, 20, 1891]

[Reported [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311;  
39 W.R. 578; 7 T.L.R. 394]

*Charity—Cy-près doctrine—Legacy to charitable institution—Institution ceasing to exist after testator's death—Legacy applicable cy-près by the Crown.*

A testator gave a legacy to a charitable institution which was in existence at his death, but which ceased to exist before the payment of the legacy.

**Held:** the legacy became the property of the charity on the testator's death, and when it ceased to exist its property fell to be administered by the Crown, who, according to custom, would apply it for some analogous purpose of charity.

*Clark v. Taylor* (1) (1853), 1 Drew. 642, distinguished.

Decision of STIRLING, J., [1891] 1 Ch. 373, reversed.

**Notes.** Considered: *Re Rymer, Rymer v. Stanfield*, post. Applied: *Re Soley, Grover v. Drapers' Co.* (1900), 17 T.L.R. 118; *Re Geikie, Robson v. Paterson* (1911), 27 T.L.R. 484. Considered: *Re Cunningham, Dulcken v. Cunningham*, [1914] 1 Ch. 427. Applied: *Re Moon's Will Trusts, Foale v. Gillians*, [1948] 1 All E.R. 300. Followed: *Re Kellner's Will Trusts*, [1949] 2 All E.R. 43. Considered: *Re Wright, Blizard v. Lockhart*, [1954] 2 All E.R. 98; *Re British School of Egyptian Archaeology, Murray v. Public Trustee*, [1954] 1 All E.R. 887; *Re Cooper's Conveyance Trusts, Crewdson v. Bagot*, [1956] 3 All E.R. 28. Referred to: *Re Davis, Hannen v. Hillyer*, [1900-3] All E.R. Rep. 336; *Re King, Kerr v. Bradley*, [1923] 1 Ch. 243; *Re Tacon, Public Trustee v. Tacon*, [1958] 1 All E.R. 163.

As to the cy-près doctrine generally, see 4 HALSBURY'S LAWS (3rd Edn.) 317 et seq.; and for cases see 8 DIGEST (Repl.) 463, 503.

Cases referred to:

- (1) *Clark v. Taylor* (1853), 1 Drew. 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287; 1 W.R. 476; 61 E.R. 596; 8 Digest (Repl.) 419, 1104.
- (2) *A.-G. v. Bristol Corpn.* (1820), 2 Jac. & W. 294; 37 E.R. 640, L.C.; 8 Digest (Repl.) 446, 1383.
- (3) *A.-G. v. Ironmongers' Co.* (1834), 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064, L.C.; 8 Digest (Repl.) 504, 2254.
- (4) *A.-G. v. Earl of Craven* (1856), 21 Beav. 392; 25 L.J.Ch. 291; 27 L.T.O.S. 23; 20 J.P. 261; 2 Jur.N.S. 296; 4 W.R. 340; 52 E.R. 910; 8 Digest (Repl.) 435, 1256.
- (5) *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.J.J.; 8 Digest (Repl.) 439, 1299.
- (6) *Lyons Corpn. v. Advocate-General of Bengal* (1876), 1 App. Cas. 91; 45 L.J.P.C. 17; 34 L.T. 77; 24 W.R. 679, P.C.; 8 Digest (Repl.) 460, 1608.
- (7) *A.-G. v. Wilson* (1834), 3 My. & K. 362; 3 L.J.Ch. 126; 40 E.R. 138; 8 Digest (Repl.) 444, 1348.
- (8) *Hayter v. Trego* (1830), 5 Russ. 113; 38 E.R. 970; 8 Digest (Repl.) 463, 1629.
- (9) *Cherry v. Mott* (1836), 1 My. & Cr. 123; 5 L.J.Ch. 65; 40 E.R. 323; 8 Digest (Repl.) 431, 1221.
- (10) *Loscombe v. Wintringham* (1850), 13 Beav. 87, 51 E.R. 34; 8 Digest (Repl.) 417, 1084.
- (11) *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 420, 1106.
- (12) *Coldwell v. Holme* (1854), 2 Sm. & G. 31; 2 Eq. Rep. 390; 23 L.J.Ch. 594; 18 Jur. 396; 2 W.R. 150; 65 E.R. 288; 8 Digest (Repl.) 418, 1091.
- (13) *Wilson v. Barnes* (1886), 38 Ch.D. 507, C.A.; 8 Digest (Repl.) 345, 263.

**A** Also referred to in argument :

*A.-G. v. Fraunces*, [1866] W.N. 280; 8 Digest (Repl.) 453, 1498.

*Russell v. Kelllett* (1855), 3 Sm. & G. 264; 26 L.T.O.S. 193; 20 J.P. 131; 2 Jur.N.S. 132; 65 E.R. 653; 8 Digest (Repl.) 468, 1692.

*Re Prison Charities* (1873), L.R. 16 Eq. 129; 42 L.J.Ch. 748; 37 J.P. 420; 8 Digest (Repl.) 459, 1592.

**B**

**Appeal** by the Attorney-General from a decision of STIRLING, J., holding that a legacy of £200 "to the Orphanage of St. Dominic's, Newcastle," which was in existence at the testator's death but which ceased to exist before receiving payment, failed and fell into residue.

**C**

John Slevin made his will, dated Feb. 14, 1888, and thereby appointed his brother the plaintiff Michael Slevin, and the defendants Hopburn and Fogan his executors and trustees, and after giving a specific legacy to his wife, the testator bequeathed a number of legacies or sums of money varying from £20 to £400 to various persons, the gift of which was prefaced by the words "I bequeath the pecuniary legacies following." He then continued, "I bequeath the following charitable legacies," and proceeded to give a number of legacies to various Roman Catholic institutions, churches, and bodies, and among others, he gave as follows: "To the Orphanage of St. Dominic's, Newcastle-upon-Tyne, £200." The testator added :

**D**

"I direct that the receipt or receipts of the respective treasurers, secretaries, ministers, or managers, or any of them respectively for the time being of the said institutions, churches, or bodies shall be a sufficient discharge to my executors and trustees for the said charitable legacies respectively, and that the same legacies shall be paid out of such part of my personal estate as may be lawfully applied to charitable purposes, and preferably to every other payment thereout."

**E**

The testator bequeathed the residue of his estate to his trustees upon the trusts in his will mentioned. The testator died on Feb. 24, 1883.

**F**

The history of the Orphanage of St. Dominic's, Newcastle-upon-Tyne, appeared from the evidence to be as follows. In 1874 a Mrs. Priestman undertook at her own expense the charge of four or five orphan girls, and rented a small house for them in Newcastle-upon-Tyne, and placed them under the care of a matron. In 1878 the number of orphans under her charge having increased she purchased a large house for them in Shield Field Green, Newcastle, in a Roman Catholic district, known as St. Dominic's, where they were looked after during her absence from ill-health first by a matron and afterwards by some Dominican sisters; and a brass plate was affixed to the door bearing the words "St. Dominic's Orphanage."

**G**

In 1882 the state of Mrs. Priestman's health obliged her to leave Newcastle, and she and her husband went to live at Clifton, to which place she removed most of the children from Newcastle, placing them in various orphanages in the neighbourhood, where some of them were still maintained at her expense. A few of them, however, were left at the house in Shield Field Green until about the end of March, 1883, when the last of them left, and Mrs. Priestman subsequently sold the house to the Dominican Sisters. Mrs. Priestman's husband having died she ceased to have a permanent residence, and now lived at various health resorts in England and the south of Europe.

**H**

The residuary legatees took out an originating summons for a declaration that the legacy of £200 given to the Orphanage of St. Dominic's lapsed, and formed part of the testator's residuary estate. Mrs. Priestman was not represented at the hearing, and did not claim the legacy. STIRLING, J., held (following *Clark v. Taylor* (1)) that the legacy could not be applied cy-près, but failed and fell into the residue. The Attorney-General appealed.

**I**

*Ingle Joyce* for the Attorney-General.

*Welby King* for the defendants.

*Cur. adv. vult.*

Mar. 20, 1891. **KAY, L.J.**, read the following judgment of the court.—This case raises a question which seems only to have occurred in two instances in the books; namely, whether a charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid over, fails for the benefit of the residuary legatee, as in the case of a lapse. Properly speaking, a lapse can only occur by failure of the object in the lifetime of the testator. But it is possible that a will might be so framed as that a subsequent failure of the object of the charitable gift might occasion a resulting trust for the benefit of the testator's estate. We have not been referred to any such case, nor have we found any.

A surplus of charity funds arising from decay of the particular charity, or from increase in the value of the charity property beyond the requirements of the special object, has been treated as charity property to be administered *cy-près*. **LORD ELDON**, in *A.-G. v. Bristol Corpn.* (2) states expressly that this is a settled rule in case of a surplus arising from an increase of the fund. *A.-G. v. Ironmongers' Co.* (3) decides the same point, where the object fails after the bequest has taken effect; and see *A.-G. v. Earl of Craven* (4), *Chamberlayne v. Brockett* (5) and *Lyons Corpn. v. Advocate-General of Bengal* (6).

In *A.-G. v. Wilson* (7) a difference is suggested where the will shows an intention to create a resulting trust, as where the charitable purposes do not exhaust the whole income of the fund which is dealt with at the time of the disposition, but something is left undisposed of from the first. This is not a case of that kind. It is a simple legacy of a sum of £200 to the Orphanage of St. Dominic's, Newcastle-on-Tyne. If it had been received the whole might have been expended at once, and even if not received the amount might have been anticipated by borrowing from a banker or otherwise and charging the legacy with the amount so borrowed. **BOWEN, L.J.**, has some doubt as to the effect of the evidence, but **LINDLEY, L.J.**, and **KAY, L.J.**, think it must be treated as the learned judge has done, namely, that, upon the evidence, the orphanage, though about to be discontinued at the beginning of the year 1883, had not ceased to exist at the time of the testator's death. The orphanage did come to an end before the legacy was paid over.

In the case of a legacy to an individual, if he survive the testator it could not be argued that the legacy would fall into the residue. Even if the legatee died intestate and without next-of-kin, still the money was his, and the residuary legatee would have no right whatever against the Crown. So, if the legatee were a corporation which was dissolved after the testator's death, the residuary legatee would have no claim. Obviously it can make no difference that the legatee ceased to exist immediately after the death of the testator. The same law must be applicable whether it was a day, a month, a year, or, as might well happen, ten years after, the legacy not having been paid either from delay occasioned by the administration of the estate or owing to part of the estate not having been got in. The legacy became the property of the legatee upon the death of the testator, though he might not for some reason obtain the receipt of it till long after. When once it became the absolute property of the legatee, that is equivalent to saying that it must be provided for, and the residue is only what remains after making such provision. It does not for all purposes cease to be part of the testator's estate until the executors admit assets, and appropriate or pay it over; but that is merely for their convenience and that of the estate. The rights as between the particular legatee and the residue are fixed at the testator's death.

These propositions are so obvious that it would seem impossible to dispute them without some authority to the contrary. Is there any such authority? In *Hayter v. Trego* (8) **SIR JOHN LEACH, M.R.**, had this very case to deal with. A testator gave a legacy of £500 to a voluntary society called the Plymouth and Devon Asylum for the Reception of Female Penitents. He died in June, 1821, at which time the asylum was still in existence, but on May 29, 1822, before the legacy was paid, the society was dissolved. We have examined the record; it is plain from it that the contest was between the next-of-kin (there being no residuary gift) and the



**A** Attorney-General; and SIR JOHN LEACH, M.R., decided the case in the only way which on principle seemed to us to be possible, viz., that the fund must be applied for charitable purposes, resembling that which had failed. It is said, and perhaps with truth, that there was in that case a sufficient indication of a general charitable intention to justify the decision, even if there had been no such institution in existence at the testator's death, and reliance is placed on the more recent decision

**B** of KINDERSLEY, V.-C., in *Clark v. Taylor* (1).

According to the report in DREWRY, the bequest was £50 to a female orphan school in Greenwich, patronised by Mrs. Enderby. The testator died in October, 1846 (which is in the report incorrectly printed 1840), and the school was discontinued in November of the same year. In the WEEKLY REPORTER it is stated that the school was discontinued about the same time that the testator died.

**C** Neither in the arguments nor in the judgment was reliance placed upon the circumstance that the institution was actually in existence at the testator's death. In the judgment it was treated as a clear case of lapse—that is, as though there was no such institution at the testator's death, and the only matter dealt with by the Vice-Chancellor was the question whether, on that supposition, there was such a general intention of charity as to justify an administration *cy-près*. The Vice-Chancellor decided that there was not, and that the residuary legatees were entitled.

**D** *Hayter v. Trego* (8) was not referred to. The only cases cited were *Cherry v. Mott* (9) and *Loscombe v. Wintringham* (10), in one of which the failure of the charity occurred in the testator's lifetime, and in the other—what is equivalent—the legatee declined the bequest. It was upon the authority of this decision of KINDERSLEY, V.-C., that the learned judge in the court below chiefly rested his

**E** judgment, rather, as we gather from his language, against his own opinion.

We cannot treat *Clark v. Taylor* (1) as a decision which supports the view he has taken. It seems to us that all the Vice-Chancellor intended to decide was that, assuming the institution to have failed in the testator's lifetime, there was no such general purpose of charity as would warrant the distribution *cy-près*. We have not found any case in which the supposed view of the Vice-Chancellor in *Clark v.*

**F** *Taylor* (1) has been followed. In the textbooks, TUDOR'S CHARITABLE TRUSTS (3rd Edn.) 41; JARMAN ON WILLS (4th Edn.), vol. 1, pp. 246, 247 (doubtfully), and THEOBALD ON WILLS (3rd Edn.) 277, and also by LORD HATHERLEY in *Fisk v. A.-G.* (11), and STUART, V.-C., in *Coldwell v. Holme* (12), it is treated as a case of lapse on the ground that the institution had come to an end in the testator's lifetime. If it decided that failure of the institution after the testator's death

**G** occasioned a lapse, or on any other ground entitled the residuary legatee to the legacy, we are of opinion that the decision should be overruled; but we do not believe that anything of the kind was intended.

In the present case we think that the Attorney-General must succeed, not on the ground that there is such a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed in the testator's lifetime,

**H** but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity, as in *A.-G. v. Ironmongers' Co.* (3), *Wilson v. Barnes* (13), and the other cases collected in TYSSSEN ON CHARITABLE BEQUESTS, 440. The appeal will, therefore, be allowed.

**I**

*Appeal allowed.*

Solicitors: *Hare & Co.* for the Solicitor to the Treasury; *Grundy, Izod & Grundy* for *W. Webb*, Morpeth; *Pattison, Wigg & Co.* for *H. F. Richardson*, Newcastle-upon-Tyne.

[Reported by A. J. SPENCER, Esq., Barrister-at-Law.]

## RAPIER v. LONDON TRAMWAYS CO.

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), May 12, 15, 16, 1893]

[Reported [1893] 2 Ch. 588; 63 L.J.Ch. 36; 69 L.T. 361;  
9 T.L.R. 468; 37 Sol. Jo. 493; 2 R. 448]

*Nuisance—Statutory powers—Exercise—Authority to tramway company to erect “works and conveniences”—Stables for horses working on tramway.*

The defendant company, incorporated under the Companies Acts, 1862 and 1867, acquired under the authority of a special Act the undertakings of two tramways companies, which had power under their special Acts to purchase land for the purposes of their undertakings. The defendant company was subsequently authorised by special Act to construct and maintain three extensions of the tramways “with all proper rails, plates, works, and conveniences connected therewith.” They acquired land near one of the extensions and erected stabling thereon for the accommodation of horses employed on the tramway. A neighbouring householder claimed an injunction to restrain a nuisance caused by smells arising from the stables.

**Held:** although the defendant company was authorised by the Act to have stables and horses, they were not justified in creating a nuisance, and it was no defence that they had taken all reasonable care to prevent it; the plaintiff was, therefore, entitled to an injunction.

**Notes.** Referred to: *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Newsome v. Darton Urban District Council*, [1938] 1 All E.R. 79; *Wringe v. Cohen*, [1939] 4 All E.R. 241; *Spicer v. Smea*, [1946] 1 All E.R. 489.

As to interference with private rights by public authorities in the exercise of permissive powers, see 30 HALSBURY'S LAWS (3rd Edn.) 692 et seq.; and for cases see 38 DIGEST (Repl.) 34 et seq.

Case referred to:

(1) *London, Brighton and South Coast Rail. Co. v. Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, 690.

Also referred to in argument:

*Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59.

*Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, 64.

*Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, 185.

**Appeal** from a decision of KEKEWICH, J., reported, [1893] 2 Ch. 588, that smells and noises coming from stables erected by the defendant company under statutory powers constituted a nuisance and that the plaintiff was entitled to damages and an injunction.

The London Tramways Co., Ltd., was incorporated in 1870 under the Companies Acts, 1862 and 1867; and by the London Tramways Co., Ltd. (Purchase) Act, 1873, the Metropolitan Street Tramways Co. and the Pimlico, Peckham, and Greenwich Street Tramways Co. were authorised to sell their respective undertakings to the company, and the same were sold to and vested in the company accordingly. The Metropolitan Street Tramways Act, 1869, which related to the undertakings so transferred to the company, provided by s. 63 that:

“The company may from time to time purchase or acquire (by agreement) such land as they may require for their undertaking, not exceeding in the whole twenty acres.”

The London Tramways Co., Ltd. (Various Powers), Act, 1888, authorised the construction by the company of extensions of their tramway system, namely, a

- A double line tramway of about six furlongs in length from High Street, Clapham, to Clapham Common, and two double line tramways of about five furlongs and four furlongs respectively, commencing by junction with the first-mentioned extension. Section 4 of the Act of 1888 provided that the company might make, form, lay down, work, use, and maintain the above-mentioned tramways in accordance with the deposited plans and sections, "with all proper rails, plates, works, and conveniences connected therewith." Section 24 gave the company power to make, maintain, and alter crossings, etc., as they might find necessary or convenient for the efficient working of the tramways "or for providing access to any stables . . . of the company." One of the tramways authorised by this Act ran along the Balham Road, out of which the Tooting Park Road opened. In April, 1891, the company acquired certain land in Tooting Park Road and erected thereon stabling capable of accommodating about 400 horses. These buildings were situated about forty-two yards from a private dwelling-house belonging to the plaintiff R. C. Rapier. At the date of these proceedings about 200 horses were kept by the defendants in the stables. This action was brought by the plaintiff, claiming an injunction to restrain the company from using these premises so as to cause a nuisance to the plaintiff by smell, noise, or otherwise. Subsequently to the commencement of the proceedings the company took steps to diminish the noise on their premises, with the result that the nuisance from this cause was considerably, if not completely abated. The smells, however, continued, and upon the evidence *KEKEWICH, J.*, came to the conclusion that, though intermittent, they were such as to constitute a nuisance to the plaintiff, and he gave the plaintiff 40s. damages in respect of the noise, and granted an injunction in respect of the smell. The company appealed.
- E *W. Willis, Q.C., Renshaw, Q.C., and J. S. Gregson* for the defendant company. *Finlay, Q.C., Warmington, Q.C., and P. S. Stokes* for the plaintiff.

LINDLEY, L.J.—I think it is impossible to disturb the judgment or order which is appealed from. The case is one of very considerable importance, both to the plaintiff and to the defendant company, and it is of importance from a public point of view.

The first point which we have to consider is the Act of Parliament under which, if at all, the defendant company can justify what they have done. What they have done is this: Being a company formed for making tramways, they have bought a piece of land near the plaintiff's house, about five acres in extent, they have erected at very considerable expense, very excellent stables upon this land, capable of holding 400 horses, but used, apparently, up to the present time, for 200, more or less. All that is perfectly lawful; there is no reason why people should not have stables, and large stables too, provided only they carry on their stable business in such a way as not to occasion a nuisance to their neighbours. The Act of Parliament to which counsel for the defendant company has referred does not appear to me to come to anything more than this: It authorises the company to create and make a certain tramway, and it proceeds on the assumption (I do not think it authorises) that they may use animal power. Animal power for such a purpose in this country means horse power, and it assumes, as a matter of course, that they must have horses. That involves, as a natural consequence, stables to put them in. To that extent the Act of Parliament authorises them to have stables and horses. I agree with counsel for the defendant company, that it is for the directors to say, within limits which I will discuss presently, where they shall have stables, how many horses they will have and where they will locate them.

What are the limits of that discretion? Here we approach a matter of very considerable importance. Counsel says that this Act of Parliament, which does not say anything expressly about stables or horses which is worth commenting on, does give the directors power to do whatever in the exercise of their discretion they may think reasonable and proper, and in their own interests, provided they take all reasonable care not to commit a nuisance. Is that the true construction of the



Act of Parliament, or is it that they may do what they think right in the exercise of their own discretion, provided they do not commit a nuisance? Which is it? The whole case seems to me up to a certain point to turn on that. An Act of Parliament might be so worded as to cast upon them no greater duty than the duty to take reasonable care. Unless the Act of Parliament is so worded as to limit their duty to that extent, I think the common law must prevail; that they must exercise their power so as not to commit a nuisance. A

At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say and to prove that I have taken all reasonable care to prevent it. An Act of Parliament may be an answer. It was an answer in *London, Brighton, and South Coast Rail. Co. v. Truman* (1), and it might be an answer here if the Act of Parliament went further than it did. I cannot find that the Act of Parliament contains any clause which warrants us in saying that no limit is set to the exercise of the discretion of the directors, or the duty to take reasonable care not to create a nuisance. The only limit I can find is the limit which is set by the general law of the country, that they do not commit a nuisance. Within that limit they may have what stables they like, they may have what number of horses they like, and they may conduct them how they like. B

That being the law upon the matter, I now pass on to consider the facts of this case. Does the company so carry on their business as to commit a nuisance? What is meant by the word "nuisance" in this particular case? The alleged nuisances were two, noise and smell. We have not to consider the question of noise now, so I will say nothing more about that. It is alleged that they carry on business in the stable in such a way as to create smell to such an extent as seriously to diminish the comfort of the neighbours who live near, and in particular seriously to interfere with the comfortable enjoyment of the house and land of the plaintiff. That is the alleged nuisance. Because somebody with a sensitive nose sniffs some ammonia and does not like it, that will not make a nuisance; it is a question of degree. You can only appeal to the common sense of ordinary people. The test is, whether this smell is so bad and continuous as seriously to interfere with comfort and enjoyment. No one says it is so bad as to interfere with health. C

Looking at it from that point of view it is obvious we cannot go to the length of saying that there is no evidence of the nuisance. There is plenty of evidence of it. The learned judge having seen all the witnesses has come to the conclusion that there is a nuisance. I cannot agree with the observation that this conclusion is entirely unfounded; the utmost that I could say is, that the injunction ought not to go without a new trial. Would it be right and fair to put the parties to the expense of a new trial? Can I say there is so much unsatisfactory evidence that the court ought not to act upon the judgment of the learned judge in the court below? I do not think we ought to say that. [His LORDSHIP considered the evidence, and continued:] Making all the allowance and discounts which can reasonably, fairly, and properly be made on both sides—not to the plaintiff more than the defendant company—there is a body of evidence which, I think, it is impossible to get over. The consequence is, we cannot disturb the order which has been made. That order is in the common form, namely, to restrain the defendants from carrying on the business of their stables so as to create a nuisance to the plaintiff. That is the form of the injunction. What that may involve I cannot possibly say. If the defendants are right in saying that they cannot concentrate their stables to such an extent as is desirable without committing a nuisance to the neighbourhood, then they cannot concentrate their horses to such a degree. That is all. It is a mere question of money; it is nothing but economy which requires them to crowd their horses together. In their attempt to economise, which is a laudable and proper attempt, I think they have gone too far. If they cannot have 200 horses together, even when they take proper precautions, without committing a nuisance, all I can say is they cannot have so many horses together. D E F G H I

A No doubt it is a serious matter to them, but I cannot disagree with the learned judge who tried the case in the court below.

BOWEN, L.J.—I agree.

KAY, L.J.—I agree.

B Solicitors: *Woodward & Hood; Julius O. Jacobs.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

C

## Re MEDICAL BATTERY CO.

D

[CHANCERY DIVISION (Vaughan Williams, J.), November 22, 1893]

[Reported [1894] 1 Ch. 444; 63 L.J.Ch. 189; 69 L.T. 799;  
42 W.R. 191; 38 Sol. Jo. 81; 1 Mans. 104; 8 R. 46]

E

*Company—Winding-up—Fraudulent trading—Public examination of director or officer of company—Applicability of Companies (Winding-up) Act, 1890, s. 8 (3).*

F

By the Companies (Winding-up) Act, 1890, s. 8 (3) [see now the Companies Act, 1948, s. 270 (1)]: “. . . the court may, after consideration of any such report [by the official receiver on winding-up and proceedings thereon], direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.”

G

This section **held** to be inapplicable to cases where charges are made against a company of having committed frauds in the conduct of its business upon members of the public who are not connected in any way with the promotion or formation of the company.

H

**Notes.** The Companies (Winding-up) Act, 1890, s. 8 (3), has been replaced by s. 270 (1) of the Companies Act, 1948. Section 145 of the Companies Act, 1862, has been repealed. See now s. 310 of the Companies Act, 1948. Section 255 of the Companies Act, 1929, which has been re-enacted in s. 310 of the 1948 Act, effected a change in the law. Under s. 145 of the 1862 Act a creditor seeking a winding-up order had to allege and prove that the continuance of a voluntary winding-up was prejudicial to his rights but under s. 310 of the 1948 Act it is necessary for the petitioner to prove that his rights are prejudiced only in the case of a petition by a contributory.

I

Considered: *Re Campbell Coverings, Ltd.*, [1954] 1 All E.R. 222. Distinguished: *Adebayo v. Nigeria (Official Receiver)*, [1954] 2 All E.R. 197.

As to order for public examination of an officer of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 570 et seq.; and for cases see 10 DIGEST (Repl.) 910 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452 et seq.

**Petition** presented by a simple contract creditor asking that a company might be compulsorily wound-up.

The Medical Battery Co., Ltd., was incorporated in 1889 with a capital of £100,000, divided into 20,000 shares of £5 each. All the shares had been issued and credited as fully paid up. The debentures which had been issued by the company were alleged to constitute a charge upon all the assets of the company. On Oct. 26, 1893, an action was commenced by debenture-holders against the company to enforce their securities. On Oct. 27 a receiver was appointed and on Oct. 30 an order was made, empowering him to manage the business of the company. On Nov. 4 judgment was given in the action. The petition was presented by a simple contract creditor on Oct. 27, 1893, asking that the company might be compulsorily wound-up. On Nov. 3 the company held a general meeting, at which resolutions were passed for a voluntary liquidation, and appointing the receiver in the action voluntary liquidator. Subsequently to the passing of the above resolutions the petition was with the consent of the court amended by asking in the alternative that the voluntary winding-up should be continued under the supervision of the court, and that some person who was independent of the debenture-holders, should be appointed liquidator in the place of the receiver. The petition, as amended, had been re-advertised, and now came on to be heard.

In October and November, 1893, charges of fraud had been made against the company in certain newspapers. These frauds were alleged to have been made by the company in the course of their business with the outside public. At the time when the petition came on for hearing a libel action brought by the managing director of the company against the newspapers concerned was pending and criminal proceedings against the managing director and others concerned were proceeding.

The only point in the case calling for a report was whether s. 8 (3) of the Companies (Winding-up) Act, 1890, applied in a case where the alleged fraud was in the dealings of the company with the outside public.

*C. E. E. Jenkins* in support of the petition.

*Eve* for the creditors.

*Bramwell Davis, Macnaghten and Whittaker* for other creditors.

*G. Henderson* for the company.

*Haldinstein (Boxall with him)* for shareholders, and *Tanner* for the plaintiffs in the debenture-holders' action.

**VAUGHAN WILLIAMS, J.**—At the time when the petition was first presented no resolution for a voluntary liquidation had been passed. All that had happened then was, that a debenture-holders' action had been commenced, and Mr. Davis had been appointed a receiver. After the presentation of the petition, the resolution that the company should be wound-up voluntarily was passed. According to my understanding of the practice under s. 145 of the Companies Act, 1862, although that resolution was not passed until after the presentation of the petition, I ought not to make a compulsory order unless I am of opinion that the rights of the creditors will be prejudiced by a voluntary liquidation [but see now s. 310 of the Companies Act, 1948]. It has been suggested that I ought to take into consideration that the rights of the creditors will be prejudiced by the continuance of the voluntary liquidation not only as regards matters affecting them pecuniarily, but also by their exclusion from the benefit of a public examination given by s. 8 (3) of the Companies (Winding-up) Act, 1890, where a compulsory order is made. I propose to deal with both those suggestions, and see whether there is any evidence that the creditors will be prejudiced by not getting the benefit of s. 8 (3) of the Act of 1890.

I will deal with the last suggestion first, and I say that, in my opinion, I should be acting wrongly if I were to hold that the section was intended to apply to a case where charges are made against a company of having committed frauds in the course of its business upon members of the outside public, and



**A** not connected in any way with the promotion or formation of the company—that is, upon persons who have simply dealt with the company, and not upon shareholders as regards their membership in the company. It seems to me that a police court is the proper place for an investigation of the kind said to be required here, and I ought not to take that into consideration at all in determining whether the creditors are likely to be prejudiced by the continuance

**B** of the voluntary liquidation. The only way in which it would be right to take into consideration at all the fact that these charges have been made, would be in considering the desire of some persons that the voluntary liquidation should be continued with a view to carrying on the business as a going concern. For that purpose it would be material to consider whether having regard to the fact that the charges have been made, the business would be likely to be

**C** carried on successfully, but so far as an instigation into them is concerned, I ought not to say that the creditors will be prejudiced by not obtaining the benefit of s. 8 (3) of the Act of 1890. [HIS LORDSHIP then proceeded to deal with the particular facts of the case, and came to the conclusion that the rights of the creditors would be prejudiced by the continuance of the voluntary liquidation, and he accordingly made a compulsory order.]

**D** Solicitors: *Ingle, Cooper & Holmes; Stanley, Woodhouse & Hedderwick; Reddell, Vaizey & Co.; Rodgers & Co.; Steinberg & Co.; Boxall & Boxall; Jerome & Co.; Richard Furber.*

[Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.]

**E**

**F**

## Re DAINTREY. Ex Parte HOLT

[QUEEN'S BENCH DIVISION (Vaughan Williams and Bruce, JJ.), April 14, May 6, 1893]

[Reported [1893] 2 Q.B. 116; 62 L.J.Q.B. 511; 69 L.T. 257; 41 W.R. 590; 9 T.L.R. 452; 37 Sol. Jo. 480; 10 Morr. 158; 5 R. 414]

*Bankruptcy—Act of bankruptcy—Suspension of payment of debts—Notice—Evidence—Letter “without prejudice”—Admissibility—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 4 (1) (h).*

**H**

By s. 4 (1) of the Bankruptcy Act, 1883: “A debtor commits an act of bankruptcy . . . (h) If the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.”

A document sent by a debtor to a creditor may be looked at by the court in order to decide whether or not it amounts to a notice of suspension within the meaning of s. 4 (1) (h) though the document is headed, “Private and confidential, without prejudice.”

**I**

**Notes.** The Bankruptcy Act, 1883, s. 4 (1) (h), has been repealed and replaced by the Bankruptcy Act, 1914, s. 1 (1) (h).

Referred to: *Burke and Unsworth v. Elder Dempster Lines, Ltd.*, [1939] 3 All E.R. 339.

As to notice of suspension or intended suspension of payment of debts, see 2 HALSBURY'S LAWS (3rd Edn.) 283 et seq.; and for cases see 4 DIGEST (Repl.) 113 et seq. For the Bankruptcy Act, 1914, s. 1 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 324, 325.

Cases referred to in argument:

*Hoghton v. Hoghton* (1852), 15 Beav. 278; 51 E.R. 545; 22 Digest (Repl.) 369, 3973. A

*Jones v. Foxall* (1852), 15 Beav. 388; 21 L.J.Ch. 725; 51 E.R. 588; 22 Digest (Repl.) 370, 3985.

*Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; 25 L.T. 319; 19 W.R. 1130, L.J.J.; 22 Digest (Repl.) 369, 3974. B

*Walker v. Wilsher* (1889), 23 Q.B.D. 335; 58 L.J.Q.B. 501; 54 J.P. 213; 37 W.R. 723; 5 T.L.R. 649, C.A.; 22 Digest (Repl.) 368, 3970.

*Paddock v. Forrester* (1842), 3 Man. & G. 903; 3 Scott, N.R. 715; 133 E.R. 1404; 22 Digest (Repl.) 369, 3979.

**Appeal** from a decision of the registrar of the Brighton County Court dismissing a petition, but staying proceedings on the order for seven days, or until an appeal was heard. C

On Dec. 15, 1892, an action had been commenced against the debtor, a solicitor, in which judgment was signed on Jan. 25. On Jan. 17, 1893, a petition was presented against the debtor, the debt being in respect of moneys received by the debtor as the solicitor to the petitioning creditor. The act of bankruptcy relied on was, that on Dec. 24, 1892, the debtor gave notice to the petitioning creditor that he was about to suspend payment. The letter in which this notice was contained was type-written with an accompanying memorandum dated Dec. 26, and was headed "Private and confidential, without prejudice," and was as follows: D

"Private and confidential, without prejudice—Petworth, Dec. 24, 1892— E

Dear Sir,—I am very sorry to have to inform you that through the great pecuniary pressure to which I have been subjected during the last few months, and the fact that the distraction caused by this pressure and my illness has prevented my full attention to business, and allowed affairs to get into a great tangle owing to not having got in money due to me, this has resulted in my becoming absolutely unable to pay my debts at once, although I have reduced my staff and have and am prepared still further to cut down my personal expenditure, which at one time was vastly greater than it is now, though it seemed to me warranted by my profits, which have in several cases unfortunately proved to be nominal only, as I have lost several sums through various causes, principally the fall of the value of property, which is now very seldom equal to the former estimates of valuers. The result is, that I must of necessity appeal to my creditors for time, and if they will not give it, I must of course become bankrupt. This would mean a heavy loss to everyone, for my position and appointments would be gone, and I should have no possibility of recovering them or paying the loss to my creditors, which would be my first wish. The winding-up of estates in bankruptcy is expensive, and my assets are so scattered, that they would be very much more difficult to get in than most people's and the expense of doing this and the loss that would be entailed by hurried and forced realisation would be enormous. I have at least sixteen creditors who are taking almost every conceivable means against me, and therefore there is no time for any meeting or parley. I must know at once from all of them whether they will give time as suggested by the enclosed reply form, or waste my assets and their chances by driving me into bankruptcy. To be of any use to avert bankruptcy, the enclosed must reach my office on Tuesday evening, the 27th inst., or the sheriff will proceed to sale. I regret exceedingly having to write to you thus, and remain,—Yours truly, Charles James Daintrey, Dec. 26, 1892." F

The enclosure was as follows: G

"I agree to accept the sum owing to me by Mr. Daintrey on all accounts (which are to be agreed between us as promptly as possible) by three instal- H

I

A ments of 7s., in all 21s. in the £, that is to say, the principal and interest from this date for one year at 5 per cent. These instalments to be without prejudice to any securities now held by me and to be paid at intervals of four, eight, and twelve months from the present time. In the event of bankruptcy, this arrangement not to be binding on me."

B The letter was received by the petitioning creditor on Dec. 26. Objection was taken before the registrar that the letter being without prejudice could not be looked at for any purpose. On Feb. 3 the registrar placed on the file a written judgment dismissing the petition with costs, but staying proceedings on the order for seven days, and if notice of appeal was given within that time, then until the appeal was disposed of. The petitioning creditor appealed.

C *Muir Mackenzie* for the petitioning creditor.  
*F. C. Gore* for the debtor.

*Cur. adv. vult.*

May 6, 1893. **VAUGHAN WILLIAMS, J.**, read the following judgment of the court.—In this case the question raised was as to the admissibility of a document which was expressed to be written "without prejudice." A petition in bankruptcy was presented which alleged as an act of bankruptcy that the debtor had given notice to a creditor that he had suspended, or was about to suspend, payment. It was proposed to prove this act of bankruptcy by the production of the document in question, and it was objected that the document could not be put in evidence, being written "without prejudice." It was suggested, in answer to this objection, that the document in fact was a circular, addressed by the debtor to his creditors, and that a document of such a character would be admissible in evidence, although headed "without prejudice." To this it was replied that there was no evidence dehors the document itself that it was a document of such a character, or that it had been sent to anyone besides the petitioner. The petitioner, by his counsel, in reply to a question by the learned registrar before whom the petition was being heard, deliberately elected to rely only on the sending of the circular to the petitioner, and offered no evidence of the document having been sent to any other creditors. Under these circumstances it did not seem to us that we ought to allow further evidence to be put in on the appeal. We have, therefore, to decide the case on the materials before the learned registrar, who decided that the document was inadmissible, and dismissed the petition for want of proof of the act of bankruptcy alleged.

In my opinion, this decision was wrong. I think that the document was admissible in evidence. In the first place, I think that the court was entitled to look at the document and its contents for the purpose of deciding the question of its admissibility. It seems to me that the question of its admissibility depended upon a matter of fact, which matter of fact it was the function of the registrar in his character of judge, and not in his character of jurymen, to decide, and it seems to me that the judge for this purpose was entitled to look at the document though not in evidence, just as he would have been entitled to have looked at the document if he had been trying a case before a jury, before allowing it to be put in evidence before the jury.

I In my opinion, the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to me that the judge must necessarily be entitled to look at the document in order to determine whether the conditions under which alone the rule applies exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiation and an offer, the rule has no application. It seems to me that the judge must be entitled to look at the document to determine whether the



document does contain an offer of terms. Moreover, I think that the rule has no application to a document which in its nature may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but in my opinion the writer is not entitled to make this reservation in respect of a document which from its character may prejudice the person to whom it is addressed if he should reject the offer, and for this reason, also, I think the judge is entitled to look at the document, to determine its character. A  
B

The next question which arises is the question whether this document is of a character fulfilling the conditions to which the rule of exclusion applies. This is the document: [His Lordship read the document.] It seems to me that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, i.e., the offer of a composition which was intended to apply, among other things, to the petitioner's claim in the action, but the document, the letter of the debtor to the petitioner, was, in my opinion, more than this. It was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to me that a notice of an act of bankruptcy cannot be given "without prejudice," because the document in question was one which from its character might prejudicially affect the recipient, whether or not he accepted the terms offered thereby. For the reasons I have already given, I think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence. If admitted, it conclusively proves the act of bankruptcy. It follows that the learned registrar ought to have made the receiving order, and we now make it, and allow this appeal. C  
D  
E

**BRUCE, J.**—I am of the same opinion.

*Appeal allowed.*

Solicitors : *Senior, Attree, Johnson & Co., for Brydone, Petworth; Daintrey.*

[*Reported by W. B. YATES, ESQ., Barrister-at-Law.*] F

# COLLINS v. LONDON GENERAL OMNIBUS CO.

[QUEEN'S BENCH DIVISION (Wills and Charles, JJ.), April 14, 1893]

[Reported 63 L.J.Q.B. 428; 68 L.T. 831; 57 J.P. 678; 5 R. 355]

**B** *Discovery—Privilege—Production of document—Legal professional privilege—Report of accident by servant to defendant company—Probability, almost certainty, that litigation would ensue—Report made in anticipation of litigation and for use of solicitors.*

**C** An accident, upon which the plaintiff subsequently founded an action for negligence against the defendants, occurred about six o'clock in the evening, and on the following day a written report thereof was made by the defendants' servant, at a time when no action had been commenced or even threatened. Privilege from inspection was claimed for this report, on the ground that it had been made or had come into existence solely for the use of the defendant company's solicitor, in anticipation of this action, to advise the company in reference thereto.

**D** **Held:** although the report came into existence before the actual commencement of the action, the circumstances of the case were such as to raise a high probability, amounting almost to a certainty, that litigation would ensue; therefore, as the report had been made in anticipation of such litigation and for the sole purpose of being laid before the defendant company's legal adviser, it was privileged from disclosure to the other side.

**E** *Southwark and Vauxhall Water Co. v. Quick* (1) (1878), 3 Q.B.D. 315, followed.

**F** **Notes.** Considered: *Birmingham and Midland Motor Omnibus Co. v. London and North Western Rail. Co.*, [1913] 3 K.B. 850; *Seabrook v. British Transport Commission*, [1959] 2 All E.R. 15. Referred to: *The Hopper No. 13*, [1925] P. 52; *Hollington v. F. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; *Westminster Airways, Ltd. v. Kuwait Oil Co.*, [1950] 2 All E.R. 596.

As to legal professional privilege in the case of discovery, inspection and interrogatories, see 12 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 18 DIGEST (Repl.) 109 et seq.

Cases referred to:

- G** (1) *Southwark and Vauxhall Water Co. v. Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, 752.  
 (2) *Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, 863.  
 (3) *Cook v. North Metropolitan Tramway Co.* (1889), 54 J.P. 263; 6 T.L.R. 22, D.C.; 18 Digest (Repl.) 112, 948.

**H** Also referred to in argument:

*English v. Tottie* (1875), 1 Q.B.D. 141; 45 L.J.Q.B. 138; 33 L.T. 724; 24 W.R. 393; 3 Char. Pr. Cas. 198; 18 Digest (Repl.) 106, 909.

*Underwood v. Secretary of State in Council for India* (1866), 35 L.J.Ch. 545; 14 L.T. 385; 12 Jur.N.S. 321; 14 W.R. 551, L.JJ.; 18 Digest (Repl.) 93, 767.

**I** **Appeal** from a decision of KENNEDY, J., in chambers, reversing the master's order for the delivery of a better affidavit of documents, and for inspection.

The action was brought in respect of personal injuries alleged to have been inflicted through the negligence of the defendants in knowingly using a vicious horse to draw an omnibus in which the plaintiff was travelling. The horse kicked through the glass window of the omnibus, and seriously injured the plaintiff, who was sitting inside. The incident happened in the evening of Sept. 16, and on the following day a written report was made for the defendants by the conductor

of the omnibus, there being at that time no action commenced or even threatened. A  
The defendants, in their affidavit of documents, included this report, but they  
claimed privilege for it, and refused to allow the other side to inspect it, on  
the ground that it

"had been made or had come into existence for the use of the company's  
solicitor in this action, and as evidence and information as to how evidence B  
could be obtained and otherwise for the use of the said solicitor to enable  
him to conduct the defence in this action, and to advise the defendant com-  
pany in reference thereto, and that it had been made under the actual direction  
of the defendants' solicitor, and for no purpose other than for his use in  
anticipation of litigation, and in the conduct of this action."

The plaintiff applied for a further and better affidavit of documents and for C  
inspection. The master granted this order but was reversed by KENNEDY, J.,  
in chambers. The plaintiff appealed.

G. M. Cohen for the plaintiff.

M. Powell for the defendants.

**WILLS, J.**—I am of opinion that the decision of KENNEDY, J., was right. D  
The paragraph in the affidavit in which protection is claimed for these two docu-  
ments is a very comprehensive one, and has evidently been prepared with reference  
to the expressions used in the several cases which have been decided on the  
subject. Counsel for the plaintiff says that if the paragraph is true it is a sufficient  
protection, but he says that in the circumstances of this case it is impossible for E  
it to be true or accurate, because this action was not in fact in existence when  
the report in question was made. We are told that the complaint is in reference  
to a vicious horse of the defendants, which kicked the plaintiff, an inside passenger  
in an omnibus to which it was attached, injuring him severely, and rendering  
him insensible, and, after that, I should suppose that an action was as near a  
dead moral certainty as anything could be, and I cannot think that it would  
make any difference whether at the time when this document came into existence F  
an action had been formally threatened or not. If the circumstances were such  
that no reasonable person could doubt that an action would follow, they might  
lay the foundation of privilege for such a document as this.

I do not know that the point is entirely a new one, for in *Southwark and*  
*Vauxhall Water Co. v. Quick* (1) the protection is held to apply to cases where G  
the litigation is not actually in existence if the document is bona fide prepared,  
and came into existence solely for the purpose of obtaining the advice of the  
party's professional adviser. *COTTON, L.J.*, says (3 Q.B.D. at p. 322) that

"the true principle is that if a document comes into existence for the purpose  
of being communicated to the solicitor with the object of obtaining his advice,  
or of enabling him either to prosecute or defend an action, then it is privileged," H

and the judgments of the other lords justices (BRAMWELL and BRETT, L.J.J.) are  
to much the same effect. There was abundance in the present case to indicate  
that this document came into existence for no purpose other than for the use  
of the solicitor, in anticipation of this action, to advise the defendants in reference  
thereto. The case clearly falls within those decisions, and our attention was  
not called to any authority in the other direction. In *Anderson v. Bank of British* I  
*Columbia* (2), the only words in the affidavit applicable to the documents in  
question were

"on the ground that they are correspondence between the defendants and  
their agents in reference to the subject of this suit,"

and that was not a sufficient allegation on which to found privilege.

*Cook v. North Metropolitan Tramway Co.* (3) was also referred to. We have  
not got the affidavit in that case, and are, therefore, driven to rely on the report;



A but it is clear that more must have appeared upon the affidavits there than appears in the report, and that the documents there fell far below that used in the present case. The affidavit in the present case says that this report

"came into existence solely for the purpose of being laid before a solicitor for his advice,"

B and I am of opinion that such a communication is privileged. I have treated this as in substance an application for inspection, the substantial question between the parties.

CHARLES, J.—I am of the same opinion. Counsel for the plaintiff invites us to say that the affidavit cannot be true, but he has not satisfied me that that is

C not so, and I think that a sufficient case for declining to produce the report is made out. The affidavit says that the report was made

"for no purpose other than for the use of the defendants' solicitor in anticipation of litigation,"

D and that is a most important allegation. This report came into existence before the actual commencement of the action, but litigation may either be reasonably apprehended, or threatened, or actually begun. I assume that this belongs to the first of those three classes, when there is a high probability, amounting almost to certainty, that an action will ensue, and a report is made to enable the solicitor to conduct the defence of any action which may be brought; in which event the case is covered by *Southwark and Vauxhall Water Co. v. Quick* (1), and the rule to be gathered is that, when a document comes into existence under circumstances such as these, privilege will attach, though an action be not in existence or even threatened. *Cook v. North Metropolitan Tramway Co.* (3) is capable of explanation on the ground that the report there was made only in the ordinary discharge of duties. Here there is no such circumstance, and our decision, therefore, in no way conflicts with that case.

F

*Appeal dismissed.*

Solicitors: *Avery & Co; William Hicks.*

[*Reported by H. LEIGH, Esq., Barrister-at-Law.*]

## DONOVAN v. LAING, WHARTON AND DOWN CONSTRUCTION SYNDICATE

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Bowen, L.JJ.), March 2, 1893]

[Reported [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512;  
57 J.P. 583; 41 W.R. 455; 9 T.L.R. 313; 37 Sol. Jo. 324;  
4 R. 317]

*Master and Servant—Liability of master for act of servant—Temporary servant—Servant lent by general master—Negligence of servant—Liability of general master for injury to servant of temporary master.*

A master who, whether for reward or not, has lent his servant to another person for a particular purpose is not responsible for the negligence of the servant in the course of his employment by the borrower, if he has given up to the borrower the right of controlling the servant in such employment.

The plaintiff was employed by J. & Co., and, while engaged in loading a ship, was struck and injured by the arm of a crane belonging to the defendants. The crane was being driven by W., a crane driver employed by the defendants and lent by them to J. & Co. under an agreement by which J. & Co. should have the use of the crane when they required it and the defendants should supply fuel and a man to drive it. At the time of the accident W. was acting according to signals given by the plaintiff, but he negligently swung the arm of the crane round without waiting for a signal. In an action for damages brought by the plaintiff against the defendants in respect of injuries caused by the negligent acts of their servant,

**Held:** although W. could be said to be the defendants' servant for a number of purposes and the defendants were his general masters, he was not their servant in respect of the working of the crane at the time of the accident as at that time they had parted with the right of controlling him; they were not responsible for his acts while he was under the control of J. & Co.; and, therefore, the action failed.

*Rourke v. White Moss Colliery Co.* (1) (1877), 2 C.P.D. 205, applied.

**Notes.** Although this case has not been overruled it has been explained and distinguished in subsequent cases, notably *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd.* In that case LORD MACMILLAN said ([1946] 2 All E.R. at p. 350): "The current of subsequent authorities has set against this case and the opinions of the judges who have commented on it have been largely concerned with distinguishing and explaining it, if not explaining it away."

Distinguished: *Cahalane v. North Metropolitan Railway and Canal Co.* (1896), 12 T.L.R. 611. Applied: *Jones v. Scullard*, [1898] 2 Q.B. 565; *The Louise* (1901), 18 T.L.R. 19. Distinguished: *Waldock v. Wingfield*, [1901] 2 K.B. 596. Applied: *Dewar v. Tasker* (1907), 23 T.L.R. 259. Considered: *Poulson v. Jarvis* (1919), 89 L.J.K.B. 305. Approved: *Société Maritime Française v. Shanghai Dock and Engineering Co.* (1921), 90 L.J.P.C. 85. Considered: *Bull v. West African Shipping, etc., Co.*, [1927] A.C. 686. Distinguished: *Clelland v. Edward Lloyd, Ltd.*, [1937] 2 All E.R. 605. Considered: *Willard v. Whiteley, Ltd.*, [1938] 3 All E.R. 779; *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd.*, [1946] 2 All E.R. 345; *Cassidy v. Minister of Health*, [1951] 1 All E.R. 574. Referred to: *Abrahams v. Bullock* (1901), 85 L.T. 237; *Wilmerson v. Lynn and Hambourg Steamship Co.* (1913), 109 L.T. 53; *Performing Right Society v. Mitchell and Booker (Palais de Danse)*, [1924] 1 K.B. 762; *Falcon v. Famous Players Film Co.*, [1926] 1 K.B. 393; *G. W. Leggott & Son v. C. H. Normanton & Son*, [1928] All E.R.Rep. 468; *Egginton v. Reader*, [1936] 1 All E.R. 7; *Lambert v. Constable and Hart, Ltd.* (1940), 163 L.T. 194; *Century Insurance Co. v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491;

- A** *Gold v. Essex County Council*, [1942] 2 All E.R. 287; *Bonter Knitting Works, Ltd. v. St. Johns Garage*, [1948] 2 All E.R. 690; *Dowd v. Boase & Co., Ltd.*, [1945] 1 All E.R. 605; *McFarlane v. Coggins and Griffiths (Liverpool), Ltd.*, [1945] 1 All E.R. 605; *Chowdhary v. Gillo*, [1947] 2 All E.R. 541; *O'Reilly v. I.C.I., Ltd.*, [1955] 3 All E.R. 382.

**B** As to the employment of other persons' servants, see 25 HALSBURY'S LAWS (3rd Edn.) 501 et seq.; and for cases see 34 DIGEST 20 et seq.

Cases referred to:

- (1) *Rourke v. White Moss Colliery Co.* (1877), 2 C.P.D. 205; 46 L.J.Q.B. 283; 36 L.T. 49; 41 J.P. 580; 25 W.R. 263, C.A.; 34 Digest 25, 46.
- C** (2) *Johnson v. Lindsay & Co.*, [1891] A.C. 371; 61 L.J.Q.B. 90; 65 L.T. 97; 55 J.P. 644; 40 W.R. 405; 7 T.L.R. 715, H.L.; 34 Digest 22, 24.
- (3) *Jones v. Liverpool Corpn.* (1885), 14 Q.B.D. 890; 54 L.J.Q.B. 345; 49 J.P. 311; 33 W.R. 551; 1 T.L.R. 389, D.C.; 34 Digest 24, 34.
- (4) *Laugher v. Pointer* (1826), 5 B. & C. 547; 8 Dow. & Ry.K.B. 556; 4 L.J.O.S.K.B. 309; 108 E.R. 204; 34 Digest 23, 27.
- D** (5) *Sadler v. Henlock* (1855), 4 E. & B. 570; 3 C.L.R. 760; 24 L.J.Q.B. 138; 24 L.T.O.S. 233; 1 Jur.N.S. 677; 3 W.R. 181; 119 E.R. 209; 34 Digest 21, 13.

Also referred to in argument:

*Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 23, 29.

**E** **Appeal** from a decision of POLLOCK, B., upon further consideration after the trial of the action with a jury brought by the plaintiff to recover damages for personal injuries caused to him by negligence of a person alleged to have been at the time a servant of the defendants.

At the time of the accident the plaintiff was employed by Jones & Co., and was engaged upon the loading of a vessel at a wharf. The goods were being moved from the wharf into the vessel by means of a crane which stood upon the wharf, and which was being worked by a man named Wand. The crane belonged to the defendants, and was being used for the loading at the time when the accident happened, under an agreement made between the defendants and Jones & Co., by which, as was stated in answer to an interrogatory delivered by the plaintiff, the defendants,

**G** "in or about the month of August, 1891, verbally agreed with Messrs. Jones & Co., that they should have the use of the steam crane when they required the same, and that the defendant company should supply the fuel and necessary power, and also a man to drive such crane, Messrs. Jones & Co. paying to the company therefor the sum of £50 per annum."

**H** In pursuance of this agreement the defendants had lent the crane and their servant, Wand, to work it for the purpose of loading the vessel on the occasion when the accident happened. Wand's duty on the day in question was to work the crane for putting goods into the vessel, and to move the arm of the crane according to signals given by the plaintiff, a servant of Jones & Co. Wand negligently moved the crane without waiting for a signal, and struck and injured the plaintiff. At the trial of the action the jury found that Wand was guilty of negligence, and assessed the damages at £500. Upon further consideration POLLOCK, B., held that, as Wand was acting on the occasion in question as the servant of Jones & Co., and not of the defendants, the case was governed by the decision in *Rourke v. White Moss Colliery Co.* (1), and he therefore gave judgment for the defendants. The plaintiff appealed.

**I** *Cock, Q.C.*, and *Lynden Bell* for the plaintiff.  
*Lawson Walton, Q.C.*, and *J. F. P. Rawlinson* for the defendants, were not called on to argue.



**LORD ESHER, M.R.**—In this case the plaintiff has brought an action against the defendants in respect of injuries caused to him by the negligent acts of a servant of the defendants, for whose negligence at that time the defendants are said to be liable. A

The facts of the case are not in dispute. The firm of Jones & Co. were loading a ship from a quay. They had no crane of their own; but the defendants have a crane which they sometimes let out to other people, and also a man who is in charge of the crane. This man was therefore a servant of the defendants with regard to the crane, unless something else happened. On the occasion when the accident happened to the plaintiff, the defendants had let out on hire to Jones & Co. for consideration this crane for the purpose of its being used as a crane ordinarily is used when a ship is being loaded. The ordinary way of using a crane on a quay for the purpose of putting goods into a ship is well known. The goods are slung on to the crane, and then the arm of the crane is turned round so as to bring the goods over that part of the ship on which they are to be lowered. The people who are conducting the loading determine on what part of the ship the goods are to be lowered, whether on the fore or after deck or hold, and they tell the man who is working the crane how far round to move the arm of the crane, and when the goods are to be raised or lowered, so that every motion of the crane is under their orders and control. When a crane is let or lent to people loading a ship for the purpose of being used in the ordinary way that a crane is used in that operation, every motion of the crane, whether it is to be moved so as to be over the goods lying on the quay or over any particular part of the ship, whether the goods are to be lifted up or lowered, and whether they are to be stopped in the middle of their being lifted up or lowered, every motion of the crane for those purposes must take place according to the orders given by those who are engaged in loading the ship, and to whom the crane has been let or lent. Those are facts which cannot be questioned, and it would be no use asking what a jury thought about the matter. B C D E

Therefore we have in this case these facts, that the defendants let or lent their crane with a man in charge of it to Jones & Co., for a consideration to be used in the way that I have described. The man in charge of the crane, whose name was Wand, was therefore for some purposes a servant of the defendants. If he had negligently let the crane get out of order and an accident consequently happened, I should think that the defendants would be liable, or it may well be that they would be liable. But here the accident did not happen from anything of that kind, it happened in consequence of the manner in which the crane was worked. Wand negligently swung the arm of the crane round at an improper time, and so hurt the plaintiff. The accident was caused by negligence in the manner of working the crane, and in the manner of working the crane Wand's duty was to act according to the orders, and under the absolute control of Jones & Co. F G

The question then is, whose servant was Wand in respect of his working the crane? It is true that he was selected by the defendants to work the crane; it is true that he was paid his wages by the defendants; and those are circumstances which, if nothing else intervened, would go far in showing that he was the servant of the defendants. And for a great many things he was their servant, but he was not their servant in respect of the working of the crane at the time when the accident happened. Although Jones & Co. did not pay him, the operation in which he was concerned was to be conducted solely by them, and he was bound to obey their orders, and was under their control for that purpose. I have no doubt that, if Jones & Co. saw him misconducting himself and disobeying their orders, they would have a right to send him away from their employment to his own master. In that sense they could discharge him from that employment. H I

That being so, was Wand the servant of Jones & Co., so as to make them liable for his negligence in working the crane? In considering this question, it is hardly necessary to seek for authority. It is no use going back to all the old cases which are to be found long before *Rourke v. White Moss Colliery Co.* (1). In that case the question was, whose servant was a man named Lawrence? He was the general

A servant of the defendants, but it was held that in respect of the operation in which he had acted negligently he was not the servant of the defendants so as to make them liable, but of someone else. COCKBURN, C.J., puts the case thus (2 C.P.D. at p. 209) :

"It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

Lawrence in that case was clearly the general servant of the defendants, but was lent to Whittle for a particular purpose. In the course of that particular employment he was negligent, and it was held that as regards that negligence he was the servant of Whittle, and not the servant of his general master. The reason of that decision was that Whittle had control of the employment in which Lawrence being engaged had acted negligently, and the general master of Lawrence, having lent him, had not control of him in that employment.

The passage that has been read to us from the opinion of LORD WATSON in *Johnson v. Lindsay & Co.* (2) seems to me to be exactly the same. He says ([1891] A.C. at p. 382) :

"I do not think it necessary to discuss the question under what circumstances the servant of one man ought to be considered the servant of another; I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B. and submitting himself to the control and orders of B., become pro hac vice B.'s servant, in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned, by his fault, to B.'s own workmen."

That is exactly the same doctrine, and it seems to me to be well established, and to be applicable to the present case.

With regard to *Jones v. Liverpool Corpn.* (3), GROVE, J., seems to have thought that there was a difference between the case of a general master lending his servant for reward, and lending him gratis. I can only say that that is a matter which seems to me to have nothing to do with the principle upon which in these cases a man is said to have been a servant of one person, and not a servant of someone else.

It has also been argued that Wand was the servant both of Jones & Co. and the defendants. In one sense he was; he was the general servant of the defendants, and at a particular moment he was the servant of Jones & Co.; he was the servant of both at the same moment, but not with regard to the same acts of service. As to the mode of working the crane he was under the sole control of Jones & Co., and he was therefore not the servant of the defendants as regards that working of the crane, whatever he might be as regards other matters. The defendants are clearly not liable for this negligence of Wand, both on principle and on authority, and I think this appeal should be dismissed.

LINDLEY, L.J.—I am quite of the same opinion. The action is brought for damages for personal injuries sustained by the plaintiff through the negligent working of a crane belonging to the defendants. The crane was worked by a man named Wand, who was a servant of the defendants, and those facts give the plaintiff a clear prima facie right to bring this action. But there are some other facts to be considered. The crane was being used for the purpose of loading some barges, and Wand was working it under an arrangement which had been made between the defendants and another firm called Jones & Co. What we know about this arrangement is contained principally in the answer to the fifth interrogatory, which shows what, to my mind, is the key to the whole case, namely, the fact that Jones & Co. were the people who were loading the barges, and not the defendants. The crane

was being used solely for the purpose of loading the barges; that is to say, for Jones & Co.'s purposes, not for the defendants' purposes at all. For the purpose for which the crane was being used, Jones & Co. must be regarded as the masters and employers of Wand, and not the defendants. That to my mind carries the case against the plaintiff, and brings it within the decision of the Court of Appeal in *Rourke v. White Moss Colliery Co.* (1). The Court of Appeal decided that case on what are, to my mind, sound principles; I say nothing about the judgment of the Common Pleas Division. As to *Jones v. Liverpool Corpn.* (3) I agree with the observations of the Master of the Rolls, though I think the decision was right.

As to the alleged joint responsibility of the defendants and Jones & Co., I think the answer may be found in the words of LITTLEDALE, J., in *Laugher v. Pointer* (4). He says (5 B. & C. at p. 558):

"The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other; the law does not recognise a several liability in two principals who are unconnected."

I think that the appeal should be dismissed.

**BOWEN, L.J.**—I am of the same opinion. It seems to me that the law is perfectly clear, and I should be very sorry if, in consequence of the argument that has been addressed to us, the least doubt as to the law should remain in the mind of anybody. The question here is not who procured the act to be done which caused the mischief. Of course everybody is liable in law for directing a wrongful act to be done. But the liability of the defendants, if it exists at all, exists in consequence of the doctrine of the liability of a master for the act of his servant, a liability which, whatever its historic origin and development, really now is understood to involve the master in responsibility for what the servant does in his employment. We have to consider here whether, at the time the accident happened, the defendants really were the masters of the man who caused the injury to the plaintiff in the sense which such a doctrine of responsibility implies. The defendants were without doubt the general masters of Wand, but were they his masters at the time when he did the negligent act in the sense of having a power to control his acts? The point is, who was his master then, in the sense of having the right at that moment to control his acts. Whether the master was at the other end of the world or not is immaterial if he had the right at that moment of controlling what was being done.

That is the test which has been laid down clearly for the last forty or fifty years, and nowhere better than in the judgment of CROMPTON, J., in *Sadler v. Henlock* (5), where he says that the test is, did the defendants retain the power of controlling the work. Here the defendants certainly parted with something. They parted with the crane, and they sent a man to work it while it was being used in loading the ship. Did they retain a power of controlling the acts to be done? There are two ways in which persons who are going to carry out a work may get other independent contractors to assist them. A contractor may agree simply to carry out the work which has been indicated to him, the end being prescribed to him, but the mode of effecting the end and of controlling the means being left to him. In such a case, if he employs persons to carry out the end which has been indicated to him, those persons are his servants, because he controls their acts in attaining the prescribed end. But a contractor may make a different sort of contract. He may place his servants under the control of another person; that is to say, he may lend them for the purpose of carrying out the work indicated. In such a case he does not retain control over the servants in what is being done. For the reasons which the Master of the Rolls has given it is clear that in this case the defendants, although they placed their crane and their man at the disposal of Jones & Co., did not in the language of CROMPTON, J., retain the power of controlling the work. It was on these lines that *Rourke v. White Moss Colliery Co.* (1) was decided. The language of LORD WATSON that has been referred to is in no way inconsistent with



A the opinions in that case; it seems to me to follow exactly the same train of thought.

B The argument addressed to us has been chiefly founded upon what I may com-  
pendiously call the carriage cases, which really have nothing at all to do with the  
present case. Where a man hires a carriage of a livery-stable keeper, the owner  
places at the disposal of the hirer the carriage and a man to drive it. The hirer  
prescribes the end for which the carriage is to be used, and names the places to  
which the carriage is to be driven, while the owner undertakes to carry out the end  
which the hirer may from time to time prescribe, the owner and his servants  
effecting the operation, and the owner having the right to control the means. It  
is true that the owner undertakes that the coachman shall drive in a skilful manner,  
but in ordinary cases he does not place him under the orders of the hirer except for  
C the purpose of driving the carriage to the places indicated by the hirer. The  
control of the means by which the driving is accomplished is always left to the  
coachman, who is not subject to the orders of the hirer in the sense of being his  
servant. It is true that, if the coachman behaves badly or drives unskilfully, the  
hirer can complain to the owner, and the contract between the hirer and the owner  
may be broken, but the coachman does not become the servant of the hirer. If the  
D hirer himself takes part in the operation of driving, he does not become the master  
of the coachman. In such a case he would become liable for a negligent act, not  
because he was master of the coachman, but because he has been taking part in  
the wrongful act.

E The carriage cases have, therefore, nothing to do with the case we have now to  
decide. The truth is that, though the defendants remained the general masters of  
Wand, nevertheless under their contract with Jones & Co. they had parted with the  
right of controlling him while he was engaged in working the crane for Jones & Co.  
When they parted with their power of control, their responsibility for Wand's acts  
which sprang from that power of control ceased, although they remained his general  
masters. They were no longer the masters in the sense which the law requires  
them to be before they can be held responsible for the negligent act.

F I quite agree with what my Lord and my brother LINDLEY have said as to there  
being no difference between a lending for reward and a lending not for reward, of  
a person to perform a work. Upon the lines upon which I have endeavoured to  
express my judgment it is obvious that that is a matter of no importance, the test  
being, as I have said, the retaining control over the acts of the servant.

*Appeal dismissed.*

G Solicitors: *Roland H. Ward; Henry F. Kite.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

# Re VITORIA. Ex Parte SPANISH CORPORATION, LTD.

[COURT OF APPEAL (Lord Halsbury, Lopes and Kay, L.JJ.), December 15, 1893]

[Reported [1894] 1 Q.B. 259; 63 L.J.Q.B. 161; 70 L.T. 141;  
42 W.R. 193; 10 T.L.R. 165; 38 Sol. Jo. 144; 1 Mans. 1;  
9 R. 132]

*Bankruptcy—Appeal—Notice—Time—Extension—Failure to send copy of notice to registrar of county court—Discretion of court to extend time—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), ss. 104 (2) (d), 105 (4), 143 (1)—Bankruptcy Rules, 1886, r. 132.*

By the Bankruptcy Rules, 1886, r. 132 [see now the Bankruptcy Rules, 1952, r. 130]: "Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent to the registrar of the court appealed from who shall mark thereon the date when received, and forthwith file the same with the proceedings."

By the Bankruptcy Act, 1883, s. 105 (4) [see now the Bankruptcy Act, 1914, s. 109 (4)]: "Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time . . . upon such terms, if any, as the court may think fit to impose."

Failure due to a change of their solicitors by petitioning creditors to send, in accordance with the requirements of r. 132, to the registrar of a county court a copy of their notice of appeal against a refusal by the registrar to grant a receiving order, **held** not to be sufficient special circumstances for the court to extend the time for compliance with the rule.

**Notes.** The Bankruptcy Rules, 1886, have been revoked. See now the Bankruptcy Rules, 1952. Rule 132 of the 1886 Rules has been replaced in substance by r. 130 of the 1952 Rules which provides that the copy of the notice of appeal must be sent within seven days from the entry of the appeal. Rule 389 of the 1952 Rules provides that: "The court may, for good cause shown, extend or abridge the time appointed by these Rules or fixed by an order of the court for doing any act or taking any steps in any proceedings." The general power of the court to extend time is, however, contained in s. 109 (4) of the Bankruptcy Act, 1914.

The Bankruptcy Act, 1883, has been repealed. For ss. 104 (2) (d), 105 (4), and 143 (1) of that Act, see now ss. 108 (2) (c), 109 (4), and 147 (1) respectively of the 1914 Act.

Considered: *Re Barley*, [1923] 1 Ch. 177; *Re Muscovitch, Ex parte Muscovitch*, [1939] 1 All E.R. 135.

As to procedure on appeals in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 584 et seq.; and for cases see 4 DIGEST (Repl.) 576 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Case referred to:

(1) *Re Southam, Ex parte Lamb* (1881), 19 Ch.D. 169; 51 L.J.Ch. 207; 45 L.T. 639; 30 W.R. 126, C.A.; 4 Digest (Repl.) 577, 5130.

Also referred to in argument:

*Re Jones, Ex parte Williams* (1882), 46 L.T. 242, C.A.; 4 Digest (Repl.) 577, 5131.

*Christopher v. Croll* (1885), 16 Q.B.D. 66; 55 L.J.Q.B. 78; 53 L.T. 655; 35 W.R. 134, C.A.; Digest (Practice) 802, 3658.

*Re Sillence, Ex parte Sillence* (1877), 7 Ch.D. 238; 47 L.J.Bey. 87; 37 L.T. 676; 26 W.R. 129; 4 Digest (Repl.) 577, 5128.

*Re Green, Ex parte Donnithorne* (1879), 40 L.T. 660; 27 W.R. 824; 4 Digest (Repl.) 577, 5129.

**A** *Re Gilbert, Ex parte Viney* (1877), 4 Ch.D. 794; 46 L.J.Bcy. 80; 36 L.T. 43; 25 W.R. 364, C.A.; 4 Digest (Repl.) 577, 5125.

**B** Appeal from an order of the Queen's Bench Division (VAUGHAN WILLIAMS and KENNEDY, JJ.), reversing a decision of the registrar of the Croydon County Court, and making a receiving order against the debtor, J. F. Vitoria, upon the petition of the Spanish Corpn., Ltd.

**C** In appealing from the refusal of the registrar to grant a receiving order, the petitioning creditors omitted to send a copy of their notice of appeal forthwith to the registrar in accordance with the requirements of r. 132 of the Bankruptcy Rules, 1886, nor had they sent any such copy to the registrar at the time when this matter came before the Court of Appeal. The omission to send this copy of the notice of appeal was said to be accidental, and due to the fact that after the entry of the appeal the petitioning creditors changed their solicitors.

By the Bankruptcy Act, 1883, it is provided :

**D** "Section 104 (2). Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows : . . . (d) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal. . . . Section 105 (4). Where by this Act or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof upon such terms, if any, as the court may think fit to impose. . . . Section 143 (1). No proceeding in bankruptcy shall be invalidated by any formal defect, or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

**E** Upon the hearing of the appeal before the Queen's Bench Division a preliminary objection was raised on behalf of the debtor that the appeal could not be heard by reason of the creditor's non-compliance with the requirements of r. 132. The Court held that the omission to send to the registrar a copy of the notice of appeal was a mere irregularity which had caused no injury to the debtor, and they therefore enlarged the time for compliance with r. 132, and, allowing the creditor's appeal, made the receiving order asked for. The debtor appealed.

**G** *Jelf, Q.C.*, and *F. Cooper Willis* (Ivor Bowen with them) for the debtor.  
*Finlay, Q.C.*, and *Ringwood* for the creditors.

**LORD HALSBURY.**—I am of opinion that the preliminary objection which has been raised on behalf of the debtor is fatal to the creditors. I shall lay down no general rule in this case, but when there is a statutory regulation that

**H** "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal,"

**I** and when I am asked to exercise my discretion and to enlarge the time within which under the rules an appeal must be brought, it is impossible not to see that what the legislature has given is a rule, and that it has not left the matter entirely to the discretion of the court. The court has a discretion, but the legislature has given it a criterion to guide it in exercising its discretion, and the legislature has provided that an appeal shall only be entertained when the rules as to appeals have been complied with. Even if *Re Southam, Ex parte Lamb* (1) had not been decided, I should have come to the same conclusion as I do now. There the Court of Appeal held that because a copy of the notice of appeal had not been sent to the registrar of the county court "forthwith" as required by r. 144 of the Bankruptcy Rules, 1870, the appeal could not be heard.

In the present case special circumstances are urged, but the only excuse which has been offered is that a slip in the procedure has been accidentally made.



Yet to this hour the regulations of r. 132 have not been complied with. It would be of the worst example to lay down, as we are in fact asked to do here, that when the court is asked to enlarge the time which by statute has been limited by doing an act, it will be satisfied with an excuse of a solicitor's forgetfulness. The legislature having provided certain fixed limits of time, the interpretation which I put upon the rule is that the circumstances of the case must be something special before the court, in the exercise of its discretion, will enlarge the time. In the present case no special circumstances exist, and I am therefore of opinion that this appeal must be allowed. I cannot help thinking that the exigency of the statute and r. 132 was not really called to the attention of the Divisional Court.

**LOPES, L.J.**—I entirely agree.

**KAY, L.J.**—I agree. I should be sorry if, in no possible case, the court were able to exercise its discretion. Section 104 (2) (d) of the Bankruptcy Act, 1883, provides that no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal. If the general rules are not complied with in the case of an appeal, then it is only when there are special circumstances in the case that the court can extend the time for obedience to the rules. No special circumstances are alleged here, and the appeal must therefore be allowed.

*Appeal allowed.*

Solicitors: *H. W. Christmas; Jenkins, Baker & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## WOOD v. McCARTHY AND ANOTHER

[QUEEN'S BENCH DIVISION (Wills and Lawrance, JJ.), May 3, 4, 1893]

[Reported [1893] 1 Q.B. 775; 62 L.J.Q.B. 373; 69 L.T. 431;  
41 W.R. 523; 9 T.L.R. 447; 37 Sol. Jo. 478; 5 R. 408]

*Practice—Parties—Representative parties—Unincorporated association—Defendants—Two defendants authorised to defend on behalf of all persons interested—R.S.C., Ord. 16, r. 9.*

The plaintiff, a member of a labour protection league, an unincorporated association, sued two defendants, the president and the secretary of the league, both personally as members and as representing all the members of the league, claiming to have a levy of 6d. made on each member for his benefit under a rule of the league which provided that, in case of a member being permanently incapacitated through accident while following his employment, a levy of 6d. should be made on every member of the league for his benefit. The defendants denied the plaintiff's right to sue them as representing all the members of the league.

**Held:** the old Chancery practice, which allowed a class of defendants to defend on behalf of the whole body of persons interested, had not been altered by R.S.C., Ord. 16, r. 9, under which an order might be made for the two defendants to defend on behalf of all the members; the plaintiff possessed a beneficial proprietary right under the league rule; and the two defendants were properly joined as representative defendants.

**A Notes.** In this case the defendants were unwilling to be joined as representative defendants and it would appear that the words "may be authorised" in R.S.C., Ord. 16, r. 9, have been construed as meaning "shall be directed".

Referred to: *Hardie and Lane, Ltd. v. Chilton* (1927), 96 L.J.K.B. 773; *Barker v. Allanson*, [1937] 1 All E.R. 75; *Campbell v. Thompson*, [1953] 1 All E.R. 831.

**B** As to representative parties, see 30 HALSBURY'S LAWS (3rd Edn.) 315; and for cases see DIGEST (Practice) 420 et seq. As to contracts with unincorporated associations, see 8 HALSBURY'S LAWS (3rd Edn.) 64, 65; and for cases see 12 DIGEST (Repl.) 42. For R.S.C., Ord. 16, r. 9, see the ANNUAL PRACTICE (1963) 337.

Cases referred to:

**C** (1) *Bromley v. Williams* (1863), 32 Beav. 177; 1 New Rep. 413; 32 L.J.Ch. 716; 8 L.T. 78; 27 J.P. 294; 9 Jur.N.S. 240; 11 W.R. 392; 1 Mar.L.C. 320; 55 E.R. 69; 29 Digest (Repl.) 358, 2766.  
(2) *Temperton v. Russell*, post; [1893] 1 Q.B. 435; 62 L.J.Q.B. 300; 68 L.T. 425; 57 J.P. 518; 41 W.R. 321; 9 T.L.R. 304; 37 Sol. Jo. 303; 4 R. 302, C.A.; Digest (Practice) 416, 1132.

Also referred to in argument:

**D** *May v. Newton* (1887), 34 Ch.D. 347; 56 L.J.Ch. 313; 56 L.T. 140; 35 W.R. 363; Digest (Practice) 421, 1178.  
*Andrews v. Salmon*, [1888] W.N. 102, 176; 4 T.L.R. 490; 8 Digest (Repl.) 668, 116.  
*Lloyd v. Loaring* (1802), 6 Ves. 773; 31 E.R. 1302, L.C.; 8 Digest (Repl.) 651, 13.  
**E** *Adair v. New River Plate Co.* (1805), 11 Ves. 429; 32 E.R. 1153, L.C.  
*Cullen v. Duke of Queensberry* (1787), 1 Bro.C.C. 101, L.C.; affirmed sub nom. *Duke of Queensbury v. Cullen*, 1 Bro. Parl. Cas. 396; 1 E.R. 646, H.L.; 8 Digest (Repl.) 663, 87.  
*Pare v. Clegg* (1861), 29 Beav. 589; 30 L.J.Ch. 742; 4 L.T. 669; 26 J.P. 53; 7 Jur.N.S. 1136; 9 W.R. 795; 54 E.R. 756; 25 Digest (Repl.) 339, 220.  
**F** *Griffith v. Pound* (1890), 45 Ch.D. 553; 59 L.J.Ch. 522; 10 Digest (Repl.) 838, 5492.

**Appeal** by the defendants from an order of BRUCE, J., in chambers, that "the defendants be authorised to defend this action on behalf and for the benefit of all the members" of the Amalgamated Stevedores Labour Protection League.

**G** The plaintiff was a member of the Amalgamated Stevedores Protection League, an unincorporated and unregistered association, and while following his employment met with an accident which incapacitated him for life from following his employment. The defendants, Daniel McCarthy and Stephen Sims, were respectively president and secretary of the league and members of it. The plaintiff brought an action claiming to have a levy of 6d. made on each member of the league and the total sum paid to him in accordance with r. 27 of the league rules which provided:

"In the event of any member meeting with an accident while following his employment, and thereby being incapacitated from following his employment for the remainder of his life, a levy of 6d. each shall be made on every member of this society for his benefit. . . ."

**I** The plaintiff sued the two defendants "personally as representing the . . . league and executive council, and all the branches and members of the . . . league". The defendants in their individual capacity each paid 6d. into court without admitting liability and in their representative capacity denied the claim and relief sought and also the plaintiff's right to sue them as representing all the members of the league.

*T. E. Crispe* for the defendants.

*J. Holmes Poulter* for the plaintiff.

**WILLS, J.**—In my opinion the order made by **BRUCE, J.**, is right. In this case an action is brought for the purpose of enforcing a contractual obligation. For a very long time past the Court of Chancery has been in the habit of allowing a class of defendants to be sued as representative of a whole body. In *Bromley v. Williams* (1) **SIR JOHN ROMILLY, M.R.**, said (32 Beav. at p. 188):

“If that be so, provided all the members of the association were made parties, then this rule is well established; that if they are so numerous that they cannot be made parties to the cause with any chance of bringing it to a hearing in consequence of abatements and the like difficulties, then you may make two or three of a class defendants to represent the interest of all that class. Formerly that was not the practice of this court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by **LORD COTTENHAM, L.C.**, in several instances. But, if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the court.”

That case was an action brought against seven persons representative of a class of persons who had agreed to contribute in the event of a ship, that belonged to a member of the insurance club, being lost.

In principle I cannot see any distinction between that case and the case before us, and I think that that case is an authority in point. It is said that **R.S.C.**, Ord. 16, r. 9, has altered this practice. I do not think that is so. **R.S.C.**, Ord. 16, r. 9, provides:

“Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.”

I cannot conceive that there was any intention to narrow the doctrine which had previously prevailed, nor do I think that *Temperton v. Russell* (2) has had that effect, for the distinction there drawn was one between actions of contract and actions of tort. In that case **LINDLEY, L.J.**, said ([1893] 1 Q.B. at p. 438):

“This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . is founded on tort. The old Court of Chancery had no jurisdiction to grant relief in such an action; and, although its rules as to parties to actions or suits maintainable in it have now to be applied in all divisions of the High Court when exercising the old jurisdiction of the Court of Chancery, the rules ought not to be construed as creating a jurisdiction in one division, which was never exercised by any court in the country before the rules were made.”

I am of opinion that the right conferred on the plaintiff in the present case, by r. 27 of the league, to have a levy of 6d. made, is a beneficial proprietary right. I am, therefore, of opinion that the order appealed from is right and ought to be affirmed.

**LAWRANCE, J.**—I am entirely of the same opinion, and for the same reasons.

*Appeal dismissed.*

Solicitors: *James Turner; Finch & Turner.*

[Reported by **G. H. GRANT, ESQ.**, Barrister-at-Law.]



## READ AND OTHERS v. BISHOP OF LINCOLN

[PRIVY COUNCIL (Lord Halsbury, L.C., Lord Hobhouse, Lord Esher, M.R., Lord Herschell, Lord Field, Lord Hannon, Sir Richard Couch and Mr. Shand. Ecclesiastical Assessors: The Bishops of Chichester (Durford), Lichfield (MacLagan) and St. David's (Jones)), June 10, 11, 12, 15, 16, July 2, 3, 7, 8, 1891, August 2, 1892]

[Reported [1892] A.C. 644; 62 L.J.P.C. 1; 67 L.T. 128; 56 J.P. 725; 8 T.L.R. 763]

*Ecclesiastical Law—Offence—Communion service—Mixing wine and water—Additional ceremony—Administration of mixture—Ablution after Benediction—Hymn sung before and during reception of Elements—Position of priest at beginning of service—Presence of candles on Table.*

In the celebration of the Holy Communion it is not an ecclesiastical offence for the priest conducting the service (i) to administer wine with which some water has been mixed beforehand, such mixing not taking place in and as part of the service: *Hebbert v. Purchas* (1) (1871), L.R. 3 P.C. 605, disapproved on this point; but the mixing of water with the wine in and as part of the service would be a ceremonial act and illegal as an additional ceremony: (ii) to use excessive care in reverently consuming the remnants of the consecrated elements in the church after the Benediction and the conclusion of the service: (iii) to sing the hymn "Agnus Dei" before and during the reception of the Elements: (iv) for the priest at the beginning of the service to stand at the northern part of that side of the Communion Table which faces eastward: *Ridsdale v. Clifton* (2) (1877), 2 P.D. 276, explained: (v) to take part without objection in the service while lights are burning on the Holy Table at a time when they are not required for the purpose of giving light, the priest not having been a party to or a participant in the original lighting of the candles and the placing of them where they were placed.

*Ecclesiastical Law—Ecclesiastical court—Proof of offence—Court satisfied that offence will not be repeated—Right to dispense with penalty.*

Where an ecclesiastical court is satisfied that an ecclesiastical offence which has been proved will not be repeated, the court is entitled to accept the assurance of a future submission and is not bound to inflict a monition or other penalty.

*Evidence—Contemporaneous usage—Proof by reference to historical works, pictures and documents.*

Where it is important to ascertain ancient facts of a public nature the law permits historical works, pictures, and documents, to be referred to.

*Privy Council—Decision—Authority—Binding effect of decision of Judicial Committee on subsequent committee.*

While fully sensible of the weight to be attached to previous decisions of the Judicial Committee of the Privy Council the committee are at the same time bound to examine the reasons on which the decisions rest and to give effect to their own view of the law, even though in the case before the committee there is no fact which was not under the consideration of the committee on the previous occasion.

**Notes.** Considered: *St. Paul, Camden Square* (1897), 14 T.L.R. 156; *Fowke v. Berington* [1914] 2 Ch. 308; *Capel St. Mary, Suffolk v. Packard*, [1927] P. 289; *Re Transferred Civil Servants (Ireland) Compensation*, [1929] A.C. 243. Applied: *Re St. Saviour's, Hampstead*, [1932] P. 134. Referred to: *Assheton-Smith v. Owen* (1905), 94 L.T. 42; *Winbledon (Vicar and Churchwardens) v. Eden, Re St. Mark's Wimbledon*, [1908] P. 167; *Hendon Parish Church* (1912), 28 T.L.R. 438; *Gore-Booth v. Bishop of Manchester*, [1920] 2 K.B. 412; *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1922] All

E.R. 207; *Re Article X of Articles of Agreement for Treaty between Great Britain and Ireland* (1928), 45 T.L.R. 57; *Nkambule v. R.*, [1950] A.C. 379; *Re St. Saviour's, Walthamstow*, [1950] 2 All E.R. 70. **A**

As to the legality of ecclesiastical rites and ceremonies, see 13 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; as to the receipt of histories as evidence, see *ibid.*, vol. 15, p. 404; as to judicial decisions as authorities, see *ibid.*, vol. 22, p. 796 et seq. For cases see 19 DIGEST (Repl.) 482; 22 DIGEST (Repl.) 377; 30 DIGEST (Repl.) 223. **B**

Cases referred to :

(1) *Elphinstone v. Purchas* (1870), L.R. 3 A. & E. 66; 39 L.J.Eccl. 28; on appeal sub nom. *Hebbert v. Purchas* (1871), L.R. 3 P.C. 605; 7 Moo. P.C.C.N.S. 468; Bro. Ecc. Rep. 162; 40 L.J.Eccl. 33; 25 J.P. 452; 19 W.R. 898; 17 E.R. 177, P.C.; 19 Digest (Repl.) 244, 40. **C**

(2) *Clifton v. Ridsdale* (1866), 1 P.D. 316; 35 L.T. 432; 41 J.P. 70; on appeal sub nom. *Ridsdale v. Clifton* (1877), 2 P.D. 276; 46 L.J.P.C. 27; 36 L.T. 865; 42 J.P. 148, P.C.; 19 Digest (Repl.) 335, 1164. **C**

(3) *St. Katherine's Hospital Case* (1671), 1 Vent. 149; 86 E.R. 102; 22 Digest (Repl.) 377, 4072.

(4) *Martin v. Mackonochie, Flamank v. Simpson* (1868), L.R. 2 A. & E. 116; 37 L.J.Eccl. 17; 18 L.T. 245; 16 W.R. 604; on appeal sub nom. *Martin v. Mackonochie*, L.R. 2 P.C. 365; 5 Moo.P.C.C.N.S. 500; Bro. Ecc. Rep. 103; 38 L.J.Eccl. 1; 19 L.T. 503; 33 J.P. 35; 17 W.R. 187; 16 E.R. 603, P.C.; 19 Digest (Repl.) 479, 3053. **D**

Also referred to in argument :

*Martin v. Mackonochie (Second Suit)* (1874), L.R. 4 A. & E. 279; 32 L.T. 569; 39 J.P. 260; 19 Digest (Repl.) 467, 2889. **E**

*Liddell v. Westerton* (1857), Brod. & F. 117; 29 L.T.O.S. 54; 21 J.P. 499; 5 W.R. 470; sub nom. *Liddell v. Westerton*, *Liddell v. Beale*, Bro. Ecc. Rep. 42; sub nom. *Westerton v. Liddell and Horne*, *Beal v. Liddell*, *Parke and Evans*, *Moore's Special Report*, 1, P.C.; 19 Digest (Repl.) 460, 2816.

**Appeal** from certain parts of a decree or judgment pronounced by the Archbishop of Canterbury in his court in a cause promoted by the appellants (members of the Church of England resident within the diocese of Lincoln) against the respondent, the bishop of the diocese of Lincoln in the province of Canterbury; see [1891] P. 9. **F**

*Sir Henry Davey, Q.C., Dr. Tristram, Q.C., and Danckwerts* for the appellants. The respondent did not appear. **G**

Aug. 2, 1892. **LORD HALSBURY, L.C.**—Before dealing with any of the specific charges which are the subject of the appeal, their Lordships think it right to notice an objection raised by counsel as to the legitimacy of some of the considerations by which the archbishop was influenced in arriving at his conclusions. It has been urged that upon such subjects as the practice of the Primitive Church, the ritual of the Eastern and Western Churches, the position of the Lord's Table, the position of the celebrant at the table, and like questions, which are ex hypothesi beyond the reach of living memory, the archbishop has consulted ancient authors, historical and theological works, pictures, engravings, and a variety of documents, of which undoubtedly any careful and competent historian would avail himself, but which, it is argued, cannot legitimately be made use of in a court of justice, and upon which it is said no judge is justified in placing any reliance in forming his judgment. **H**

Where the objection is of so general a character it is impossible to do more than apply to it a general treatment. The first observation that arises is that if our law were to exclude all such historical investigation as is pointed to by the objection, and questions of ritual and ecclesiastical practice could only be investigated by the light of the words of an Act of Parliament some centuries old, **I**

**A** and by the testimony of living witnesses, it would disclose a very unreasonable and unsatisfactory state of the law. Who can doubt that contemporaneous usage would be of incalculable value in forming a judgment on such subjects as are indicated above? And if no historical investigation can be permitted as to what was the contemporaneous usage, one source of light upon doubtful questions would be excluded. The novelty of the objection urged before this Board is not

**B** a conclusive consideration, since the fact that an objection has not previously been taken is by no means conclusive against its validity when actually taken; but one cannot fail to be struck by the absence of any such objection in, e.g., *Ridsdale v. Clifton* (2), where, not by counsel only, but in the judgment ultimately pronounced, such authorities as HOOKER, BAXTER'S LIFE AND TIMES, COLLIER'S ECCLESIASTICAL HISTORY, DR. THOMAS BENNETT'S PARAPHRASE, COSIN'S WORKS,

**C** and the like, were quoted and relied upon; and this not upon questions of doctrine or opinion, but as leading to inferences of fact of what was usual at the time of the writers referred to.

But their Lordships are of opinion that the objection is founded upon an erroneous view of the law. Where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to. The

**D** House of Lords, upon the impeachment of Warren Hastings, having first determined that it would only proceed upon judicial evidence such as would be receivable in a court of law, received in evidence (being advised, it will be remembered, by the judges) CANTEMIR'S HISTORY OF THE TURKISH EMPIRE. In the *St. Katherine's Hospital Case* (3), LORD HALE admitted SPEED'S CHRONICLES to be evidence of a particular point of history in Edward III's time, and PEMBERTON, C.J., received

**E** the same evidence to prove the death of Isabel, Queen Dowager of Edward II, and said he knew not what better proof could be given. Without considering further how far an ecclesiastical judge has a right to act upon his own historical learning when it becomes important to ascertain what was the ecclesiastical practice, or what were the views entertained by eminent theologians in remote times, it is enough to say here, dealing with the objection generally, that it is

**F** impossible to contend that, if in other respects the archbishop's judgment was well founded, it could be invalidated by his having called to his aid for this purpose his own historical researches. Nor does it make the objection better that, instead of pronouncing *ex cathedra* what, in his opinion, was the history of such and such a practice, the archbishop has disclosed in his judgment the sources from which he derived his views.

**G** With respect to some of the matters which have been the subject of debate in this appeal, it has been strongly argued that they have been conclusively determined by this Board, and that, if the facts are found to be the same, no further argument is permissible. That question was raised in *Ridsdale v. Clifton* (2). Some of the points in issue in that case had been already the subject of decision by the Judicial Committee in *Hebbert v. Purchas* (1). In answer to the argument

**H** that they had been conclusively settled and were no longer open to discussion, LORD CAIRNS, in delivering the judgment of the committee, said (2 P.D. at pp. 305-307):

"Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this tribunal between other parties, and an order of the Sovereign in Council founded thereon, should be

**I** held to be conclusive in all similar cases subsequently coming before them. . . . In the case of decisions of final courts of appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. . . . Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be re-opened without the very greatest hesitation. Their Lordships are fully sensible of the importance of establishing and maintaining,



as far as possible, a clear and unvarying interpretation of rules, the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders. On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject."

It was argued for the appellants that the doctrine thus laid down in *Ridsdale v. Clifton* (2) was only applicable where there was some "fresh light," and that by this was meant some fact which had not been under the consideration of the tribunal on the previous occasion. But an examination of the arguments and judgment shows that this was not the meaning of the committee. They entered upon an elaborate and independent examination of the law bearing upon the legality of acts already pronounced illegal, and it was expressly stated, as their Lordships' conclusion,

"that, although very great weight ought to be given to the decision in *Hebbert v. Purchas* (1), yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and, if they should feel themselves forced to dissent from those reasons, to decide upon their own view of the law."

In the result, their Lordships dissented upon one point from the reasoning of the previous committee, and came to the conclusion that an act was lawful which had been previously pronounced illegal. In the present case their Lordships cannot but adopt the view expressed in *Ridsdale v. Clifton* (2) as to the effect of previous decisions. While fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law.

The first matter dealt with by the archbishop is that contained in the 4th article. That article when read with the 13th and 14th articles, seems to contain, as the archbishop points out, two heads of charge. First, the mixing of the cup during the Communion service; and, second, the consecration and administration of the mixed cup. With the former of these their Lordships need not concern themselves. The finding of the archbishop on this part of the charge was adverse to the respondent, and no question as to the legality of this act arises upon this appeal. As regards the latter head of charge, however, the archbishop declared that the act of consecrating wine which had been mixed with water before the service, and of administering the same when so mixed to the communicants, would not be offences against the ecclesiastical law of England. The appellants impeach this declaration, and ask their Lordships to pronounce the use of wine mixed with water in the administration of the Lord's Supper to be an ecclesiastical offence. The ceremonial mixing of the cup as part of the service is no longer in question; all that their Lordships have to consider is whether the mere supply of wine which had some water in it, and the consecration and administration thereof in the Holy Communion, is a violation of the ecclesiastical law.

It is argued that the Prayer Book directs that "wine" is to be used for the purpose of the Sacrament, and that the rubric is not complied with if any water has been added to the wine which is so used. The argument must necessarily go the length of asserting that what is in that case consecrated and administered is not "wine." It is difficult to contend that what is generally called and known as "wine" loses that character by the admixture of a little water. Wines differ in alcoholic strength, and their Lordships do not believe that anyone would hesitate to apply the word "wine" to such a mixture, or that it would be an unnatural use of language to do so. The responsive plea states that "a little

A water" was added, and it is not suggested that there was such an admixture as to cause the wine to lose its distinctive character as wine. It is to be observed that the word "wine" is applied in King Edward's first Prayer Book to the mixture of wine and water which that Prayer Book enjoined, and, in the absence of any liturgical direction as to the alcoholic strength of the wine, their Lordships cannot think that the mere use of the word "wine" in the rubric by implication prohibited the presence of water in that which is consecrated and administered.

B Their Lordships, after carefully weighing what was said in *Hebbert v. Purchas* (1), are unable to see anything in the references to "wine" in any part of the rubrics inconsistent with this view. LORD HATHERLEY, in delivering the judgment of this committee in *Hebbert v. Purchas* (1), said that since it had been decided that the act of mingling wine with water in the service with a view to its administration is one of the additional ceremonies excluded by implication by the service for the Holy Communion, the question was whether the doing of the act before the service, and in the vestry or elsewhere, could so alter the symbolical character of the act that the cup might be brought in and consecrated and administered to the people without constituting an innovation or additional ceremonial act beyond what is ordered in the service; and, after stating that whatever the admixture of water symbolised, it could scarcely be said that the reception of the mingled chalice had no share in this symbolism, but only the act of mingling, concluded that if the mingling and administering in the service water and wine was an additional ceremony, and so unlawful, it did not become lawful by removing from the service the act of mingling, but keeping the mingled cup itself and administering it.

E Their Lordships find themselves unable to concur in this reasoning. The mixing of water with the wine in and as part of the service is no doubt a ceremonial act, and there can be as little doubt that, if so, it is an additional ceremony, quite apart from any particular idea as to its symbolic character which may induce the act. But where the chalice is placed mixed upon the Holy Table no act is done during the service in addition to those prescribed; the acts of consecration and administration are precisely the same as if the chalice were unmixed, and the recipients may even well be ignorant whether the chalice be mixed or not. It seems to their Lordships that there is not in such a case any additional ceremony, that no ceremonial act is added to the service. The "removing from the service the act of mingling," which the judgment in *Hebbert v. Purchas* (1) treated as of no moment, is the removal of the very thing which as an added ceremony was unlawful. If wine, with a small admixture of water, be "wine" within the meaning of the rubric, and if the use of it does not involve an added ceremony, their Lordships cannot but agree with the archbishop that it does not become unlawful on account of any symbolism which has been attached to the use of the mixed chalice. The practice cannot be said to have received any general agreed or definite symbolical meaning at any period of the Church's history. And, indeed, the use of the mixed chalice, because Christ himself is believed to have administered wine mingled with water, cannot with propriety be said to be a symbolical use of it, and yet this is the ground on which many have both advocated and defended the practice.

I The use of the mixed chalice in primitive times is not denied. In mixing water with the Sacramental wine the early Christians, in all probability, merely followed the practice which prevailed at that period, when, according to the ordinary usage, wine was not taken without some admixture of water, and when in ordinary parlance the word *δίνος* was understood to include wine and water. PLUTARCH, writing at a period not very far removed from the time of the institution of the Lord's Supper, uses the phrase—*τὸ κρᾶμα καὶ τοῖς ὕδατος μέτεχον πλείονος ὕνιον καλοῦμεν*. It is to be observed, however, that in the narrative of each of the Gospel accounts of the institution itself, the word "wine" does not occur, but cup (*ποτήριον*), as also in St. Paul's reference to it in the First Epistle to the Corinthians. There appear to have been three stages in the practice of the Church—at one time simple

mixture of the wine with water; then there appears to have been instituted an additional ceremony in which there was a ceremonial admixture, but separate from the service; and then in later times an incorporation of the ceremonial admixture into the administration itself. It was to the latter, which was in use in their time, that the attention of our Reformers was directed, and which they certainly intended to exclude. Their Lordships consider that the archbishop accurately states the law when he says that the mixing of the wine in and as part of the service is against the law of the Church, but that the use of a cup mixed beforehand does not constitute an ecclesiastical offence.

The charge in the 8th and 12th articles seems to resolve itself into a question of fact. It is not denied, but is impliedly admitted by the bishop, that anything like the ceremony of ablution would be illegal. The time at which the act was done is by the appellants themselves stated to have been after the Benediction, when, according to all ordinary understanding, as well as upon the true construction of the rubric, the service is at an end. The act itself is described by the bishop as having been done with the intention of complying with the direction of the rubric, reverently to consume what remained of the consecrated elements. Even if their Lordships should be of opinion that, in the honest desire to comply with the direction in question, the bishop exhibited excessive care and scruple in the mode in which he performed the prescribed duty, that certainly could not be construed to be an ecclesiastical offence. The drink of what the witness called to prove the facts describes as the "rinsings" does not suggest any ceremony, and their Lordships cannot think that what was done was intended to be anything but what it is alleged to have been—namely, a reverent consumption of the remnants of the consecrated elements in accordance with the Book of Common Prayer—or that there is any reason to regard it as an additional, and, therefore, unlawful, ceremony. The appeal on this point, therefore, fails.

The 6th article and the responsive plea taken together establish that it was with the bishop's sanction that the hymn known as the "Agnus" was sung by the choir. The hymn, which was sung in English, consists of words taken out of the Bible, and, unless there be something to make the singing of that particular hymn at the time alleged in the charge [before the reception of the Elements and immediately after the reading of the Prayer of Consecration] unlawful, the argument must go to the full extent of making all hymns or psalms sung during the service in the English Church an unlawful addition to such service. With respect to this charge, the archbishop states that it was not contended before him that it is illegal to use a hymn or anthem in all places in the service where its use may not have been ordered, and practically the same concession was made here. It would, indeed, be difficult to maintain, in the face of usage ever since the passing of the Act of Uniformity, that singing a hymn at all during the service was in itself illegal. The careful research of the archbishop has established, as far as historical evidence can establish anything, that during the seventeenth and eighteenth centuries the practice was common, and it has undoubtedly continued to our own time. Such universal and unbroken usage is of great force, and it would, in their Lordships' opinion, be impossible now to contend that in itself, and apart from any interference with the due order of the service or anything objectionable in the hymn sung, the practice is illegal. Whether the origin of the usage is the permission given by the Act of Uniformity

"to use openly any psalms or prayer taken out of the Bible at any due time, not letting or omitting thereby the service or any part thereof mentioned in the said book,"

it is immaterial now to inquire.

The charge is that the hymn was sung "before the reception of the Elements." This is admitted in the responsive plea; but the archbishop did not understand it as alleging that the celebrant waited till the end of the hymn before he and others received the Elements. No evidence was given on the point, and the



**A** archbishop's construction was not questioned before their Lordships. No case of "letting" any part of the service, therefore, was made out against the respondent. With reference to the provision in the statute that the psalms must be used at a "due time," it is noteworthy that the HYMNS AND SONGS OF THE CHURCH, by WITHER, licensed by James I and Charles I in succession, should contain, in connection with a hymn inserted therein, a statement that:

**B** "We have a custom among us that, during the time of administering the Blessed Sacrament of the Lord's Supper, there is some psalm or hymn sung the better to keep the thoughts of the communicants from wandering after vain objects."

**C** Considering the ordinary mode in which the Sacrament is administered to each communicant, and the number who may either have received or be waiting to receive the Elements, their Lordships cannot differ from the archbishop that it was a "due time" for singing a hymn. If hymns and anthems are lawful at this point in the service, it cannot be said that the "Agnus Dei" is otherwise than appropriate. Although the words are not in their combination taken out of Scripture, they combine two separate passages of Scripture, and are found in more places than one in the Book of Common Prayer. They have direct reference to the great event commemorated in the Sacrament, and they are not likely to be abused to any kind of idolatrous adoration except by those who would make for themselves other opportunities for it. It is quite true that they were omitted from this part of the service in 1552, but other omissions were made at the same time which it was not suggested could have any doctrinal significance.

**E** The ninth charge is founded upon an alleged disobedience to that part of the rubric prefixed to the Communion service, which is in these words:

**F** "The table, at the Communion time having a fair white linen cloth upon it, shall stand in the body of the church, or in the chancel where Morning and Evening Prayer are appointed to be said. And the priest, standing at the north side of the table, shall say the Lord's Prayer with the collect following, the people kneeling."

The charge as formulated sufficiently shows what is intended to be charged as illegal, though it is true, as pointed out by the archbishop, that the particular illegality is not definitely stated. The words at the end of the ninth charge, "and not on the north side thereof," sufficiently show what the pleading meant —i.e., that the standing on the west side of the table during the whole of that part of the service which intervenes between its commencement and the ordering of the bread and wine before the Prayer of Consecration is illegal, and an offence against the Act of Uniformity.

**G** Before discussing the matter in its relation to the express words of the rubric, their Lordships cannot forbear from observing that it is impossible to assign to the directions in the rubric any meaning, either positively or negatively, which touches matters of doctrine. Whatever the position of the priest may be, it is the same whether there is or is not a celebration of the Lord's Supper; and the rubric, immediately before the Prayer for the Church Militant, shows that what is described as the Communion service may be used—at least, that the part of it down to the end of that prayer may be used—without the celebration of the Lord's Supper at all. This is also plain from the first rubric at the end of the entire service. The question is, therefore, by the form of the charge, whether the position of the respondent on the occasion to which the charge relates constituted an ecclesiastical offence. It is difficult to understand the importance which has been attached by the appellants to the position of the priest during the early part of the Communion service. It appears to be suggested that the eastward position at the Holy Table is significant of the act of the priest being a sacrificial one. The archbishop has pointed out that, in his opinion, this view is erroneous; but, quite apart from this, if there be any such significance in the

position of the officiating priest, and if the intention of those who framed the rubrics now in force was to prohibit a position which could be interpreted as indicating a sacrificial act, it is obvious that the prohibition would have been specially aimed at the position during the consecration of the Elements. Yet it has been decided by this committee, and the appellants did not seek to impeach the decision, that the celebrant may at that time stand at the middle of the table facing eastwards. If this be lawful, of what importance can it be to insist that he shall during the two prayers with which the service commences place himself at that part of the table which faces towards the north?

This is all that is now in controversy. The point at issue has been sometimes stated to be whether the eastward position is lawful, but this is scarcely accurate. Even if the contention that the priest must stand at that part of the table which faces northward were well founded, there is nothing to make his saying the Lord's Prayer and the opening collect with his face eastward unlawful; the only question is whether he can lawfully do so when occupying a position near the north corner of the west side of the table. Of what moment is it, or can it ever have been, to insist that he should, during the two prayers with which the service commences, place himself at that part of the table which faces towards the north, if it be lawful to stand at the middle of the table facing eastward during the Prayer of Consecration? The very necessity of occupying the position which it is contended is alone legal during the early part of the service would serve to emphasise the subsequent change of position, and to render the position assumed at the time the Elements are consecrated the more significant.

In their Lordships' opinion there can be no doubt that, at the period when the rubric in question was framed, the table was, at the time of the Holy Communion, placed in almost all parish churches lengthwise in the body of the church or chancel, the smaller sides or ends facing east and west, and the longer sides north and south, when the church stood, as it ordinarily did, east and west; and there can be as little doubt that the rubric was framed with reference to this position of the table. While the table stood in this position, and the priest could comply conveniently with all the directions of the rubrics, without assuming a position at any part of the table other than that prescribed at the commencement of the service, there would be no reason for any change of position. When at a later period the Holy Table came to be placed what has been termed altarwise, a controversy unquestionably arose as to the manner in which the rubric ought to be complied with. Those who were in favour of the change to the altarwise position insisted that the rubric was complied with if the priest stood at the north end or side of the table. The Puritan party, on the other hand, who objected to the change, insisted that it rendered compliance with the directions of the rubric impossible, inasmuch as the priest could not stand on the north side of the table, neither of the "sides," according to their view, facing the north. This controversy was still being carried on when the Prayer Book now in use came into force, but the rubric prescribing the position of the priest at the commencement of the Communion service was left unaltered in its terms, and no attempt was made to solve the controversy. Subsequently to this period the position at the north end or side of the table appears to have become the common, though not, perhaps, absolutely the universal, one, there being reason to believe that a position at the northern side of that part of the table which faces eastwards was sometimes assumed.

When the question came to be discussed before this Board in *Ridsdale v. Clifton* (2), Dr. Stephens, the leading counsel who appeared for the promoters of the suit, still argued that the Acts of Uniformity required that at Communion time the Lord's Table should stand with its ends east and west, thus providing a side to the north at which the priest is to stand and officiate. It is to be observed that the only question which had to be decided, either in *Hebbert v. Purchas* (1) or *Ridsdale v. Clifton* (2), was whether the clergymen against whom these suits were brought had occupied an unlawful position by standing at the

A middle of the west side of the Communion Table while saying the Prayer of Consecration. It is true that opinions were expressed as to the position which it was the duty of the clergyman to occupy during the earlier part of the service. But these expressions of opinion were dicta not necessary for the decision of either of those cases, in which opposite views were taken as to the legality of the position occupied during the Prayer of Consecration. The question whether

B it is an ecclesiastical offence to stand while saying the two prayers with which the service commences elsewhere than at the north end had not then to be determined, and it must be remembered that the observations in the judgment in *Ridsdale v. Clifton* (2) were, in some measure at least, directed to the argument, to which reference has been made, that the table must, during the administration of the Communion, stand lengthwise east and west. Their Lordships, in *Ridsdale v. Clifton* (2), expressed the opinion that where the minister is directed to stand at the north side of the table, it is his duty to stand at the side of the table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the table.

It will be observed that, although the only direction in the rubric has reference

D to a particular point of the compass, their Lordships did not consider that the obligation to stand at the commencement of the Communion service facing southwards was absolute. They interpreted the rubric with reference to the fact that churches, at the time the rubric was framed, generally stood east to west. It seems equally legitimate to have regard to the usual position of the table as having been then in contemplation, and there can be, as has been pointed out,

E no doubt that this was lengthwise in the body of the church, the ends facing east and west. It is true that a quadrilateral, whatever its form, is rightly described as having four sides, and the word "side" may without impropriety be applied to each of them. But it is obvious, from the arguments which were common at the time when the table began to be placed in what has been called the altarwise position, that the word "end" was then, as now, more usually

F employed than the word "side" to describe the shorter sides of the quadrilateral.

Their Lordships are of opinion that, even assuming that what would be more commonly spoken of as "ends" may properly be called "sides," yet where a position at the "north side" was enjoined by the rubric, one of the longer sides of the table was in contemplation, and it was also in contemplation that all the acts prescribed which were to be done at the table should be done at that

G side. When the terms of the rubric are considered in connection with the circumstances existing at the time it was framed, their Lordships consider that it cannot be regarded as so definitely and unequivocally enjoining that the priest shall, no matter how the table may be placed, stand at that end of the table which faces the north when saying the opening prayers, that no other position can be assumed without the commission of an ecclesiastical offence. They

H cannot think that it renders it obligatory on a clergyman who thinks it desirable during the Prayer of Consecration to stand at the side of the table which now ordinarily faces eastward to stand during the earlier part of the service at a different part of the table. Their Lordships are not to be understood as indicating an opinion that it would be contrary to the law to occupy a position at the north end of the table when saying the opening prayers. All that they determine

I is that it is not an ecclesiastical offence to stand at the northern part of the side which faces eastwards.

In dealing with the charge relating to lighted candles on the Communion Table, it becomes necessary to consider with care the allegations actually made and the proofs in reference to the allegations. The offence is alleged to have taken place in the church of St. Peter-at-Gowts on Dec. 4, 1887, and the charge in the 3rd article is that the bishop,

"when officiating as bishop and the principal celebrant in the service for



the administration of the Holy Communion in the same church used, and permitted to be used, lighted candles on the Communion Table, or on a ledge immediately over the said table so constructed as to appear to form part of the said Communion Table, during such service as a matter of ceremony, and when such lighted candles were not required for the purpose of giving light."

The 13th article alleges :

"That the use of the lighted candles . . . [is an] unlawful addition and variation from the form and order prescribed . . . by the said statutes, and of the order of the administration of the Holy Communion . . . and . . . contrary to the said statutes and to the rubrics . . . and to the . . . canons."

The responsive plea of the bishop is that

"throughout the celebration there were, without any objection being raised by him, two lighted candles on the Holy Table. These lights, whether required for the purpose of giving light or no, are, in his judgment, and he submits, lawful."

All that is here admitted is that two candles were, without objection on the part of the bishop, alight throughout the celebration on the Holy Table, and the only fact added by the proof was that they were not required for the purpose of giving light. The allegation that the candles were used as a matter of ceremony is an essential averment in any view of the offence indicated by the charge. It is not charged that there was any act of lighting or carrying lights about, nor was there any evidence of their use as a matter of ceremony, unless it be afforded by the mere fact that they were alight during the Communion service. If the proof corresponded with the allegation in all respects it would be matter for grave consideration how far the archbishop's elaborate exposition of the history of the question, and in particular the decision of two learned judges in 1628 and 1629, have afforded new materials for consideration since the decision of this Board in *Martin v. Mackonochie* (4) upon the same subject, but their Lordships are unable to see that the charge against the bishop raises the same question.

The charge against Mr. Mackonochie, who was himself responsible for the arrangement of the service and for the ornaments in his church, was presented under two aspects, and this Board dealt with both—the ceremonial lighting and burning of the candles when light was not required, and the placing and keeping the candles as unlawful ornaments on the Lord's Table. It is important to bear in mind the commentary made in that case upon the utterance of the Council of Trent, *De Missæ Ceremoniis et Ritibus*: "*Cerimonias item adhibuit ut mysticas benedictiones, lumina, thymiamata, vestes, aliaque multa.*" In commenting upon this it was said by this Board (L.R. 2 P.C. at pp. 387, 388):

"There is a clear and obvious distinction between the presence in the church of things inert and unused and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be part of the furniture or ornaments of a church, but the censuring of persons and things, or, as was said by the Dean of the Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist; the symbolical use of water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner, the lighting, cremation, and symbolical use of the torch or candle; these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law."

Their Lordships are not able to attach any definite meaning to the phrase that the respondent was officiating as bishop. If it is sought to be argued that his position as bishop made any difference in his responsibility from that which

**A** would attach to any other clergyman not being the incumbent, their Lordships are not prepared to adopt such a view. The act of lighting candles or keeping them alight, the placing or maintaining ornaments, are all things for which the incumbent of the church is himself responsible, and their Lordships in *Martin v. Mackonochie* (4) felt themselves compelled to deal with the questions whether there had been a ceremonial use of the lights and whether unlawful ornaments had been in use. It was on the latter ground mainly that the judgment against the respondent was rested. No such question arises here; the bishop is not charged, and manifestly could not be, with introducing unlawful ornaments. If he had disapproved of the existence of the lights where they were placed he would have had no power to remove them; and, where no act of lighting, cremation, or actual use is proved, it is impossible to say that the ecclesiastical offence has been established of using a ceremony not retained, and, therefore, prohibited, by the Act of Uniformity, unless the mere fact that the bishop took part in the consecration and administration of the Elements while the lights were burning constituted of itself the use by him of such a ceremony. No act was done by the bishop which conveyed, or was calculated to convey, to the minds of those present any different idea from that which would have been conveyed had the lights been absent.

Their Lordships are not prepared to hold that a clergyman who takes any part in the celebration of Divine service in a church in which unlawful ornaments are present necessarily uses them as a matter of ceremony. Doubtless acts done by a person primarily responsible may be so aided and assisted by others that the persons thus aiding and assisting become parties to the transaction and as guilty as the principal; but no such case has been, in their Lordships' opinion, established here. There is no allegation or evidence that the bishop was a party to or a participant in the original lighting and placing the candles where they were placed, and the only alternative open to a clergyman under the circumstances of this case, whatever his own views, and whatever his rank in the Church, would be to refuse to join in the administration of the Sacrament of the Lord's Supper to the congregation because there was a light burning when no light was necessary. Whatever view might be entertained as to the propriety of such a course being taken, their Lordships are unable to affirm that the not taking such a course makes the bishop so far responsible for the act of the incumbent in lighting and keeping alight the candles as to establish the charge contained in the 3rd article. The bishop's responsive plea, in which he submits that the existence of the two lighted candles on the table throughout the celebration is lawful, and in which he admits that he made no objection, does not add anything to the case made against him. No authority was cited to show that his not making such objection constitutes an ecclesiastical offence, and their Lordships are of opinion that it does not.

Finally, it is necessary to say that their Lordships do not concur in the suggestion made at the Bar that upon those parts of the case as regards which an ecclesiastical offence was found to be proved the archbishop was under a legal obligation to issue a monition. The promoters of a suit have, it is said, a right, where they have succeeded in establishing a breach of the law, to insist upon sentence being pronounced, even if it be only a monition not to repeat the offence. Their Lordships are of opinion that the promoters have no such right. If the archbishop has satisfied himself that the offence will not be repeated, he is entitled to accept the assurance of future submission, and is not bound to inflict a penalty, and a monition is a penalty. In the result, their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: *Wainwright & Baillie.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

# Re BOWEN. LLOYD PHILLIPS v. DAVIS

[CHANCERY DIVISION (Stirling, J.), March 11, 29, 1893]

[Reported [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789;  
41 W.R. 535; 9 T.L.R. 380; 37 Sol. Jo. 386; 3 R. 529]

*Perpetuities—Gift—Gift to individual followed by executory gift to charity—Gift to charity followed by executory gift to individual.*

The principle that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another does not extend to cases where an immediate gift in favour of private individuals is followed by an executory gift in favour of a charity or where an immediate gift to a charity is followed by an executory gift in favour of private individuals.

The testator by his will, dated Sept. 3, 1846, gave a certain fund to trustees on trust to establish certain parish schools and to continue them thereafter for ever. He declared that if at any time thereafter the government should establish a general system of education the trust should cease and determine and the fund should be distributed in the same way as his residuary personalty. The Elementary Education Act, 1870, first established a general system of public elementary education.

**Held:** on the true construction of the will there was an immediate gift to a charity in perpetuity, followed by a gift over of a future interest to the residuary legatees; as the event on which the future interest was to arise, namely the establishment of a general system of education, need not necessarily have occurred within the perpetuity period the gift over was bad.

**Notes.** Distinguished: *Re Blunt's Trusts*, *Wigan v. Clinch*, [1904] 2 Ch. 767. Considered: *Worthing Corpn. v. Heather*, [1904-7] All E.R.Rep. 530. Applied: *Re Barnett*, *Waring v. Painter Stainers' Co.* (1908), 24 T.L.R. 788. Followed: *Re Peel's Release*, [1921] All E.R.Rep. 103. Considered: *Gibson v. South American Stores (Gath and Chaves), Ltd.*, [1949] 2 All E.R. 985. Applied: *Re Cooper's Conveyance Trusts*, *Crewdson v. Bagot*, [1956] 3 All E.R. 28. Referred to: *Re Talbot*, *Jubb v. Sheard*, [1933] All E.R.Rep. 126; *Re Bland-Sutton's Will Trusts*, *National Provincial Bank, Ltd. v. Middlesex Hospital Medical School Council*, [1951] 1 All E.R. 494.

As to the period allowed for suspension of vesting, see 29 HALSBURY'S LAWS (3rd Edn.) 281 et seq.; and for cases see 37 DIGEST 55 et seq. As to the application of the perpetuity rule to charitable trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 300 et seq.; and for cases see 8 DIGEST (Repl.) 437 et seq.

Cases referred to:

- (1) *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 79, 195.
- (2) *Christ's Hospital v. Grainger* (1849), 1 Mac. & G. 460; 1 H. & Tw. 533; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 14 Jur. 339; 41 E.R. 1343, L.C.; 8 Digest (Repl.) 440, 1308.
- (3) *Re Tyler*, *Tyler v. Tyler*, [1891] 3 Ch. 252; 60 L.J.Ch. 686; 65 L.T. 367; 40 W.R. 7; 7 T.L.R. 654, C.A.; 8 Digest (Repl.) 440, 1307.
- (4) *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.J.J.; 8 Digest (Repl.) 439, 1299.
- (5) *Brattle Square Church v. Grant*, 3 Gray, 142.
- (6) *Theological Education Society v. A.-G.*, 21 Lathrop, 285.
- (7) *Re Randell*, *Randell v. Dixon* (1888), 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 36 W.R. 543; 4 T.L.R. 307; 8 Digest (Repl.) 435, 1253.
- (8) *Pearks v. Moseley*, *Re Moseley's Trusts* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, 98.



**A** Also referred to in argument :

*Walsh v. Secretary of State for India* (1863), 10 H.L.Cas. 367; 2 New Rep. 339; 32 L.J.Ch. 585; 8 L.T. 839; 9 Jur.N.S. 757; 11 W.R. 823; 11 E.R. 1068, H.L.; 8 Digest (Repl.) 442, 1322.

**B** **Adjourned Summons** to determine whether certain trusts declared by the testator's will had ceased and determined and whether the trust money should fall into residue.

The Rev. Daniel Bowen, by his will, dated Sept. 3, 1846, made charitable bequests in the following form :

**C** "And whereas I am desirous of establishing Welsh day schools in the said several parishes of Llandissil, Llanwenog, and Llanllwny, to be respectively called the Waun Ifor Charity School. I do, therefore, for the purpose of effecting my intentions, bequeath unto Delme Scymour Davies, John William Lewis, John Lloyd Davies, John Walters Philipps, David Thomas Bowen Davies, the Very Rev. Llewelyn Llewellyn, and the Rev. Thomas Lloyd, and the vicars for the time being of the said several parishes of Llandissil, Llanwenog, and Llanllwny, their executors, administrators, and assigns, for ever, the sum of one thousand and seven hundred pounds upon the trusts and for the intents and purposes following, namely, upon trust that they the said trustees, and the survivors and survivor of them and the executors, administrators, and assigns of such survivor, do and shall lay out and invest the said sum of one thousand and seven hundred pounds in the public stocks, funds of Great Britain, or real security in England or Wales, with liberty for the major part of them to change the investment at their discretion to any other of the kinds prescribed, and in the next place to establish in each of the said several parishes of Llandissil, Llanwenog, and Llanllwny a Welsh day school to be called the Waun Ifor Charity School and to continue the same schools for ever thereafter."

**F** After prescribing rules, regulations, and provisions for the management of the said schools, the will continued :

**G** "And whereas I am also desirous of establishing a Welsh day school in the parish of Whitechurch, in the county of Pembroke, to be also called the Waun Ifor Charity School, I do, therefore, for the purpose of effecting my intentions, bequeath unto Thomas Bowen, William Henry Lewis, George Bowen, and the Rev. William Bowen Harries, and the rector for the time being of the said parish of Whitechurch, their executors, administrators, and assigns, for ever, the sum of five hundred pounds upon the trusts and for the intents and purposes following, namely, upon trust that they the said trustees, and the survivors and survivor of them and the executors, administrators, and assigns of such survivor, do and shall lay out and invest the same in like manner as is provided for with respect to the trusts of the said sum of one thousand and seven hundred pounds and with the like power to change the investments, and in the next place to establish in the said parish of Whitechurch a Welsh day school to be called the Waun Ifor Charity School, subject to the same regulations, powers, and trusts as are hereinbefore declared relative to the schools to be established in the said several parishes of Llandissil, Llanwenog, and Llanllwny. And I declare that if at any time hereafter the government of this kingdom shall establish a general system of education the several trusts of the said several sums of one thousand and seven hundred pounds and five hundred pounds shall cease and determine, and I bequeath the said several sums in the same manner as I have bequeathed the residue of my personal estate."

**I** The will then gave a power of appointment of new trustees of the various trusts of the will, and continued :

"I appoint my sisters Jane Lloyd, Anne Walters Philipps, and Rachel Rees executrices and residuary legatees of this my will after payment of all my just

debts, legacies, funeral and testamentary expenses, hereby revoking all other wills." A

The testator died on Oct. 9, 1847, and his will was duly proved on Dec. 31, 1847. Jane Lloyd died in the lifetime of the testator and Elizabeth Frances Lloyd Philipps was the sole personal representative of Anne W. Philipps and of Rachel Rees. The trustees of the said sum of £1,700 were Herbert Davies, Charles Lloyd, and the Rev. W. G. Jenkins. This was a summons taken out by the personal representative of Anne W. Philipps and Rachel Rees against the trustees of the said sum of £1,700 and the Attorney-General to determine whether the several trusts declared by the will of the testator of the said sum of £1,700 had ceased and determined, and whether such sum had fallen into residue. B

*G. Hastings, Q.C., and Swinfen Eady* for the plaintiff.  
*Cruikshank* for the trustees. C

*The Solicitor-General (Sir John Rigby, Q.C.) and Ingle Joyce* for the Attorney-General.

*Cur. adv. vult.*

Mar. 29, 1893. **STIRLING, J.**, read the following judgment in which after stating the facts, he continued: According to the law as stated by SIR GEORGE JESSEL, M.R., in *London and South Western Rail. Co. v. Gomm* (1), if the gift in favour of the residuary legatees is one which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, then the gift is bad unless the circumstance that the prior gift is in favour of a charity makes a difference. D

It has been decided that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another: see *Christ's Hospital v. Grainger* (2) and *Re Tyler, Tyler v. Tyler* (3). The principle of those decisions, however, does not extend, in my opinion, to cases where (i) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (ii) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals. Of the former class of cases LORD SELBORNE, L.C., giving the judgment of the Court of Appeal in *Chamberlayne v. Brockett* (4) says (8 Ch. App. at p. 211): E

"If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio." F

The second class of cases does not seem to have fallen under the consideration of any court in this country; but the Supreme Court of Massachusetts has in *Brattle Square Church v. Grant* (5) and *Theological Education Society v. A.-G.* (6) held that the rule against perpetuities applies to them. For the knowledge of these decisions I am indebted to the very learned and able treatise of PROFESSOR J. C. GRAY on the RULE AGAINST PERPETUITIES (1st Edn.), s. 593, to which I was referred in argument. H

On the other hand, as property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes. Of this an example is to be found in *Re Randell, Randell v. Dixon* (7), in which the head-note is as follows (38 Ch.D. at p. 213): I

"A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at H. for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings was ever demanded, she directed the £14,000 to fall into her residue. Held, first, that the testatrix had not ex-

- A** pressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy-près*; secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities."
- B** The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will, i.e., whether the testator has given the property to charity in perpetuity, subject to an executory gift in favour of the residuary legatee, or one for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by LORD SELBORNE, L.C., in *Pearks v. Moseley* (8) (5 App. Cas. at p. 719):
- C** "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect."
- D** In the present case the sums of £1,700 and £500 are bequeathed to trustees who are obviously selected with a view to the efficient administration of the charitable trusts created by the will, and were not intended by the testator to be charged with any duties as regards any other portion of his property. He directs the trustees named in the will, by means of the funds paid in to them by his executors, to establish certain schools "and to continue the same schools for ever thereafter."
- E** He contemplates a perpetual succession of trustees in whom the execution of the trusts is to be vested. I think that on the true construction of the will there is an immediate disposition in favour of charity in perpetuity and not for any shorter period. That is followed by a gift over if at any time the government should establish a general system of education; and under that gift over the residuary legatees take not an immediate but a future interest. As the event on which that future interest is to arise is one which need not necessarily occur within perpetuity limits, it follows that the gift over is bad; and, consequently, the summons must be dismissed.

Solicitors: *Sharon Grote Turner; Helder, Roberts, Son & Walton* for *W. Morgan Griffiths, Carmarthen; Hare & Co.*

**G** [Reported by J. WINKFIELD, Esq., Barrister-at-Law.]



## Re WHITE. WHITE v. WHITE

[COURT OF APPEAL (Lindley, Bowen and A. L. Smith, L.JJ.), December 17, 19, 1892, January 14, February 8, 1893]

[Reported [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187;  
41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380]

*Charity—Religion—Gift for “religious societies”—Presumption of charitable purpose—Direction of scheme as to personality.*

By his will, dated 1849, the testator, a dissenting minister, after giving his residuary estate to trustees upon trust for sale, and, subject to life interests, to certain persons, proceeded as follows: “I do give and bequeath the whole of my property to the following religious societies, viz.—to be divided in equal shares among them.” When the testator executed his will, he left a blank for the names of the societies. Afterwards he inserted the names of four societies, which were not admitted to probate as part of the will.

**Held:** as a bequest to a religious institution or for a religious purpose was prima facie a bequest for a charitable purpose unless the contrary could be shown, the testator’s personal estate was subject to a trust for charitable purposes, and a scheme must be directed as to such part of it as was pure personality at the testator’s death.

*Baker v. Sutton* (1) (1836), 1 Keen, 224, *Townsend v. Carus* (2) (1844), 3 Hare, 257, and *Wilkinson v. Lindgren* (3) (1870), 5 Ch. App. 570, applied.

**Notes.** Considered: *Re Macduff*, *Macduff v. Macduff*, [1895-9] All E.R.Rep. 154. Followed: *Re Forester*, *Jervis v. Forester* (1897), 13 T.L.R. 555. Distinguished: *Re Davidson*, *Minty v. Bourne*, [1908-10] All E.R.Rep. 140. Considered: *Dunne v. Byrne*, [1911-13] All E.R.Rep. 1105. Applied: *Geologists’ Association v. I.R.Comrs.* (1928), 14 Tax Cas. 271. Considered: *Re Bain*, *Public Trustee v. Ross*, [1929] All E.R.Rep. 387; *Gilmour v. Coats*, [1949] 1 All E.R. 848. Distinguished: *Re Smith’s Will Trusts*, [1961] 3 All E.R. 824. Referred to: *Grimond v. Grimond* (1904), [1905] A.C. 603; *Re Williams*, *Public Trustee v. Williams*, [1941] 2 All E.R. 125; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60.

As to religious societies as charities, see 4 HALSBURY’S LAWS (3rd Edn.) 221 et seq.; as to the effectuation of charitable trusts by means of schemes, see *ibid.*, p. 309 et seq. For cases see 8 DIGEST (Repl.) 331 et seq.

Cases referred to:

- (1) *Baker v. Sutton* (1836), 1 Keen, 224; 5 L.J.Ch. 264; 48 E.R. 292; 8 Digest (Repl.) 399, 901.
- (2) *Townsend v. Carus* (1844), 3 Hare, 257; 13 L.J.Ch. 169; 8 Jur. 104; 67 E.R. 378; 8 Digest (Repl.) 334, 148.
- (3) *Wilkinson v. Lindgren* (1870), 5 Ch. App. 570; 39 L.J.Ch. 722; 23 L.T. 375; 18 W.R. 961, L.C.; 8 Digest (Repl.) 395, 880.
- (4) *Cocks v. Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 331, 128.
- (5) *Mills v. Farmer* (1815), 1 Mer. 55; 19 Ves. 483; 35 E.R. 597, L.C.; 8 Digest (Repl.) 466, 1659.
- (6) *A.-G. v. Syderfen* (1683), 1 Vern. 224; cited in 7 Ves. 43, n.; 23 E.R. 430; 8 Digest (Repl.) 465, 1655.

Also referred to in argument:

- Moggridge v. Thackwell* (1792), 1 Ves. 464, L.C.; affirmed (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.
- Pieschel v. Paris* (1825), 2 Sim. & St. 384; 4 L.J.O.S.Ch. 77; 57 E.R. 392; 8 Digest (Repl.) 466, 1657.

- A** *Williams v. Williams, Williams v. Kershaw* (1835), 5 Cl. & Fin. 111, n.; 1 Keen, 274, n.; 5 L.J.Ch. 84; 7 E.R. 346; 8 Digest (Repl.) 398, 899.  
*Browne v. Yeall* (1791), cited in 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, 821.  
*Bruce v. Deer Presbytery* (1867), L.R. 1 Sc. & Div. 96, H.L.; 8 Digest (Repl.) 406, 975.
- B** *Budget v. Hulford*, [1873] W.N. 175; 8 Digest (Repl.) 389, 827.  
*Pocock v. A.-G.* (1876), 3 Ch.D. 342; 46 L.J.Ch. 495; 35 L.T. 575; 25 W.R. 277, C.A.; 8 Digest (Repl.) 466, 1660.  
*Iwen v. Bannerman* (1830), 2 Dow. & Cl. 74; 6 E.R. 657, H.L.; 8 Digest (Repl.) 400, 910.  
*Gloucester Corp'n. v. Wood* (1843), 3 Hare, 131; on appeal sub nom. *Gloucester Corp'n. v. Osborn* (1847), 1 H.L.Cas. 272; 9 E.R. 760, H.L.; 8 Digest (Repl.) 389, 824.  
*Aston v. Wood* (1868), L.R. 6 Eq. 419; 8 Digest (Repl.) 388, 810.  
*Loscombe v. Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, 1084.  
*Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, 928.
- D** *Clark v. Taylor* (1853), 1 Drew, 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287; 1 W.R. 476; 61 E.R. 596; 8 Digest (Repl.) 419, 1104.  
*Russell v. Kellett* (1855), 3 Sm. & G. 264; 26 L.T.O.S. 193; 20 J.P. 131; 2 Jur.N.S. 132; 65 E.R. 653; 8 Digest (Repl.) 468, 1692.  
*Re Slevin, Slevin v. Hepburn*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 39 W.R. 578; 7 T.L.R. 394, C.A.; 8 Digest (Repl.) 463, 1633.
- E** *A.-G. v. Ironmongers' Co.* (1834), 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064, L.C.; 8 Digest (Repl.) 504, 2254.  
*Clephane v. Edinburgh Corp'n.* (1869), L.R. 1 Sc. & Div. 417, H.L.; 8 Digest (Repl.) 459, 1595.  
*Thomas v. Howell* (1874), L.R. 18 Eq. 198; 43 L.J.Ch. 799; 30 L.T. 244; 38 J.P. 693; 22 W.R. 676; 8 Digest (Repl.) 316, 25.  
*Liley v. Hey* (1842), 1 Hare, 580; 11 L.J.Ch. 415; 66 E.R. 1162; sub nom. *Lilley v. Hey*, 6 Jur. 756; 8 Digest (Repl.) 391, 842.

**Appeal** by the Attorney-General from a decision of KEKEWICH, J., reported [1893] 2 Ch. 41, that the testator's next-of-kin were entitled to the capital of his residuary estate, there being no general charitable intent in the will.

- G** By his will, dated 1849, the Rev. Ebenezer White, a Dissenting minister, gave his residuary estate to trustees upon trust for sale, and subject to successive life interests to his widow and a niece he proceeded as follows:

"I do give and bequeath the whole of my property to the following religious societies, viz.—to be divided in equal shares among them."

- H** The will was written on one side of several sheets of paper fastened together book-wise, and when the testator executed it he left a blank for the names of the societies. On the sheet opposite the sheet upon which the above clause was written were the following words referring to the blank in the will which were inserted after the testator had executed his will:

- I** "Viz., the Tract Society, the Home Missionary Society, the London Missionary Society, the Colonial Missionary Society."

The testator died in 1859. Upon the will being proved the court refused to admit to probate the clause specifying the names of the religious societies.

An originating summons was taken out by a legal personal representative of the testator, being also one of his next-of-kin, to have it declared that the testator died intestate as to the capital of his residuary estate; and that, subject to the life interests, the next-of-kin were entitled to such capital. On Oct. 28, 1892, the summons came on to be heard before KEKEWICH, J., who decided that there was no

general intention to devote the residue to charity such as the court could execute or recognise; and that, as between the next-of-kin and the Attorney-General on behalf of the Crown, the former were entitled. The Attorney-General appealed. A

*The Solicitor-General (Sir John Rigby, Q.C.) and Ingle Joyce* for the Attorney-General.

*Warmington, Q.C., and Edward Ford* for the next-of-kin of the testator.

*J. F. Mills*, for the legal personal representative, took no part in the argument. B

*Cur. adv. vult.*

Feb. 8, 1893. **LINDLEY, L.J.**, read the following judgment of the court.—This is an appeal from the decision of **KEKEWICH, J.**, on the will of Ebenezer White. He was a dissenting minister, and in the events which happened he left the whole of his property (subject to a life estate) C

“to the following religious charities, viz. . . . to be divided in equal shares among them.”

When the testator executed his will he left a blank for the names of the societies. After he had executed his will he put in their names, but they very properly do not appear in the probate, and the will must be construed as if the blank had never been filled up. Under these circumstances **KEKEWICH, J.**, held that there was an intestacy. From this decision the Attorney-General has appealed, upon the ground that the testator has bequeathed his property for charitable purposes, and that a scheme for its application ought to be directed. D

If the bequest in question amounts to and ought to be construed as, a dedication by the testator of his property to charitable purposes, then there can be no doubt the Attorney-General is right. But the will says nothing in terms about charity, nor about the purposes for which the property is bequeathed. And it was urged by counsel for the next-of-kin that it was not possible to discover those purposes, except by guessing. A “religious” society may or may not be a “charitable” society in the sense in which that expression is used. A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a “religious” society, but not a “charitable” one: see *Cocks v. Manners* (4). In that case it was held that a gift by will to a Dominican convent was not a charitable gift. **WICKENS, V.-C.**, said (L.R. 12 Eq. at p. 585): E

“A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word ‘charitable’ is used in its popular sense or in its legal sense.” F

The words of the testator's will are insufficient to show what kind of religious societies he meant. They may or may not have been “charitable” as well as “religious,” and, as all religious societies are not charitable, we should, in the absence of authority, be unable to come to the conclusion that “charity” was intended, and we should, therefore, be of opinion that the result was an intestacy. G

It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies, but what for? The only rational answer to this question must, we think, be “for the purposes of those societies,” and, the societies being themselves described as “religious societies,” the purposes for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily “charitable” purposes, and in a particular case a “religious” society may be shown not to be a “charitable” society. This was the case in *Cocks v. Manners* (4). But the authorities show that a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a “charitable” purpose, and that the law applicable to “charitable” H



**A** bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

The leading cases on this head are as follows: *Baker v. Sutton* (1), where the bequest was to such religious and charitable institutions and purposes as in the opinion of the trustees might be fit and proper. LORD LANGDALE, M.R., in that case said (1 Keen, at p. 233):

**B** "All the cases, with one exception, go to support the proposition that a religious purpose is a charitable purpose."

*Townsend v. Carus* (2) is to the same effect. WIGRAM, V.-C., there said (3 Hare, at p. 261):

**C** "If this is a bequest for religious purposes I think I am bound to hold it a charity within the decided cases."

The promotion of the spiritual welfare of mankind was the object of the testator in that case, and the Vice-Chancellor dealt with the argument that some modes of promoting such welfare might not be "charitable." Having come to the conclusion that the object of the testator was "charitable" because it was "religious," he says that no mode of carrying out his intention could be proper if that mode was not itself charitable. In *Wilkinson v. Lindgren* (3), where the bequest was to certain charitable institutions previously named, "or any other religious institution or purposes," as the trustees might think proper, religious purposes were treated as clearly "charitable." We can find no authority which really conflicts with these, or which is opposed to the principle on which they proceed, and we cannot, without splitting straws, distinguish this case from them.

**E** We come, therefore, to the conclusion—first, that the gift is for religious purposes; and, secondly, that being for religious purposes it must be treated as a gift for "charitable" purposes, unless the contrary can be shown. If once this conclusion is arrived at the rest is plain. A charitable bequest never fails for uncertainty; *Mills v. Farmer* (5) settles that point. LORD ELDON was clearly of opinion that the nomination of particular objects is only the mode and not the substance of a gift to "charity." We may add that, having looked at the registrar's book for the will in *A.-G. v. Syderfen* (6), we find that it is correctly set out in 7 Ves. 43, n. The decision appealed from must therefore be reversed, and it must be declared that, in the events which have happened, the testator's personal estate is subject to a trust for "charitable" purposes, and a scheme must be directed as to such part of it as was pure personalty at the testator's death. But, having regard to the blunder made by the testator, and the real difficulty occasioned by him, the costs of all parties, both here and below, ought to come out of his estate, subject to the life interest of the tenant for life.

*Appeal allowed.*

**H** Solicitors: *Hare & Co.; Barfield & Child.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

## SOVEREIGN LIFE ASSURANCE CO. v. DODD

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), July 6, 1892]

[Reported [1892] 2 Q.B. 573; 62 L.J.Q.B. 19; 67 L.T. 396;  
41 W.R. 4; 8 T.L.R. 684; 36 Sol. Jo. 644; 4 R. 17]

*Company—Winding-up—Set-off—Mutual dealings—Action by liquidator for debt owing to company—Right of defendant to set-off debt owing by company to him.*

The right of set-off in an action depends upon the existence of a debt due by the plaintiff to the defendant, and the fact that the debtor-plaintiff, if a company, is in liquidation cannot prevent the right of set-off arising, though it does prevent the defendant obtaining in the winding-up more than his share of the assets. When, therefore, an action is brought by the liquidator of a company to recover a debt due to the company the defendant can set off a debt due to him from the company.

*Company—Winding-up—Scheme of arrangement—Approval by “class” of creditors—Class not to include persons with different interests—Winding-up of assurance company—Arrangement sanctioned by meeting attended by holders of matured policies and holders of policies not matured.*

By s. 2 of the Joint Stock Companies Arrangement Act, 1870, it was provided that where any compromise or arrangement was proposed between a company which was being wound-up and “the creditors of such company or any class of such creditors,” the court might order a meeting of “such creditors or class of creditors” to be called; and, if a majority of “such creditors or class of creditors” agreed thereto, such compromise or arrangement should bind “all such creditors or class of creditors,” and the liquidator and contributories. A meeting of all the policy-holders of an assurance company, which was in liquidation, was called to sanction an arrangement by which another company should make reduced payments upon the policies in satisfaction of all their claims, and a statutory majority agreed thereto. All policy-holders were called to the meeting, no distinction being made between those whose policies had, and those whose policies had not, matured.

**Held:** “class” in s. 2 of the Act of 1870 must be construed so as to avoid injustice being done to a minority of shareholders, and, accordingly, not to include in one class persons with different interests; the interests of persons whose policies had matured and those of persons whose policies had not matured were different; and, therefore, the decision of the meeting was not binding on the holder of a matured policy who did not attend the meeting or assent to its decision.

**Notes.** Distinguished: *Re Daintrey, Ex parte Mant and Mant*, [1895-9] All E.R.Rep. 657. Considered: *Re City Life Assurance Co., Ltd.*, [1925] All E.R.Rep. 453. Applied: *Greenhalgh v. Arderne Cinemas, Ltd.*, and *Mallard*, [1945] 2 All E.R. 719. Considered: *Kitchen’s Trustee v. Madders*, [1949] 2 All E.R. 1079. Referred to: *Paddy v. Clutton*, [1920] 2 Ch. 554.

As to set-off in bankruptcy (applied to companies winding-up by, now, Companies Act, 1948, s. 317), see 2 HALSBURY’S LAWS (3rd Edn.) 480-485, and as to schemes of arrangement in winding-up, see *ibid.*, vol. 6, 764 et seq. For cases see 4 DIGEST (Repl.) 423 et seq.; 10 DIGEST (Repl.) 1183, 1184. For the Companies Act, 1948, see 3 HALSBURY’S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Re Lankester, Ex parte Price* (1875), 10 Ch. App. 648; 33 L.T. 113; 23 W.R. 844, L.JJ.; 4 Digest (Repl.) 433, 3845.

- A (2) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch.D. 216; 54 L.J.Ch. 460; 53 L.T. 65; 33 W.R. 513, C.A.; 10 Digest (Repl.) 990, 6814.
- (3) *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1880), 17 Ch.D. 337; 50 L.J.Ch. 273; 44 L.T. 299; 10 Digest (Repl.) 1171, 8150.
- B (4) *Re Bridges, Hill v. Bridges* (1881), 17 Ch.D. 342; 50 L.J.Ch. 470; 44 L.T. 730; 24 Digest (Repl.) 878, 8773.

**Appeal** by the plaintiffs from the decision of CHARLES, J., at the trial of the action without a jury, reported [1892] 1 Q.B. 405.

On Feb. 5, 1879, the defendant effected with the plaintiff company two policies of assurance upon his life of £1,000 each. The amount assured was to be payable to him if he were living on May 7, 1888, or to his executors if he died before that date. Before July, 1887, the defendant borrowed from the plaintiff company two sums of £570 and £600, and secured the repayment thereof by mortgages to the secretary of the company of the two policies. On Aug. 5, 1887, a petition to wind-up the company was presented, and on Sept. 2, 1887, a provisional liquidator was appointed. The defendant paid the premiums upon the two policies up to May 7, 1888, and the amount of the policies became due to the defendant on that day. On July 30, 1889, a winding-up order was made, and on Sept. 17 a liquidator was appointed. On April 11, 1890, a deed of arrangement was entered into between the plaintiff company and the Sun Life Assurance Co. This deed provided for the payment of reduced sums by the Sun company to those policy-holders in the plaintiff company whose policies would not have matured by Aug. 4, 1890, and of a dividend out of the assets of the plaintiff company; and "as to the policies of the plaintiff company which, but for the said winding-up order, would have matured between Aug. 4, 1887, and Aug. 4, 1890," for the payment of reduced sums and a dividend out of the assets. It was also provided that,

"if this agreement is sanctioned by the court, all policy-holders of the Sovereign company who were such on Aug. 4, 1887, shall accept the provisions hereof in full satisfaction of all claims on the Sovereign company and the assets thereof."

Under the deed of arrangement, the amount payable to the defendant would be about £247 upon each policy. This deed of arrangement was made under the provisions of s. 2 of the Joint Stock Companies Arrangement Act, 1870. A meeting of policy-holders was summoned under this section to agree to the arrangement, but those whose policies had matured and those whose policies had not matured were all summoned to the same meeting. At this meeting a majority, representing three-fourths in value, agreed to the arrangement. The defendant was not present, and did not assent to the arrangement. The deed of arrangement was sanctioned by the court on June 14, 1890. In December, 1890, the company, by their liquidator, brought this action against the defendant to recover £1,345, the amount of the above-mentioned loans and interest. The defendant pleaded a set-off of the sum of £2,000 due and payable to him by the company in respect of the two policies which matured on May 7, 1888. CHARLES, J., held that the defendant was entitled to the set-off, and gave judgment in his favour. The plaintiffs appealed.

By the Joint Stock Companies Arrangement Act, 1870, s. 2 [see now Companies Act, 1948, s. 206 (1) (2)]:

"Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound-up, either voluntarily, or by or under the supervision of the court under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court



shall direct; and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

By the Bankruptcy Act, 1883, s. 38 [see now Bankruptcy Act, 1914, s. 31] :

"Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

By s. 10 of the Supreme Court of Judicature Act, 1875 [see now s. 317 of Companies Act, 1948] :

"In the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

*Buckley, Q.C.*, and *Hull (H. Tindal Atkinson with them)* for the plaintiffs.

*Crump, Q.C.*, and *Morton Smith* for the defendants, were not called on to argue.

**LORD ESHER, M.R.**—I am of opinion that this appeal must be dismissed. The plaintiff company, which is in liquidation, has brought an action to recover a sum of money lent by the company to the defendant before the liquidation, and the defendant sets up as a defence a right of set-off against the company and the liquidator. To that defence the plaintiffs answer that, in the first place, the defendant has no right of set-off, and, secondly, that the claim which he seeks to set off has been released. The first question which we have to consider is: What circumstances will destroy a right of set-off which a defendant would otherwise have? When an action of debt is brought, will the fact that the plaintiff is in liquidation or a bankrupt, and the action is brought by a liquidator or trustee, of itself destroy a right of set-off and compel the defendant to prove his claim in bankruptcy?

Let us see what the rights of the parties would have been under the old law in such a case. It is suggested that, if a trustee in bankruptcy brought an action to recover a debt due to the bankrupt, and a set-off was pleaded, it would have been a good answer that the bankrupt could only pay one shilling in the pound, and that the set-off was thus reduced to one shilling in the pound. Such a thing as that, however, never was heard of. Now a set-off can only be set up when an action is brought. What is the right of a defendant after an action is brought against him? Clearly his right is to set off a debt due to him from the plaintiff if the debt due to him is of the same kind as the debt for which he is being sued. The right of set-off depends upon the existence of a debt due to the defendant, and the fact that his debtor is a bankrupt cannot prevent the right of set-off arising, though it does prevent him obtaining in the bankruptcy more than his share of the assets. The whole debt is still in existence. When, therefore, an action is brought by a trustee in bankruptcy, the defendant can set off a debt due to him from the bankrupt. What is the result of a plea of set-off? It is not a counterclaim or cross-action,

A but it is a plea in bar of the action, and, therefore, when the plea is proved, although it may be that when the action was brought the defendant was indebted to the plaintiff, yet, since the plaintiff is indebted to the defendant to the same amount, the plaintiff's claim is barred. Bankruptcy, therefore, does not make any difference in the right of set-off.

F The cases in which a debt could be set off in bankruptcy were limited, and many difficulties arose, and the subject was dealt with by the Bankruptcy Act, 1869, s. 39, and by the Bankruptcy Act, 1883, s. 38, which enlarged the subject-matter of set-off. These Acts, however, made no difference in the effect of a set-off, and a debt can now be treated as a set-off which could not have been so treated under the old law, and when pleaded and proved is still a bar to the action. We have, therefore, in this case to see whether, when this action was brought, the defendant had a C right to set off this debt.

When an action is brought by a company, through its liquidator, to recover a sum of money lent by the company to the defendant, the defendant may answer that he admits the claim, but that the company is indebted to him in an equal or larger amount which he has a right to set off against the claim. Was, then, the plaintiff company so indebted to the defendant when this action was brought? At D the time when the action was brought the date for the payment of these policies had arrived, and the company was, therefore, at that time indebted to the defendant who had a claim against them for the sums insured by the policies, a liquidated and ascertained amount. The company was indebted to the defendant, and the defendant to the company. The winding-up prevented the defendant from obtaining payment from the company of the amount due upon the policies, and he E could only prove in the winding-up for a dividend in respect of that amount. The winding-up, however, had no effect upon his right to plead a set-off, and he had a right to plead as a defence to this action that the plaintiff company was indebted to him in a sum of £2,000, and to claim to set that sum off against the plaintiffs' claim. It appears to me, therefore, to be clear that the defendant had a right to plead a set-off which would be a bar to the action. It is immaterial whether this F would have been a set-off before the statute (though I incline to think that it would have been), for I have no doubt that it comes within the terms of the section.

It has been argued that the decision in *Re Lankester, Ex parte Price* (1) is to the contrary; but that case is distinguishable, because, as was pointed out in *Re Asphaltic Wood Pavement Co.; Lee and Chapman's Case* (2), there was there no action at all, and the court was only considering the right of proof in bankruptcy. G In the present case it is unnecessary to consider what would have been the rights of the defendant, if there had been no action, and the proceedings had been in bankruptcy. We have only to consider the defendant's rights in this action, and in this action his set-off is so large as to bar the claim of the plaintiff company. That view is in accordance with the decision in *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (2), and does not conflict with the decision in *Re H Lankester, Ex parte Price* (1).

The defendant is, therefore, entitled to the benefit of his set-off unless the plaintiffs can say that his debt has been released as against them, and that the debtor has consented to take, and has taken, someone else as his debtor instead of the plaintiff company. That question depends upon what was done at the meeting of creditors, and whether what was there done bound the defendant so as to I release the plaintiff company from their liability to him. For the purpose of determining this question we must look at the facts at the time when this action was brought. With regard to the meeting of creditors we must consider who were the persons to be summoned to attend it, and who are to be dealt with as different classes within the meaning of s. 2 of the Joint Stock Companies Arrangement Act, 1870. We must consider the position of affairs at the date of the meeting in order to see who had a right to attend it at that time, for the position of affairs at that time must be looked at for that purpose. The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are

persons who can be divided into different classes, classes which the Act recognises, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes. A

In the present case the persons who were summoned to the meeting were policy-holders whose policies had to be dealt with. The defendant, however, was not a policy-holder at all. His policies had been fulfilled and he was a creditor of the company for the amount of his policies, and could have sued the company for the debt. He had then a vested cause of action; the policy-holders had not. It is clear, therefore, that he would not consider the matter with the same mind and from the same point of view as the policy-holders who were summoned to the meeting. A creditor such as the defendant was could not be said to be in the same class as the policy-holders whose policies had not matured. The defendant belonged to a different class of creditors from those persons who were summoned to the meeting as policy-holders, for his policies, being matured, had not to be dealt with in any way. What was done at that meeting did not, therefore, bind him. The learned judge at the trial was right in holding that the section applied so as to enlarge the subject-matter of a plea of set-off, and his judgment must be affirmed. As I have already intimated, I think that there would have been a set-off apart from the statute; but, if the right depends upon the statute, I entirely agree with the judgment of CHARLES, J., that the defence is open to the defendant and is a bar to the action. This appeal must be dismissed. B C D

**BOWEN, L.J.**—I am of the same opinion. This was an action for money lent, and the defendant sought to defend upon the ground that as against the company he had a set-off in respect of money due to him upon policies granted to him by the company, which money became payable under the policies on May 7, 1888. At that date a petition to wind-up the company had been already presented. The defendant paid all premiums due upon the policies up to May 7, 1888; and on that day a large sum of money became due to him from the company. E

What, then, was the position of the defendant upon that day? The company was then being wound-up, for the subsequent winding-up order, when made, dated back to the presentation of the petition. The defendant was a person who had effected policies with the company and had assigned them to the company as security for a loan, and was also a person to whom the company owed £2,000. It is true that he could not successfully sue the company for that £2,000 because of the winding-up, and was only entitled to prove against the company for the value of his claim. His case, therefore, is clearly distinguished from that of the other policy-holders whose policies had not matured; his claim upon his policy had become a fixed and ascertained sum; this operated to his benefit, and the case is somewhat like *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (3), and *Re Bridges, Hill v. Bridges* (4). The defendant then had money due to the company in his pocket, and was entitled to make use of his claim against the company as a set-off against any claim which the company might make against him in respect of the loan, and as a defence to the action. He could not sue the company for the money due to him, or counterclaim that sum from them, because of the winding-up; but he could say that the transactions between them had resulted in mutual debts, and that he had a right to set off the debt due from the company to him against the debt due from him to the company. That was his position when the policies matured, and he could not be in any worse position when the company brought their action against him: he was then entitled to set up his defence of a set-off, and that set-off was so large as to be a bar to the claim of the company. F G H I

That being so, I agree with the Master of the Rolls that it is unnecessary to consider what the position of the parties would have been if there had only been



A proceedings in liquidation and no action had been brought. What is there to prevent the defendant availing himself of a set-off in this action? Certainly not the winding-up, which has not altered the position and rights of the parties in this respect. As far as I can see, this is a good set-off at law; but, even if it were not, by reason of the assignment of the policies to the secretary of the company, it would yet be a good set-off in equity. The operation of s. 39 of the Bankruptcy Act, 1869, and of s. 38 of the Bankruptcy Act, 1883, has been to enlarge, not the effect of a set-off, but the meaning of the term. This appears from the decision in *Re Asphaltic Wood Pavement Co.* (2), and especially from the judgment of CORRON, L.J., in that case, which is cited at some length by CHARLES, J., in his judgment in the present case. It has been argued, however, that the decision in *Re Lankester, Ex parte Price* (1), is inconsistent with that case, and governs the present case. I am unable to agree with that argument. *Re Lankester, Ex parte Price* (1) dealt only with the doctrine of mutual rights in relation to the proof of a set-off in a winding-up, and not in a case where an action had been brought, and the court was dealing with the valuation of policies current at the time when the right of set-off was claimed. In the present case the policy had ceased to be current and was matured, and we have to deal with the rights of a person who is entitled to the full amount secured by his policy. There is here, therefore, either a mutual debt or a mutual dealing, and unless there had been a release of the defendant's claim against the company, they cannot succeed in this action.

The question whether there has been a release or not depends upon the construction of the deed of arrangement, and upon the effect of the statute upon that deed. I very much doubt whether the term "policy-holder" includes those persons who have been policy-holders, but whose policies have matured by the happening of the stipulated event. It is not, however, necessary for us to decide that question if we think that, under the Act of 1870, this deed of arrangement did not bind dissentient creditors. What, then, is the true construction of s. 2 of the Joint Stock Companies Arrangement Act, 1870? It provides that "the creditors or any class of creditors" may be called to a meeting, and that the agreement of the majority shall bind the minority; it exercises a very formidable compulsion upon dissentient, or would-be dissentient, creditors; it must consequently be construed carefully so as not to enable some creditors to compel others to do that which it would be unreasonable to require them to do, or to play with the interests of the minority. If we construe the section in the way suggested by the plaintiffs we should hold that a class of policy-holders whose interests are uncertain may, by a majority in value, override the interests of those whose rights are not uncertain but have already been ascertained. It is obvious that the interests of these two classes are inconsistent, and that those whose policies are still current are deeply interested in sacrificing the interests of those whose policies have matured. They are bound by no community of interests, and their claims are not capable of being ascertained by any common system of valuation. Are we then justified in so construing the statute as to include all these persons in one class? The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. That being so, in considering the deed of arrangement made with the company which took over the business of the plaintiff company, we must so construe it as not to include in one class those persons whose policies had already ripened into debts and those whose policies might not ripen into debts for some years. The position of a person like the defendant, to whom an ascertained sum of £2,000 was due from the company, was quite different from the position of those policy-holders whose future was entirely uncertain. It was not, therefore, right to summon to a meeting, as

members of one and the same class of creditors, those who had an absolute bar to a claim by the company against them and those who had not. In my opinion, therefore, there was no release of the defendant's claim against the plaintiff company. This appeal must be dismissed. A

KAY, L.J., stated the facts and continued: The company have now brought this action to recover from the defendant the money lent to him, and the defendant claims to be entitled to a set-off in respect of the sums due upon the policies, chiefly upon the ground that the transaction amounts to a mutual credit or dealing within s. 38 of the Bankruptcy Act, 1883. It is admitted that the company had sufficient funds to pay these policies when they matured, and the company were, therefore, then indebted to the defendant in the full amount of the policies. *Re Lankester, Ex parte Price* (1) is the only case which has been cited to us as an authority against the defendant's claim to a set-off in this case. There is, however, a very broad distinction between the two cases. In that case a proof was tendered by the company in the bankruptcy of the assured, and an attempt was made by the assured's trustee in bankruptcy to avail himself of the mutual credit section, because at the date of the bankruptcy the bankrupt was entitled to a current policy of the company which had not matured, that is to say, the bankrupt was indebted to the company, and tried to set off a claim which was not then due, and was in fact a claim for the value of what might become due upon the policy. In the present case, on the contrary, the claim which the defendant seeks to set off had already accrued due; it was a sum ascertained and liquidated. That is the material difference between the two cases. I do not desire in any way to dissent from the decision in *Re Lankester, Ex parte Price* (1), but that case is distinguishable from the present case upon the grounds which I have indicated. B C D E

This case more clearly approaches *Re Asphaltic Wood Pavement Co.* (2). There was a clear debt due upon these policies when this action was brought, and I think that we may disregard the argument founded upon the fact that there had been an assignment of the policies to a trustee for the company, for there will be an equitable set-off in cases where, but for such a circumstance as this assignment, there would have been a good legal set-off. The company were liable to the defendant for the amount of the policies, subject, indeed, to their charge thereon for the loan to the defendant, and I think that the defendant probably had a right of set-off against the company, wholly independent of s. 38 of the Bankruptcy Act, 1883. If, however, he had not, it is clear that there was a mutual dealing between the company and the defendant which entitled the defendant to have the accounts taken between them, and to bring in his claim against them under the mutual credit clause. F G

Then comes the question under the deed of arrangement, which makes provision for the liquidation of current policies, and, in cl. 2, provides for policies "which, but for the said winding-up order, would have matured between Aug. 4, 1887, and Aug. 4, 1890." The expression "would have matured" is a loose one, and does not seem to apply to a case where the policy has matured on a fixed date which the assured has outlived. Then, by cl. 11, all policy-holders who were policy-holders on Aug. 4, 1887, are to accept the provisions of the deed in full satisfaction of their claims upon the plaintiff company. Without deciding whether this clause is binding upon any particular policy-holder, I am not satisfied that it amounts to a release of the defendant's claim upon the company. He asserts a right to set off his claim against that of the company, and I think that it cannot be contended that cl. 11 operates to deprive a person of an existing right of set-off. As the defendant had an existing right of set-off, I do not think that this clause applies to prevent him availing himself of that right in this action. I agree also that it is very doubtful whether this deed relates at all to a policy-holder in the position of the defendant. There never was a separate meeting of the class of policy-holders to which he belonged, and he ought not to have been mixed with those whose policies had not yet matured. It is admitted that his policies had matured, and H I

A that the sum secured by them was due and payable. The defendant, therefore, had a right to set off that sum in order to liquidate the debt due from him to the company, and this deed of arrangement cannot be treated as a release by him of the debt due from the company. This appeal must be dismissed.

Appeal dismissed.

B Solicitors: J. Robinson; N. Jourdain.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

C

# Re BENCE. SMITH v. BENCE

[COURT OF APPEAL (Lindley, Bowen and Fry, L.J.J.), May 27, June 5, 9, 17, 1891]

D [Reported [1891] 3 Ch. 242; 60 L.J.Ch. 636; 65 L.T. 580;  
7 T.L.R. 593]

*Perpetuities—Will—Conditional gift—Gift over—Limitation on failure of issue with reference to issue taking under prior gift—Several events possible—Splitting of gift over.*

E By his will a testator directed that a one-fifth share of his real and personal estate should be held on trust to pay the income therefrom to his daughter M. for life and on her death (by reference to a prior gift) on trust for such of her child or children as should attain twenty-one or being a daughter or daughters attain that age or marry, and also such child or children of any son or daughter of M. who might die under twenty-one as should live to attain twenty-one or being a daughter marry, in equal shares per stirpes. Having settled the four other one-fifth shares on each of his four other children, the testator directed that, if any of his children should die without leaving issue who should live to attain a vested interest in their respective shares, then the share or shares as to which such failure of issue should happen should be held on trust for such of his children as should be living at the time of such failure of issue and the issue of such of them as might be dead equally as tenants in common. M. was married, but died without having had any issue.

F **Held:** the gift over on the death of M. was a single gift which could not be split into as many separate gifts over as the number of possible events which the language included so as to be held good or bad as the events happened within or beyond the limits of the rule against perpetuities; and, whether regarded as an equitable contingent remainder or as an executory devise, the gift over was void for remoteness and transgressed the rule against perpetuities.

H **Notes.** Referred to: *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482; *Re Lord's Settlement, Martin's Bank v. Lord*, [1947] 2 All E.R. 685; *Re Mill's Declaration of Trust, Midland Bank Executor and Trustee Co. v. Mill*, [1950] 1 All E.R. 789.

I As to construction of conditional gifts in wills containing limitations on failure of issue by reference to issue taking under a prior gift, see 39 HALSBURY'S LAWS (3rd Edn.) 1153; and for cases see 44 DIGEST 1141 et seq. For s. 29 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1350.

Cases referred to:

- (1) *Forth v. Chapman* (1720), 1 P. & Wms. 663; Cas. temp. Talb. 57, n.; 2 Eq. Cas. Abr. 292, 359; 24 E.R. 559, L.C.; 44 Digest 1126, 9752.



- (2) *Proctor v. Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; 44 Digest 1180, 10202. A
- (3) *Ker v. Lord Dungannon* (1841), 1 Dr. & War. 509, L.C.; affirmed sub nom. *Lord Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E.R. 1523, H.L.; 44 Digest 946, 8014.
- (4) *Burley v. Evelyn* (1848), 16 Sim. 290; 11 L.T.O.S. 410; 12 Jur. 712; 60 E.R. 885; 37 Digest 118, 506. B
- (5) *Monypenny v. Dering* (1852), 2 De G.M. & G. 145; 22 L.J.Ch. 313; 19 L.T.O.S. 320; 17 Jur. 467; 42 E.R. 826, L.C.; 37 Digest 123, 548.
- (6) *Miles v. Harford* (1879), 12 Ch.D. 691; 41 L.T. 378; 37 Digest 104, 387.
- (7) *Re Finch, Abbiss v. Burney* (1881), 17 Ch.D. 211; 50 L.J.Ch. 348; 44 L.T. 267; 29 W.R. 449, C.A.; 37 Digest 77, 178.
- (8) *Doe d. Evers v. Challis* (1850), 18 Q.B. 224; 20 L.J.Q.B. 113; 15 Jur. 601; reversed (1852), 18 Q.B. 231; 21 L.J.Q.B. 227; 16 Jur. 969, Ex. Ch.; reversed sub nom. *Evers v. Challis* (1859), 7 H.L.Cas. 531; 11 E.R. 212; sub nom. *Doe d. Evers v. Challis*, 29 L.J.Q.B. 121; 33 L.T.O.S. 373; 5 Jur.N.S. 825; 7 W.R. 622, H.L.; 37 Digest 103, 384. C
- (9) *Watson v. Young* (1885), 28 Ch.D. 436; 54 L.J.Ch. 502; 33 W.R. 637; 37 Digest 104, 388. D

Also referred to in argument:

*Jones v. Westcomb* (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 24 E.R. 149; 44 Digest 1175, 10165.

*Gulliver v. Wickett* (1745), 1 Wils. 105; 95 E.R. 517; 44 Digest 1175, 10168.

*Meadows v. Parry* (1812), 1 Ves. & B. 124; 35 E.R. 49; 44 Digest 1159, 10031.

*Murray v. Jones, Fawcett v. Jones* (1813), 2 Ves. & B. 313; 35 E.R. 338; 44 Digest 1180, 10203. E

*Pearks v. Moseley* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 44 Digest 1032, 8894.

*Re Harvey, Peek v. Savory* (1888), 39 Ch.D. 289; 60 L.T. 79, C.A.; 37 Digest 105, 395.

*Longhead v. Phelps* (1770), 2 Wm. Bl. 704; 96 E.R. 414; 37 Digest 102, 376. F

**Appeal** from a decision of KEKEWICH, J., on an originating summons taken out by the trustees of the will of the testator, William Bence, concerning the administration of the trusts contained therein to determine: (i) whether and how far the limitations in the will of the one-fifth share and one-fourth of another one-fifth share of the real and personal estate of the testator given upon trust for his daughter, Maria Ruetta, for life and to take effect after her death were valid; (ii) who were then entitled to the one-fifth share and one-fourth of another one-fifth share of the real estate and residuary personal estate respectively of the testator, and in what shares and proportions, and for what estates and interests therein respectively. KEKEWICH, J., held that the limitations as to the original and accrued shares of Maria Ruetta were void for remoteness. G

By his will dated Oct. 11, 1855, the testator, William Bence, gave his freehold, copyhold, or customary and leasehold estates and the residue of his personal estate to trustees upon certain trusts for his wife for life and after her death, the testator directed the trustees to stand possessed of all the trust estates and premises, as to one-fifth part, in trust to pay the income to his son William Henry, for life, and from and after his death, H

"upon trust to convey, assign, and pay the . . . one-fifth part of the . . . estate and premises unto and among such child or children of my son William Henry . . . as shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or be married, and also such child or children of any son or daughter of . . . William Henry . . . who may die under the age of twenty-one years as shall live to attain the age of twenty-one years, or being a daughter to be married, in equal shares and proportions per stirpes and not per capita, and in default or failure of the I

A issue of . . . William Henry . . . then the . . . one-fifth share shall be in trust for all my other children or their issue, in equal shares and proportions as tenants in common, per stirpes and not per capita."

As to another fifth part of the trust estate the testator directed his trustees to convey it to his younger son John Frederick absolutely. As to another fifth part the testator directed his trustees to pay the income to his daughter Maria Ruetta for life for her separate use with restraint on anticipation.

B "And from and after the decease of my . . . daughter, the same fifth part of the . . . estates and premises shall be in trust for her children or more remote issue in like manner as is hereinbefore declared with respect to the children of my son William Henry. . . ."

C The testator directed trusts of two other fifth parts of the estate for his daughters Ellen Amelia and Victoria Louisa and their issue with like limitations as in the case of Maria Ruetta. The testator then declared that:

D "if any or either of them . . . William Henry . . . , Maria Ruetta . . . , Ellen Amelia . . . , and Victoria Louisa . . . , shall depart from this life without leaving any lawful issue who shall live to attain a vested interest in their respective shares of the . . . trust estate and premises, then the share or shares as to which such failure of issue shall happen shall remain and be in trust for such other or others of my children as shall be living at the time of such failure of issue, and the issue then living of such of them as may be then dead equally as tenants in common, and in the same and the like manner as nearly as may be as is directed with regard to their original share or shares of my . . . trust estates and premises."

E The testator died on Mar. 18, 1857, and his widow died on Dec. 9, 1871, and letters of administration were granted to the testator's younger son, the defendant John Frederick. William Henry, the testator's heir-at-law, was lost at sea in 1885. He left no issue, and by his will gave all his real and personal estate to his wife, the defendant Susanna Shepherd Bence.

F Of the testator's three daughters: Maria Ruetta married (before the date of the will) but was without issue. Ellen Amelia Bence married, and had six children, all of whom were living, and three had attained the age of twenty-one years, the defendant Ruetta Louisa Portbury was one of such children. Victoria Louisa married, and died leaving one child, who was the infant defendant.

G On June 12, 1888, the trustees took out an originating summons to determine whether the limitations in the testator's will of the one-fifth share of the testator's real and personal estate given upon trusts for his eldest son and to each of his three daughters respectively for their respective lives and to take effect after the determination of their respective life interests, were valid, and who were entitled to the four-fifths of the real and residuary personal estate.

H On July 11, 1888, KAY, J., ordered that, as to the one-fifth share of William Henry, the gift over on his death without leaving any issue took effect, and that such one-fifth share had become divisible among the other four children of the testator, but as to the share of each of the testator's daughters subject to the limitations in the will contained of her original share; and it was declared, as to the one-fifth share of Victoria Louisa, and her one-fourth share in the one-fifth share of William Henry, that, in the event, which had happened, of her having a child, the limitations over on her death were void for remoteness, and the one-fifth share and one-fourth of one-fifth devolved on William Henry as the testator's heir-at-law. KAY, J., however, stated that he did not decide any question which might arise on the death of a daughter without issue.

I On Oct. 10, 1890, Maria Ruetta died without having had any issue, and on Dec. 5, 1890, the present originating summons was taken out, which was heard by KEKEWICH, J., in March, 1891; against whose decision the defendants, Ruetta

Louisa Portbury and John Frederick, who represented persons entitled under the gift over, if valid, now appealed. **A**

*Hall, Q.C.*, and *Daw* for the defendants.

*A. L. Ellis* for the infant child of Victoria Louisa.

*Upjohn*, for Susanna Bence, the devisee of the testator's heir-at-law.

*Cur. adv. vult.* **B**

June 17, 1891. **FRY, L.J.**, read the following judgment: The testator in this case directed his trustees to stand possessed of one-fifth of his real and personal property in trust for his daughter Maria during her life, and after her decease on trust declared by reference for the benefit of a class which consists of the following persons: (i) the children of Maria who should attain twenty-one, or, being daughters, should attain that age or be married; (ii) such of the children of any child of Maria who might die under twenty-one as should attain twenty-one, or, being a daughter, be married. It is evident that Maria might have a son born after the testator's death, and this son might die before twenty-one, leaving a child who might attain twenty-one, and so become an object of the testator's bounty. It follows that this class includes persons who might not be ascertained till after a life in being and twenty-one years afterwards. Such a gift is plainly void under the well-established rule that a gift to a class is void unless the whole class be ascertained within the period allowed by the rule against perpetuities. The testator has then directed that, if Maria should die without leaving any issue who should live to attain a vested interest in their respective shares, then the share given to Maria for life should be in trust for such of his children as should be living at the time of such failure of issue, and the issue then living of such of them as might then be dead. On Oct. 10, 1890, the testator's daughter Maria died without having had any issue; and the question is, whether the gift over can take effect. **C**

The whole property in question is, we are informed by the Bar, real estate. The first question is this. Is the event on which the gift over is to operate confined to the death of Maria, or does it extend to an indefinite failure of issue? It appears to us that s. 29 of the Wills Act, 1837, does not apply to this gift, because it comes within the proviso to that section which prevents the enactments from extending to cases where the language refers to the event of no issue living to answer the description required for obtaining a vested estate by a preceding gift to such issue. It follows that the old law must apply, and under the well-known case of *Forth v. Chapman* (1) it appears to be clear that the gift over is to take effect on an indefinite failure of the issue of Maria, an event which might happen either within or beyond the period of a life in being and twenty-one years afterwards. In the present case we have three circumstances: (i) that the particular estate which precedes the remainder in question is limited to a class which may never be ascertained within the limits of perpetuity; (ii) that the event on which the gift over is to take effect—default of the vesting of the particular estate—may in like manner never be ascertained within those limits; and (iii) that the class of persons to take under the gift over may never be ascertained within the same limits. These circumstances are, in our opinion, enough to make the gifts over (whether regarded as equitable remainders or executory devises) *prima facie* bad. **D**

The argument of the defendants is that the terms of the gift over can be split up into as many separate gifts over as there are possible events, and that, whenever the actual event falls within the limits of perpetuity, the gift over is good; whenever it falls beyond the limit it is bad. There appears to us to be a great cloud of authorities opposed to this view, among which it will be enough to mention *Proctor v. Bishop of Bath and Wells* (2); *Lord Dungannon v. Smith* (3); *Burley v. Evelyn* (4); *Monypenny v. Dering* (5); *Miles v. Harford* (6); and *Re Finch, Abbiss v. Burney* (7). The only cases which have been cited as counter- **E**



A vailing these authorities are *Evers v. Challis* (8), and *Watson v. Young* (9). In the former of these cases the testator gave an estate to his daughter Ann for life, with remainder to her sons who should attain twenty-three, and her daughters who should attain twenty-one, with cross-remainders between them; and then the testator directed that, in case his daughter Ann should die without issue, or in case all the children which his daughter might have should die, if sons  
B under twenty-three, or if daughters under twenty-one, then the estate should go over to persons including the lessor of the plaintiff. The testator gave another estate in like manner to his daughter Elizabeth for life, with similar remainders to her children, and directed that, in case all the children of his daughter Elizabeth should die, if sons under twenty-three, and if daughters under twenty-one, or if she had none, then the estate should go over in shares which vested  
C interest in the lessor of the plaintiff. Both Ann and Elizabeth died without ever having had any child, so that the event expressed by the testator in regard to Ann, of her dying without issue, happened; and in like manner the event expressed in regard to Elizabeth of her having no issue, also happened.

The case was principally discussed upon the terms of the gift over upon the death of Elizabeth, who died first; and it seems to have been held in the Queen's  
D Bench, and in the Exchequer Chamber, and in the House of Lords, that there was no difference in the operation of the two gifts over; the gifts over were held good by the House of Lords. The view taken appears to have depended on this, that the limitations over on the death of Ann expressed and constituted two gifts: the one, on her dying without issue, which was a remainder; the other on the death of all her children, if sons under twenty-three, if daughters  
E under twenty-one, which would have operated not as a remainder, but as an executory devise defeating estates in fee, which the House of Lords held would have vested in any children whom Ann might leave. In like manner, in regard to Elizabeth, the testator expressly provided for two events: namely, (i) the death of Elizabeth without ever having had a child, in which case the gift over was a true remainder; and (ii) the death of all her children, if sons under  
F twenty-three, and if daughters under twenty-one, which, if it took effect at all, would take effect only as an executory devise defeating the estates in fee vested in Elizabeth's children on her death. This case, therefore, presented the two circumstances of an expression by the testator of the two contingencies, and of the fact that one of the gifts over in each case could operate as a true remainder, while the other could operate only as an executory devise; the events on which  
G the remainders were limited occurred, and the remainders vested, and this vesting, it was held, could not be interfered with by the existence of executory devises limited upon other contingencies.

This case, therefore, in our opinion, proceeds on the application of the well-known principle, that a limitation shall, if and when, and so far as possible, be construed as a remainder rather than as an executory devise, to dispositions  
H so expressed as to sever the remainders from the executory devise. The case is, therefore, no authority for the proposition that every gift over may be analysed into as many events as are included within its language, and be held good or bad as the events happen. This is shown, in our opinion, by the language of the learned Lords and of the judges who advised the House, and especially by their adoption and affirmation of *Proctor v. Bishop of Bath and Wells* (2).  
I The gift over in that case was single in point of expression, but in point of fact embraced one event which happened, and on which a perfectly good remainder could have been limited; but inasmuch as it was not expressly so limited, inasmuch as the event of death without having any issue was not separated from a subsequent event which might transgress the rule against perpetuities, it was held that in that case the limitation over could not operate as a remainder. If the opinion of PEARSON, J., in *Watson v. Young* (8) differs from that above expressed, we are unable to concur with it. For these reasons we dismiss the appeal with costs.

**BOWEN, L.J.**—I wish to add that I accept the construction of the will which we have adopted, because it seems to me that we cannot depart from it without disregarding authorities by which we are bound. **A**

**LINDLEY, L.J.**—I agree, and for the same reasons.

*Appeal dismissed.* **B**

Solicitors: *Coodo, Kingdon & Cotton*, for *George Hirtzel*, Exeter; *Moon & Gilks*, for *R. F. & H. Campion*, Exeter; *H. G. Campion*.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*] **C**

## Re ELCOM. LAYBORN v. GROVER WRIGHT **D**

[CHANCERY DIVISION (Chitty, J.), November 2, 4, 22, 1893]

[COURT OF APPEAL (Lindley, A.L. Smith and Davey, L.J.J.), December 12, 13, 1893]

[Reported [1894] 1 Ch. 303; 63 L.J.Ch. 392; 70 L.T. 54; 42 W.R. 279; 10 T.L.R. 92, 162; 38 Sol. Jo. 127; 7 R. 87] **E**

*Married Woman—Disposal of reversionary interest in personalty—Instrument made after coming into operation of Married Women's Reversionary Interests Act, 1857—Gift of reversionary interest by will executed before Act—Codicil by testatrix after Act giving legacies to other persons—Re-publication of will. Codicil—Re-publication of will—Gift by will of reversionary interest of personalty to married woman—Codicil giving legacies to other persons.* **F**

By her will, dated Mar. 13, 1856, the testatrix gave her residuary personal estate, after payment of certain legacies given by the will or which might be given under any codicil, on trusts under which H., a married woman, took a reversionary interest. On Dec. 31, 1857, the Married Women's Reversionary Interests Act, 1857 (Malin's Act), came into operation. On April 28, 1864, the testatrix made a codicil, expressed to be a codicil to her last will and testament, by which she gave additional legacies to other persons. H., by deed dated Mar. 2, 1868, and acknowledged by deed dated Mar. 7, 1868, pursuant to the Act of 1857, purported to assign her reversionary interest to a purchaser. **G**

**Held:** the will was not re-published as at the date of the codicil so as to make the will an "instrument made after" the coming into operation of the Act; for the purposes of the Act H. became entitled to the reversionary interest under the will at the date of its execution; and, therefore, the acknowledged deed of assignment executed by H. was not effectual to pass the property. **H**

**Notes.** Applied: *Re Waring, Westminster Bank, Ltd. v. Awdry*, [1942] 2 All E.R. 250. Considered: *Re Heath's Will Trusts, Hamilton v. Lloyd's Bank*, [1949] 1 All E.R. 199. Referred to: *Re Smith, Prada v. Vandroy* (1916), 85 L.J.Ch. 657; *Re Tredgold, Midland Bank Executor and Trustee Co. v. Tredgold*, [1943] 1 All E.R. 120; *Re Sebag-Montefiore v. Alliance Assurance Co., Ltd.*, [1944] 1 All E.R. 672. **I**

As to the position generally of the proprietary rights of a married woman during coverture and also the modern law, see 19 HALSBURY'S LAWS (3rd Edn.) 822 et seq.; and for cases see 27 DIGEST (Repl.) 93 et seq. As to re-publication

**A** of a will and its effect, see 39 HALSBURY'S LAWS (3rd Edn.) 904 et seq.; and for cases see 44 DIGEST 378 et seq. For the Married Women's Reversionary Interests Act, 1857 (Malins' Act), see 11 HALSBURY'S STATUTES (2nd Edn.) 797. For the Real Estate Charges Act, 1854 (Locke King's Act), see 9 HALSBURY'S STATUTES (2nd Edn.) 688. For s. 34 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1353.

**B** Cases referred to:

- (1) *Lemage v. Goodban* (1865), L.R. 1 P. & D. 57; 35 L.J.P. & M. 28; 13 L.T. 508; 12 Jur.N.S. 32; 44 Digest 331, 1613.
- (2) *Rolfe v. Perry* (1863), 3 De G.J. & Sm. 481; 32 L.J.Ch. 471; 8 L.T. 441; 9 Jur.N.S. 853; 11 W.R. 674; 46 E.R. 722, L.C.; 44 Digest 377, 2109.

**C** Also referred to in argument:

- Re Earl's Trust* (1858), 4 K. & J. 673; 70 E.R. 280; 44 Digest 372, 2069.  
*Winter v. Winter* (1846), 5 Hare, 306; 5 Notes of Cases, 2, n.; 16 L.J.Ch. 111; 8 L.T.O.S. 252; 11 Jur. 10; 67 E.R. 929; 44 Digest 375, 2096.  
*Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch.D. 75; 59 L.J.Ch. 208; 38 W.R. 140; 44 Digest 376, 2108.  
**D** *Re Smith, Bilke v. Roper* (1890), 45 Ch.D. 632; 60 L.J.Ch. 57; 63 L.T. 448; 39 W.R. 93; 6 T.L.R. 484; 44 Digest 370, 2042.  
*Sidney v. Sidney* (1873), L.R. 17 Eq. 65; 43 L.J.Ch. 15; 29 L.T. 569; 22 W.R. 101; 44 Digest 379, 2138.  
*Re Butler's Trusts*, 3 I.R.Eq. 138.

**E** *Gurney v. Gurney* (1855), 3 Drew. 208; 3 Eq. Rep. 569; 24 L.J.Ch. 656; 25 L.T.O.S. 30; 1 Jur.N.S. 298; 3 W.R. 353; 61 E.R. 882; 44 Digest 275, 1076.

*Willet v. Sandford* (1748), 1 Ves. Sen. 178, 186; 27 E.R. 967, 972, L.C.; 44 Digest 335, 1654.

*Fuller v. Hooper* (1751), 2 Ves. Sen. 242; 28 E.R. 156, L.C.; 44 Digest 173, 6.

**F** *Pigott v. Waller* (1802), 7 Ves. 98; 32 E.R. 40; 44 Digest 371, 2054.

*Farrer v. St. Catharine's College, Cambridge* (1873), L.R. 16 Eq. 19; 42 L.J.Ch. 809; 28 L.T. 800; 21 W.R. 643; 44 Digest 345, 1752.

*Tempest v. Tempest* (1856), 2 K. & J. 635; 69 E.R. 937; on appeal (1857), 7 De G.M. & G. 470, L.C.; 44 Digest 275, 1077.

*Sherer v. Bishop* (1792), 4 Bro.C.C. 55; 29 E.R. 776; 44 Digest 386, 2205.

**G** *Wilson v. O'Leary* (1872), 7 Ch. App. 448; 41 L.J.Ch. 342; 26 L.T. 463; 20 W.R. 501, C.A.; 44 Digest 545, 3620.

*Bizzey v. Flight* (1876), 3 Ch.D. 269; 45 L.J.Ch. 852; 24 W.R. 957; 44 Digest 237, 625.

*Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623; 28 E.R. 397; 44 Digest 378, 2131.

**H** *Re Taylor, Whitby v. Highton* (1888), 57 L.J.Ch. 430; 58 L.T. 842; 36 W.R. 683; 44 Digest 394, 2270.

*Green v. Tribe* (1878), 9 Ch.D. 231; 38 L.T. 914; 27 W.R. 39; sub nom. *Re Love, Green v. Tribe*, 47 L.J.Ch. 783; 44 Digest 381, 2160.

**I** **Appeal** from a decision of CHITTY, J., by the plaintiff in an action against the trustees of the will of the testatrix and Mrs. Louisa Hamilton, claiming as a purchaser, as assignee of from his father, to be entitled to the one-sixth share of Mrs. Louisa Hamilton in the residuary personal estate on the death of Mrs. Harriet Wright by virtue of a deed made on Mar. 2, 1868, and duly acknowledged on Mar. 7, 1868, executed by Mrs. Louisa Hamilton pursuant to the Married Women's Reversionary Interests Act, 1857 (Malins' Act).

By her will, dated Mar. 13, 1856, the testatrix, Louisa Elcom, after giving certain legacies, gave all the residue of her real and personal estate to her executors and trustees, William Lloyd Birkbeck and Edward Basil Jupp, on trust to sell, call in, and convert it into money, on trust to pay her debts, funeral and



testamentary expenses, and the legacies thereinbefore given, or which she might give by any codicil to her will; and, after directing the payment of certain further legacies, the testatrix directed her trustees to invest the residue of her estate in the manner provided, and to pay the income to Harriet Wright for life; and on her death to hold the trust funds in trust for all or any the children and child of Harriet Wright who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, and be divided among them, if more than one, in equal shares. The testatrix declared that the several pecuniary legacies thereinbefore given to such person or persons as were, or should be married should be for their separate use, and free from the debts, control, or interference of their husbands, and that their receipts, or the receipts of any person or persons to whom they should by writing under their hands direct their legacies to be paid, should, and notwithstanding coverture, be sufficient discharges for such legacies.

The testatrix made a codicil to her will, dated April 28, 1864, expressed to be a codicil to her last will and testament, whereby she gave several pecuniary legacies, some in addition to what they would take under her will.

The testatrix died on April 19, 1866, and her will and codicil were duly proved on June 6, 1866.

Harriet Wright was married to John Wright, and had issue, one of whom was Louisa Wright, who married John Edmund Hamilton. On Dec. 20, 1867, Mrs. Louisa Hamilton and her husband sold by auction her absolute reversion on the death of Mrs. Harriet Wright, to one-sixth of the residuary estate of the testatrix to Thomas Layborn for £350.

By a deed dated Mar. 2, 1868, Mr. and Mrs. Hamilton assigned to Thomas Layborn, his executors, administrators, and assigns, the share and interests, vested or contingent original or accruing, expectant on the decease of Mrs. Harriet Wright, to which Mrs. Hamilton or her husband in her right then or should thereafter be entitled under the will of the testatrix. The deed was acknowledged by Mrs. Hamilton on Mar. 7, 1868, in pursuance of Malin's Act (Married Women's Reversionary Interests Act, 1857).

By a deed dated Mar. 19, 1877, made between Thomas Layborn of the one part, and his son Thomas Richard Layborn of the other part, Thomas Layborn assigned the reversionary interest to Thomas Richard Layborn. On Mar. 19, 1890, Henry Grover Wright and William Joseph Fraser were appointed new trustees of the will of the testatrix.

The action came on for trial before CHITTY, J.

*Byrne, Q.C.*, and *Hull* for the plaintiff.

*Vaughan Hawkins* for the defendants.

*Cur. adv. vult.*

Nov. 22, 1893. **CHITTY, J.**, read the following judgment.—The question is whether the deed executed after Dec. 31, 1857, by Mrs. Hamilton, then a married woman, and duly acknowledged by her in the manner required by Married Women's Reversionary Interests Act, 1857, commonly called Malin's Act, was effectual to pass her reversionary interest in personal estate, the principal point being whether she was entitled to the reversionary interest under an instrument made after Dec. 31, 1857, within the meaning of the Act. She acquired the reversionary interest under the testamentary dispositions of Louisa Elcom. By her will, made before Dec. 31, 1857, the testatrix bequeathed her residuary personal estate, after payment of the legacies thereinbefore bequeathed or which she might bequeath by any codicil, upon trusts under which Mrs. Hamilton took the reversionary interest in question. After Dec. 31, 1857, the testatrix made a codicil, whereby she bequeathed additional pecuniary legacies. The codicil is expressed to be a codicil to her last will and testament. It does not in terms confirm the will, but, as was admitted on both sides in the argument, nothing turns on that circumstance.

- A** In support of the deed an argument was founded on the general object of the Act. Before it was passed a married woman could not effectually dispose of her reversionary interest in personalty except where it was limited to her for her separate use or where a special power of disposition was conferred on her. The object of the Act, as appears on the face of it, was to enable her by acknowledged deed to dispose of her reversionary interest in personalty except
- B** where she is restrained from alienation, and where the interest is acquired under her marriage settlement. The Act is not retrospective; it is confined to dispositions made by her after Dec. 31, 1857, and the interests to which she shall be entitled under any instruments made after that date. A consideration of the general object of the Act does not throw any material light on the meaning of the particular words used. All that can be justly said is, that the Act enlarges
- C** the capacity of a married woman in the manner and to the extent prescribed by the Act, and subject to the provisions and restrictions therein contained.

- In support of the deed it was pointed out that the words in the proviso at the end of s. 1, "shall become entitled by virtue of any deed, will, or instrument," show that "any instrument" in the previous enacting part of the same section include a will. This is clear and would be so without the proviso. Then it
- D** was said that the word "will" means the aggregate of a man's testamentary intentions, so far as they are manifested in writing duly executed according to the statutes relating to wills; and in support of this proposition the judgment of LORD PENZANCE in *Lemage v. Goodban* (1) was cited. Thereupon it was urged that no man could be properly said to have made his will until he had finished his last codicil: and, applying this reasoning to the present case, the conclusion
- E** arrived at was that the testatrix's will and codicil, taken together, constituted her will, and that her will was, therefore, made after Dec. 31, 1857. But the question is, whether this reasoning has any application to the Act under consideration. By using the term "instrument" the legislature appears to have directed its attention to the particular instrument under which the married woman is entitled, and not to the set of instruments which together make up the will.
- F** Mrs. Hamilton is entitled under the will to the reversionary interest thereby bequeathed, subject only to the diminution contemplated by the will itself of the amount of the residue by legacies left by the codicil; and the will itself, regarded as a separate document, was actually made before the date mentioned in the Act. The Act treats the date at which a testator's testamentary dispositions come into operation by his death as immaterial. Persons still living
- G** at the passing of the Act (Aug. 25, 1857) who had already made their wills, and persons who afterwards made their wills before or on Dec. 31, 1857, were in effect told that their wills would be left to operate in regard to married women under the law as it stood at the passing of the Act; that it was not necessary for them to insert any restraint upon alienation in order to prevent the married woman from disposing of her interest.

- H** In dealing with the Act I am bound to take the words as I find them, and to construe them in their ordinary and natural sense. I think the words refer to the particular instrument containing the gift, which in this case is the will, and that this instrument was made within the meaning of the Act at the time when it was duly executed and attested as required by law. In his able and learned argument against the deed, counsel for the defendants referred to various
- I** expressions which have been used in reference to the effect of a codicil on a will—such as "a codicil is part of the will"; "a codicil republished the will"; "it incorporates or reiterates the will"; or "draws down the date of the will to its own date," and the like; and he contended, and as I think rightly, that all such expressions must be considered in reference to the particular case which was under discussion. They have no direct bearing on this case. Reference was made to s. 34 of the Wills Act, 1837, which enacts that the Act shall not extend to any will made before Jan. 1, 1838, and that every will re-executed or republished or revived by any codicil shall, for the purposes of that Act, be

deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. The operation of the section is, therefore, confined to the purposes of that particular Act, and there is no such enactment in Malin's Act. The section, so far as it goes, supports the conclusion at which I have arrived. A

Of the numerous authorities cited at the Bar, I think it necessary to refer only to *Rolfe v. Perry* (2). The question there was the meaning of the words, "will, deed, or document already made or to be made before Jan. 1, 1855," in Locke King's Act (Real Estate Charges Act, 1854). In that case there were two wills, both duly executed and attested, one before and the other after the date mentioned. LORD WESTBURY held that the words "already made" referred to the actual making of the first will, and declined to apply any doctrine of republication by the second will. The decision, no doubt, was on a different Act, in which the words were somewhat different; but it has a close application to the present case, and it at least shows that the word "will" in an Act of Parliament may be properly construed as referring to a particular instrument. For these reasons I hold that the acknowledged deed was not within the Act, and, therefore, that Mrs. Hamilton is not bound by it. B

From that decision the plaintiff now appealed. C

*Byrne, Q.C.*, and *Hull* for the plaintiff.

*Vaughan Hawkins*, for the defendants, was not called on to argue. D

Dec. 13, 1893. **LINDLEY, L.J.**—I think that it is unnecessary for us to hear counsel for the defendants, for the language of Malins' Act (Married Women's Reversionary Interests Act, 1857) is too strong for the plaintiff, although we have certainly no disposition to assist the defendants, and only do so if we are obliged. The facts are shortly these: In 1856 Louisa Elcom made a will giving her residuary estate to the mother of Mrs. Hamilton for life with remainder to her children who should attain twenty-one or marry. In 1864 the testatrix made a codicil giving certain additional legacies. In 1866 the testatrix died. In 1868 Mrs. Hamilton purported to assign her share of the residuary estate of the testatrix to Thomas Layborn. Malins' Act was passed in Aug. 25, 1857, s. 1 of which provides: E

"After Dec. 31, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after Dec. 31, 1857 (except such a settlement as after-mentioned). . . ." F

The short point which we have to decide is, whether Mrs. Hamilton became entitled to this reversionary interest "under any instrument made after Dec. 31, 1857." If she did, then the assignment by her by the deed of Mar. 2, 1868, is good, and she is bound by it; if she did not, that assignment is inoperative. It is argued for the plaintiff that the will and codicil together constitute the "instrument," under which she is entitled, for that a "will" means the aggregate of a person's testamentary dispositions. No doubt for some purposes a "will" does mean that. But the question is, what does the Act mean when it speaks of being "entitled under any instrument made after Dec. 31"? When was this will made so as to confer a title for the purposes of the Act? My answer is, that it was made when it was first executed. As to authority, cases do not throw much light upon the matter; but, if we are to have any, the one that seems to be nearest in point is *Rolfe v. Perry* (2). I think the appeal, therefore, fails. G

**A. L. SMITH, L.J.**—The question is, under what instrument did Mrs. Hamilton become entitled to this interest? I think, without doubt; under the will which was made on Mar. 13, 1856. It was said that because the testatrix made a H



**A** codicil to that will in 1864, Mrs. Hamilton became entitled under the aggregate of the testamentary dispositions. But I ask, did she become entitled under the codicil? If anything, she rather became disentitled under the codicil. I agree that the appeal fails.

**B** **DAVEY, L.J.**—I am of the same opinion. I do not think that “instrument” in Malins’ Act is to be construed as being equivalent to “will” in the sense of an aggregate of testamentary dispositions. The will here made in 1856 is only one of the testamentary dispositions, and so far as it is not revoked, remains in force, and I do not hesitate to say that Mrs. Hamilton is entitled under it.

*Appeal dismissed.*

**C** Solicitors: *George Brown, Son & Vardy; W. J. Fraser.*

[*Reported by G. W. KING, ESQ., and E. A. SCRATCHLEY, ESQ., Barristers-at-Law.*]

**D**

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**E** **MOGUL STEAMSHIP CO. v. MCGREGOR, GOW & CO.,  
AND OTHERS**

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Macnaghten, Lord Morris, Lord Field and Lord Hannen), April 14, 16, 17, 20, 21, 24, May 11, December 18, 1891]

**F** [Reported [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1;  
56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120]

*Contract—Illegality—Public policy—Restraint of trade—Trade association—Conspiracy—Agreement by traders to underbid competitors—Attempt to exclude from trade—Absence of improper motive or acts.*

**G** A combination to trade and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is not unlawful. It is not illegal for a trader to aim at driving a competitor out of the trade, provided that the motive be his own gain by appropriation of the trade and not merely a malicious intention to injure the competitor, and that the means he uses are lawful.

**H** The respondents, shipowners trading between China and Europe, with a view of obtaining a monopoly of part of the trade and keeping up the rate of freights, entered into an agreement under which they mutually undertook to give preferential terms to merchants who would ship cargoes to Europe only on the respondents’ vessels, to underbid competing shipowners, and to cease to employ shipping agents who acted for their competitors. In an action by a competing company which alleged that the agreement was unlawful as being in restraint of trade, that the respondents had conspired to injure the company, and that the company’s business had suffered damage thereby,

**I** **Held:** there being no evidence of an intention on the part of the respondents to cause the plaintiffs any injury other than such injury as might occur as the result of legitimate commercial competition, no unlawful obstruction of the plaintiffs’ business, and no molestation or intimidation of the plaintiffs,

or procurement of anyone to break any contract with them, the agreement was not unlawful, and there was no actionable conspiracy.

**Notes.** Applied: *R. v. Whitchurch* (1890), 24 Q.B.D. 420. Followed: *Jenkinson v. Nield* (1892), 8 T.L.R. 540. Considered: *Temperton v. Russell*, post; [1893] 1 Q.B. 715; *Trollope v. London Building Trades Federation* (1895), 72 L.T. 342; *Flood v. Jackson*, [1895] 2 Q.B. 21; *Allen v. Flood*, [1895-9] All E.R.Rep. 52; *Huttley v. Simmons*, [1898] 1 Q.B. 181; *Boots v. Grundy* (1900), 82 L.T. 769; *Quinn v. Leathem*, [1900-3] All E.R.Rep. 1; *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K.B. 600; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L.T. 439. Distinguished: *Larkin v. Long*, [1914-15] All E.R.Rep. 469. Considered: *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Re Wallace, Champion v. Wallace*, [1920] 2 Ch. 274; *Ware and De Freville, Ltd. v. Motor Trade Association*, [1920] All E.R.Rep. 387. Applied: *Reynolds v. Shipping Federation*, [1923] All E.R.Rep. 383; *Thompson v. British Medical Association (New South Wales Branch)*, [1924] A.C. 764; *Sorrell v. Smith*, [1925] All E.R.Rep. 1. Considered: *Thorne v. Motor Trade Association*, [1937] 3 All E.R. 157; *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142. Referred to: *Re Apollinaris Co.'s Trade Marks* (1890), 63 L.T. 162; *Connor v. Kent*, *Gibson v. Lawson*, *Curran v. Treleaven*, [1891] 2 Q.B. 545; *Maxim-Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (ante) (1892), 2 R. 298; *Wright v. Hennessey* (1894), 11 T.L.R. 14; *Newton v. Amalgamated Musicians' Union* (1896), 40 Sol. Jo. 716; *Lyons v. Wilkins*, [1896] 1 Ch. 811; *Ajello v. Worsley*, [1895-9] All E.R.Rep. 1222; *Elliman v. Carrington* (1901), 84 L.T. 858; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1904-7] All E.R.Rep. 211; *Denaby and Cadeby Main Collieries v. Yorkshire Miners' Association*, [1906] A.C. 384; *National Phonograph Co. v. Eddison-Bell Consolidated Phonograph Co.*, [1904-7] All E.R.Rep. 116; *Conway v. Wade*, [1908] 2 K.B. 844; *Hyams v. Stuart King*, [1908] 2 K.B. 696; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330; *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1911-13] All E.R.Rep. 1120; *Re Bowman, Secular Society v. Bowman*, [1915] 2 Ch. 447; *Evans & Co., Ltd. v. Heathcote*, [1918-19] All E.R.Rep. 279; *Thomas v. Moore*, [1918] 1 K.B. 555; *Montefiore v. Menday Motor Components Co.*, [1918-19] All E.R.Rep. 1188; *Davies v. Thomas*, [1920] All E.R.Rep. 438; *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635; *Brimelow v. Casson*, [1923] All E.R.Rep. 40; *British Oxygen Co. v. Liquid Air*, [1925] Ch. 383; *L. v. L.*, [1931] P. 63; *Wyatt v. Kreglinger and Fernau*, [1933] All E.R.Rep. 349; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *British Industrial Plastics, Ltd. v. Ferguson*, [1938] 4 All E.R. 504; *Camden Nominees, Ltd. v. Forcey*, [1940] Ch. 352; *Monkland v. Jack Barclay, Ltd.*, [1950] 2 All E.R. 715; *R. v. Newland*, [1953] 2 All E.R. 1067; *Wilts United Dairies, Ltd. v. Thomas Robinson, Sons & Co.*, [1957] R.P.C. 220; *Shaw v. D.P.P.*, [1961] 2 All E.R. 446.

As to agreements contrary to public policy and as to conspiracy, see HALSBURY'S LAWS (3rd Edn.), vol. 8, p. 130, and vol. 37, p. 127. For cases see 12 DIGEST (Repl.) 269, 42 DIGEST 983.

Cases referred to:

- (1) *Hilton v. Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest 10, 50.
- (2) *R. v. Druitt, Lawrence and Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, 1175.
- (3) *Keeble v. Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, 30.
- (4) *Richardson v. Mellish* (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore, C.P. 435; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 12 Digest (Repl.) 270, 2078.

- A (5) *Re Mirams*, post, p. 370; [1891] 1 Q.B. 594; 60 L.J.Q.B. 397; 64 L.T. 117; 39 W.R. 464; 7 T.L.R. 309; 8 Morr. 59; 12 Digest (Repl.) 271, 2080.
- (6) *Chasmore v. Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 23 J.P. 596; 5 Jur.N.S. 873; 7 W.R. 685; 11 E.R. 140; 1 Digest (Repl.) 38, 285.
- B (7) *Rogers v. Rajendro Dutt* (1860), 13 Moo.P.C.C. 209; 8 Moo. Ind. App. 103; 25 J.P. 3; 9 W.R. 149; 15 E.R. 78; sub nom. *Rogers v. Dutt*, 3 L.T. 160, P.C.; 42 Digest 968, 5.
- (8) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry. K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 15 Digest (Repl.) 1205, 12,241.
- C (9) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- (10) *Tarleton v. M'Gawley* (1794), Peake, 205; 170 E.R. 153, N.P.; 43 Digest 9, 39.
- (11) *Clifford v. Brandon* (1809), 2 Camp. 358; 170 E.R. 1188, N.P.; 42 Digest 907, 37.
- (12) *Gregory v. Duke of Brunswick* (1843), 6 Man. & G. 205.
- D (13) *Carrington v. Taylor* (1809), 11 East, 571; 103 E.R. 1126; 2 Digest (Repl.) 295, 38.
- (14) *Garret v. Taylor* (1620), Cro. Jac. 567; 2 Roll. Rep. 162; 79 E.R. 485; 34 Digest 169, 1317.
- (15) *Bowen v. Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, 174.
- E (16) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.
- (17) *Skinner v. Gunton* (1669), 1 Saund. 228; 2 Keb. 473; 1 Vent. 18; T. Raym. 176; 85 E.R. 249; 42 Digest 986, 159.
- (18) *Hutchins v. Hutchins*, 7 Hill's N.Y.Cas. 104.
- F (19) *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox, C.C. 413; 8 E.R. 1061; sub nom. *R. v. O'Connell*, 5 State Tr.N.S. 1; 15 Digest (Repl.) 778, 7285.
- (20) *R. v. Parnell* (1881), 14 Cox, C.C. 508; 15 Digest (Repl.) 778, \*4880.
- (21) *R. v. Waddington* (1801), 1 East, 143; 102 E.R. 56; 15 Digest 915, 8798.
- (22) *R. v. Rowlands* (1851), 17 Q.B.D. 671; 2 Den. 364; 21 L.J.M.C. 81; 18 L.T.O.S. 346; 16 J.P. 243; 16 Jur. 268; 5 Cox, C.C. 466; 117 E.R. 1439, C.C.R.; 14 Digest (Repl.) 128, 891.
- G (23) *Cousins v. Smith* (1807), 13 Ves. 542; 33 E.R. 397, L.C.; 43 Digest 14, 78.
- (24) *Mulcahy v. R.* (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, 856.
- (25) *Mitchel v. Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, 59.
- H (26) *Price v. Green* (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 153 E.R. 1222; sub nom. *Green v. Price*, 9 L.T.O.S. 296, Ex. Ch.; 43 Digest 47, 486.
- (27) *Hornby v. Close* (1867), L.R. 2 Q.B. 153; 8 B. & S. 175; 36 L.J.M.C. 43; 15 L.T. 563; 31 J.P. 148; 15 W.R. 336; 10 Cox, C.C. 393; 43 Digest 109, 1150.
- I (28) *Farrer v. Close* (1869), L.R. 4 Q.B. 602; 10 B. & S. 553; 38 L.J.M.C. 132; 20 L.T. 802; 33 J.P. 517; 17 W.R. 1129; 43 Digest 93, 968.
- (29) *Wickens v. Evans* (1829), 3 Y. & J. 318; 43 Digest 13, 71.
- (30) *R. v. Kimberty and North* (1662), 1 Lev. 62; 83 E.R. 297; sub nom. *Child v. North and Timberley*, 1 Keb. 203; sub nom. *R. v. Tymberly*, 1 Keb. 254; 14 Digest (Repl.) 125, 870.
- (31) *R. v. Sterling* (1663), 1 Lev. 125; 1 Sid. 174; 83 E.R. 331; sub nom. *A.-G. v. Starling*, 1 Keb. 650; 14 Digest (Repl.) 125, 871.
- (32) *R. v. Daniell* (1704), 6 Mod. Rep. 99, 182; Holt, K.B. 346; 1 Salk. 380; 3 Salk. 191; 2 Ld. Raym. 1116; 87 E.R. 856, 937.



- (33) *R. v. Eccles* (1783), 1 Leach, 274; 3 Doug.K.B. 337; 99 E.R. 684, C.C.R.; **A**  
 14 Digest (Repl.) 130, 930.  
 (34) *R. v. Turner* (1811), 13 East, 228; 104 E.R. 357; 14 Digest (Repl.) 124, 863.

Also referred to in argument:

- Hannam v. Mockett* (1824), 2 B. & C. 934; 4 Dow. & Ry.K.B. 518; 2 L.J.O.S.K.B. 183; 107 E.R. 629; 2 Digest (Repl.) 295, 41. **B**  
*Dier's Case* (1414), Y.B. 2 Hen. 5, fo. 5, pl. 26; 43 Digest 72, 766.  
*Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a; 77 E.R. 1218; sub nom. *Ipswich Tailors v. Sherring*, 1 Roll. Rep. 4; sub nom. *Ipswich Clothworkers Case*, Godb. 252; 43 Digest 8, 36.  
*R. v. Lee*, cited in 3 Russell on Crimes (5th Edn.) 149; Roscoe's Criminal Evidence (11th Edn.) 406. **C**  
*Vertue v. Lord Clive* (1769), 4 Burr. 2472; 98 E.R. 296; 14 Digest (Repl.) 129, 912.  
*R. v. Warburton* (1870), L.R.I.C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 19 W.R. 165; 11 Cox, C.C. 584, C.C.R.; 14 Digest (Repl.) 125, 868.  
*R. v. Bunn* (1872), 12 Cox, C.C. 316; 14 Digest (Repl.) 128, 892. **D**  
*R. v. Duffield* (1851), 5 Cox, C.C. 404; 14 Digest (Repl.) 134, 973.  
*Egerton v. Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, 2072.  
*Davies v. Davies* (1887), 56 L.J.Ch. 481; 56 L.T. 401; 3 T.L.R. 473; reversed, 36 Ch.D. 356; 56 L.J.Ch. 962; 58 L.T. 209; 36 W.R. 86; 3 T.L.R. 839, C.A.; 43 Digest 41, 406. **E**  
*Stanton v. Allen* (1848), 5 Denio, N.Y. 434.  
*State v. Glidden*, 59 American Rep. 721, n.  
*Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. 173.  
*Hooker v. Vanderwater*, 4 Denio, N.Y. 349.  
*State of New York v. North River Sugar Refining Co.*, 54 Hun, 354. **F**  
*Branley v. South Eastern Rail. Co.* (1862), 12 C.B.N.S. 63; 31 L.J.C.P. 286; 9 Jur.N.S. 329; 142 E.R. 1066; sub nom. *Bramley v. South Eastern Rail. Co.*, 6 L.T. 458; 11 Digest (Repl.) 440, 826.  
*Waugh v. Morris* (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 21 W.R. 438; 1 Asp.M.L.C. 573; 12 Digest (Repl.) 264, 2041.  
*Green v. London General Omnibus Co., Ltd.* (1859), 7 C.B.N.S. 290; 29 L.J.C.P. 13; 1 L.T. 95; 6 Jur.N.S. 228; 8 W.R. 88; 141 E.R. 828; 26 Digest (Repl.) 486, 1716. **G**

**Appeal** by the plaintiffs from a decision of the Court of Appeal (BOWEN and FRY, L.JJ., LORD ESHER, M.R., dissenting), reported 23 Q.B.D. 598, affirming a decision of LORD COLERIDGE, C.J., reported 21 Q.B.D. 544, in an action tried by him without a jury. **H**

The appellants were a shipping company, incorporated for the purpose of acquiring shares in certain ships, *Sikh, Pathan, Afghan, and Ghazee*, which were employed in the China and Australian trades. The respondents were shipowners trading between China and London, who joined themselves into an association for the purpose of keeping up the rate of freights in the tea trade between China and Europe, and of securing that trade to themselves by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped goods to Europe in their vessels only. They alleged that it was the large profits derived from the tea freights which alone enabled them to keep up a regular line of communication all the year round between England and China, and that without a practical monopoly of the tea trade they must cease to do so. On May 10, 1884, the respondents issued from Shanghai the following circular, which was widely **I**

A distributed among merchants engaged in the China trade :

B "To those exporters who confine their shipment of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the Steam Navigation Co.'s, Messageries Maritimes Co.'s, Ocean Steamship Co.'s, "Glen," "Castle," "Shire," and "Ben" lines, and to the steamships *Oopack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent. on the freight charged. Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (except the above named) by any other than the said lines."

In May, 1885, the respondents issued the following circular :

C "Referring to our circular dated May 10, 1884, we beg leave to remind you that shipments for London by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-conference steamers, at any of the ports in China or at Hong Kong, will exclude the firm making such shipment from participation in the return during the whole six-monthly period within which they have been made, even although the firm elsewhere may have given exclusive support

D to the conference lines."

E The effect of those circulars was, the appellants alleged, to inflict damage upon them, and they sued the respondents for conspiracy and unlawful combination to bribe, coerce, and induce shippers to forbear from shipping cargoes by the appellants' ships. LORD COLERIDGE, C.J., held that the association, being formed by the respondents with the view of keeping the trade in their own hands and not with the intention of ruining the trade of the appellants, or through any personal malice or ill-will towards them, was not unlawful, and, therefore, no action for conspiracy was maintainable. This decision was affirmed by a majority of the Court of Appeal.

F *Sir Henry James, Q.C., Gorell Barnes, Q.C., and Sims Williams* for the appellants.

*Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., Finlay, Q.C., Pollard and Box* for the respondents.

The House took time for consideration.

Dec. 18, 1891. The following opinions were read.

G LORD HALSBURY, L.C.—Notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe that the facts may be very summarily stated, and when they are stated the law seems to me not open to doubt. An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them—so favourable that,

H but for the object of keeping the trade to themselves, they would not give such terms. If their trading were confined to one particular period they would be trading at a loss, but they give these terms in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves. I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful

I and constitutes an indictable conspiracy. It is not denied, and cannot be even argued, that *prima facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying it on, according to his own discretion and choice." This is the language of ALDERSON, B., in delivering the judgment of the Exchequer Chamber in *Hilton v. Eckersley* (1) (6 E. & B. pp. 74, 75), and no authority, and indeed no argument, has been directed to qualifying that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law."

After a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them, and if this is unlawful it seems to me that the greater part of the commercial dealings, where there is rivalry in trade, must be equally unlawful. There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by it is that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms—that is to say, the reduced freights, discounts, and the like—which will be given to customers who will exclusively trade with the associated body. On a review of the facts it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury and the motive of its infliction is examined and tested on principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious, and consequently unlawful—a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference, was proved against the associated body of traders; and, as I have said, the only wrongful thing on which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful. The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. After all, what can be meant by "out of the ordinary course of trade?" I should rather think, as a fact, that it is very common within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself. I entirely adopt and make my own what was said by BOWEN, L.J., in the court below [see p. 280 post]:

"All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'thus far shalt thou go and no further.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person, is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests. I think this question is the first to be determined. What injury, if any, has been done? What legal right has been interfered with? Because, if no legal right has been interfered with, and no legal injury inflicted,



- A it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism (21 Q.B.D. at p. 551), if its meaning was rightly interpreted, which I very much doubt, of the observations made by BRAMWELL, B., in
- B *R. v. Druitt, Lawrence and Adamson* (2), if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour. I cannot think the Lord Chief Justice meant to throw any doubt upon such a proposition. But in this case, the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person.
- C If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors—if they might be supposed to have knowledge of the transaction—would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

- A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly though, I think, somewhat inaccurately, used. There are some contracts to which the
- F law will not give effect; and, therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law will not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy, as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word unlawful, which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as "contrary to law," is not applicable to such contract. [It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract (HULL, J., Yearbook, 2 Hen. 5, fol. 5, pl. 26); and CROMPTON, J., undoubtedly did say in a case where such an observation was wholly unnecessary to the decision, and, therefore, manifestly obiter, that the parties to a contract in restraint of trade would be indictable: *Hilton v. Eckersley* (1). I am unable to assent to that dictum. It is opposed to the whole current of authority. It was dissented from by LORD CAMPBELL,
- H C.J., and ERLE, J., and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

I In the result, I think that no case whatever is made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first count alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful; but, as I have already said, in proof there is nothing but the competition with which I

have dealt. The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear, and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved, but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case, and the word "induced" is absolutely neutral, and no unlawful inducement is proved. The third paragraph uses language such as "intention to injure the plaintiff," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether, if an indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offence. I am very clearly of opinion it would not. I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade, is unlawful, and I am clearly of opinion that it is not. I think, therefore, that the appeal ought to be dismissed with costs.

**LORD WATSON.**—At the hearing of this appeal in April, 1891, your Lordships had the benefit of listening to a learned and exhaustive discussion of the law applicable to combination or conspiracy. It appeared to me at the time—and further consideration has confirmed my impression—that much of the legal argument addressed to us had a very distant relation to the circumstances of the present case, which are simple enough.

The evidence, oral and documentary, contains an unusual amount of figurative language indicating a wide difference of opinion as to the legal aspect of the facts, but presents no conflict with regard to the facts themselves. The respondents are firms and companies owning steam-vessels, which ply regularly, during the whole year, some of them on the great river of China, between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season—which begins in May and lasts for about six weeks—most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then trans-shipped for Europe. Accordingly, they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels. The appellants are also a shipowning company. They do not maintain a regular service, either on the great river or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear in ordinary circumstances to have been considerable. The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates, and they claim as damages due to them by the respondents the difference between their actual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents.

As the law is now settled, I apprehend that, in order to substantiate their claim, the appellants must show either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement nor the means used for its attainment were contrary to law, the loss suffered by the appellants was *damnum sine injuria*. The agreement of which the appellants complain left the contracting parties free

A to recede from it at their pleasure, and is not obnoxious to the rule of public policy which was recognised in *Hilton v. Eckersley* (1). The decision in that case, which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no further than this—that an agreement by traders to combine for a lawful purpose and for a specified time is not binding upon any of the parties to it if he chooses to withdraw, and, consequently, cannot be enforced in invitum. In my opinion, it is not an authority for the proposition that an outsider can plead the illegality of such a contract, while the parties are willing to act and continue to act upon the ground that they have agreed for a specific period. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy.

C I have never seen any reason to suppose that the parties to the agreement had any other object in view than that of defending their carrying trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce, and it is in the eye of the law perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main and ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal.

E The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it? The appellants invited your Lordships to answer that question in the affirmative, on the ground that the respondents' competition was unfair, by which they no doubt meant that it was tainted with illegality. The facts which they mainly relied on were these—that the respondents allowed a discount of 5 per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on remunerative terms; and, lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination. I cannot for a moment suppose that it is the proper function or right of courts of law to fix the lowest prices at which traders can sell or buy for the purpose of protecting or extending their business without committing legal wrong which may subject them in damages. Until that becomes the law of the land it is, in my opinion, idle to assert that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency first

F appeared to me to be a matter attended with difficulty, but, on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them, and in circumstances which placed the appellants at no disadvantage.

I In this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavoured to obtain shipments for their vessels to the exclusion of others was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgments appealed from ought to be affirmed. I am quite satisfied with the reasons assigned for it by BOWEN and FRY, L.JJ. [see p. 278 post], and the observations which I have made were not meant to add



to those reasons, but to make it clear that in my opinion the appellants have presented for decision no question of fact or law entitling them to a judgment in their favour. A

**LORD BRAMWELL.**—The plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract; nor of any direct tort or violation of any right of the plaintiffs like the case of firing to frighten birds from a decoy: *Keeble v. Hickeringill* (3); nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that, materially and morally, they have been at liberty to do their best for themselves without any hindrance by the defendants. But they say that the defendants have entered into an agreement in restraint of trade—an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; and that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring this action. The plaintiffs have proposed an agreement among the defendants, the object of which was to prevent shipowners, other than themselves, from trading to Shanghai and Hankow. The way in which that was to be accomplished was by giving benefits to those who shipped exclusively by them, by sending vessels to compete with the plaintiffs, and by lowering their, the defendants', rates of freight so that the plaintiffs had to lower theirs to their great loss. There are other matters alleged, but they are accessory to the above, which is the substance of the complaint. B C D

The plaintiffs also say that these things, or some of them, if done by an individual would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes—*de minimis non curat lex*—while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that, if what they complain of had been done by an individual, there would be no cause of action. E F G

There is the further question whether there is a cause of action, the acts being done by several. The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and, therefore, against public policy, and so illegal. "Public policy," said BURROUGH, J., I believe, quoting HOBART, C.J., "is an unruly horse, and dangerous to ride." *Richardson v. Mellish* (4), 2 Bing. at p. 252. I quote also another distinguished judge, more modern, CAVE, J.: "Certain kinds of contracts have been held void at common law on [the ground of public policy]; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." *Re Mirams* (5), post p. 371. I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade a further supply would have been a waste. There are some people who think that the public is not concerned with this— H I

A people who would make a second railway by the side of one existing, saying "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. LORD COLERIDGE, C.J., thought it was: see his judgment (21 Q.B.D. 544). As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit, but, as a rule, it is clear that the expense of transit, and all other expenses borne by an exported article that has a market price, are borne by the importer, and, therefore, ultimately by the consumer, so that low freights benefit him.

C To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw. Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of *Hilton v. Eckersley* (1), and other cases, we should hold that the agreement was illegal—that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make  
D out that it was an offence, a crime, a misdemeanour. I am clearly of opinion it was not. Save the opinion of CROMPTON, J., which is entitled to the greatest respect, but was not assented to by LORD CAMPBELL, C.J., or the Exchequer Chamber, there is no authority for it in the English law. It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man  
E and wife without marrying. The agreement is illegal, and could not be enforced, but clearly the parties to it would not be indictable. It ought to be enough to say that there is no case where there has been a conviction for such an offence as is alleged against the defendants. It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to  
F prove the negative.

It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of fair competition? What is unfair that is neither forcible nor fraudulent? It does seem strange that, to enforce freedom of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly  
G required for their protection. There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law. Perhaps not enforceable inter se, but not indictable; the legislature has now so declared [see Trade Union Act, 1871, s. 1]. The enactment is express, that agreements among workmen shall be binding, whether they would or would  
H not but for the Acts have been deemed unlawful as in restraint of trade. Is it supposable that it would have done so in the way it has had the workman's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable they are not indictable: see also the judgment of FRY, L.J., on this point [see p. 282 post].

I Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops sufficient for the wants of the neighbourhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember the conspiracy is the offence, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show that from his skill he would have beaten one or both of the others: see in this case the judgment of LORD ESHER, M.R.,

that the plaintiffs might recover for "damages at large for future years." Would a shipowner who had intended to send his ship to Shanghai, but desisted owing to the defendants' agreement and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it. The Master of the Rolls cites SIR WILLIAM ERLE (the LAW RELATING TO TRADE UNIONS) that

"a combination to violate a private right in which the public has a sufficient interest, is a crime, such violation being an actionable wrong."

True. SIR WILLIAM ERLE means that, where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case I hold that there is no private right violated.

His Lordship further says:

"If one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order, that is to say, with intent to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong."

I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites SIR WILLIAM ERLE in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here.

The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done by the respondents in the exercise of their own free right of trade, but for the purpose of interfering with the appellants' right to a free course of trade; therefore, a wrongful act as against the appellants' right, and as injury to the appellants followed they had a right of action. I cannot agree. If there are two shopkeepers in a village and one sold an article at cost price, not for profit therefrom, but to attract customers, or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the respondents did more than they had a legal right to do. I adopt the vigorous language and opinion of FRY, L.J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts." It is a strong thing for the appellants to complain of the very practices they wished to share in, and once did. I am of opinion the judgment should be affirmed.

**LORD MACNAGHTEN** concurred.

**LORD MORRIS.**—The facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: first, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs. The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons.

Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by



**A** the defendants to customers to come and deal exclusively with them. The sending of ships to compete and the indemnifying other ships was "the competition" entered on by the defendants with the plaintiffs. The fifth means used, viz., the dismissal of agents, might be questionable according to the circumstances; but in the present case the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants—dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade. All the acts done, and the means used by the defendants, were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce anyone to break such. Their action was aimed at making it unlikely that anyone would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably

**C** prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it. Again, what one trader may do in respect of competition a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists combining together could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive and

**D** object is to promote their own trade, can combine to acquire, and thereby in so far to injure, the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. The defendants' case clearly comes within the principle I have stated.

As to the contention that the combination was in restraint of trade, and, therefore, illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise. I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair," intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncracies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another. But suppose the combination

**G** in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void because its tendency might be held to be against the public interests. Does that make, per se, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and cases abound of agreements which the law would not enforce, but which are not illegal, which

**H** you may enter into if you like, but which you will not get any assistance to enforce. I have merely summarised my views, because I adopt so entirely the principles laid down by BOWEN, L.J., in his judgment, with such felicitous illustrations [see p. 278 post], and I concur in the opinion already announced by your Lordships, that the judgment of the Court of Appeal should be affirmed.

**I** **LORD FIELD.**—I think that this appeal may be decided upon the principles laid down by HOLT, C.J., as far back as *Keeble v. Hickeringill* (3), cited for the appellant. In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it, and so driven away the wildfowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. HOLT, C.J., however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful

trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by "a violent or malicious act." He said: A

"Suppose, for instance, the defendant had shot in his own grounds, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong."

But, he added, if the defendant, "using the same employment as the plaintiff," B had set up another decoy so near as to spoil the plaintiff's custom, no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff.

In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats. It follows, C therefore, from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act causing such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject D of any action. Of course, it is otherwise, as pointed out by LORD HOLT, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although, if E done by an individual, no such consequence would follow. But I think that in all such cases it will be found that there existed either an ultimate object of malice or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negating the pursuit of a lawful object.

Everything that was done by the respondents was done in the exercise of F their right to carry on their own trade, and was bona fide so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is, therefore, presumably due to nothing but its obvious object of harm. G All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being H in restraint of trade and so against public policy and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but one which has not been generally approved) been cited to show that such an agreement, even if void, is illegal; nor any that, even if it be so, any action lies by an I individual. For these reasons I think that the appeal ought to be dismissed.

**LORD HANNEN.**—The charge against the defendants is that they conspired together to prevent the plaintiffs from obtaining cargoes for their ships by bribing, coercing, and inducing shippers to forbear from shipping cargoes by the plaintiffs' steamers; and it is further complained that the defendants, with intent to injure the plaintiffs, agreed to refuse, and refused to accept cargoes, except upon the terms that the shippers should not ship any cargoes by the

A plaintiffs' steamers. The means by which those alleged objects were sought to be attained were (i) offering to shippers and their agents a rebate of 5 per cent. on the agreed freight, to be made to those who, during a fixed period, shipped only by the defendants' steamers; (ii) sending steamers to Hankow to compete with the steamers of persons not members of the defendants' conference or combination, so as to drive them from the trade of that place; (iii) removing  
B from the agency of the defendants' steamers those persons who acted in the interest of non-conference steamers. It was contended that the agreement between the defendants to act in combination, which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: *Hilton v. Eckersley* (1). But it does not follow that the  
C entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy; and I think that the opinion to that effect expressed by CROMPTON, J., in *Hilton v. Eckersley* (1) is erroneous.

The question, however, raised for our consideration in this case, is whether a person, who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the  
D injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants, and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure  
E for himself as large a share of the trade he is engaged in as he can. If, then, the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary  
F form of competition between traders by offering goods or services at a cheaper rate than their rivals. With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered, by these ships to the ships of non-conference owners, and by their presence at  
G Hankow shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others. The removing from the agency of the defendants' vessels those persons who acted in the interest of non-conference steamers appears to me a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade.

H I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs, whether they (the defendants)  
I should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.

It only remains for me to refer to the argument that an act which might be lawful for one to do becomes criminal or the subject of civil action by anyone injured by it, if done by several combining together. On this point I think the law is accurately stated by SIR WILLIAM ERLE in his treatise on the law relating to TRADE UNIONS. The principle he lays down is equally applicable to combinations



other than those of trade unions. He says (p. 23):

A

"As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination."

B

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many persons. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that in the present case there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade by giving better terms to customers than their rivals, the plaintiffs, were willing to offer. For these reasons I think that the judgment of the Court of Appeal should be affirmed.

C

D

*Appeal dismissed.*

E

Solicitors: *Gellatly & Warton; Freshfields & Williams.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

When the case was before the Court of Appeal *BOWEN* and *FRY*, L.JJ., on July 13, 1889, read the following judgments.

F

**BOWEN, L.J.**—We are presented in this case with an apparent conflict or antimony between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits, and, inasmuch as for the purposes of the present case we are to assume some possible damage to the plaintiffs, the real question to be decided is whether on such an assumption the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law.

G

The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object and to discourage the plaintiffs' vessels from resorting to those ports the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of 5 per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports.

H

I

The acts of which the plaintiffs particularly complained were as follows: (i) A circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled; (ii) the sending of special ships to Hankow in order by competition

A to deprive the plaintiffs' vessels of profitable freight; (iii) the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field; (iv) pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal, unless made so by the object with which or the combination in the course of which they were done; and that in reality what is complained of

B is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves.

We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which

C have accurate meanings well known to the law, but which also have a popular and less precise signification into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question what, as between the

D plaintiffs and the defendants, are the rights of trade. For the purpose of clearness I desire as far as possible to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever I shall employ them. The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicini nocendi* may enter into or affect the conception of a personal wrong: see *Chasemore v. Richards* (6), 7 H. of L. Cas. at p. 388. All personal

E wrong means the infringement of some personal right. It is essential to an action of tort, say the Privy Council, in *Rogers v. Rajendro Dutt* (7),

"that the acts complained of should be, under the circumstances, legally wrongful—i.e., they must prejudicially affect another in some legal right. Merely that it will, however directly, do a man harm in his interests, is not enough."

F What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct, and we have to consider what conduct would pass this legal line or boundary. Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong: see *Bromage v. Prosser* (8); *Capital and Counties Bank v. Henty* (9), 7 App.

G Cas. at p. 772, per LORD BLACKBURN. The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But, in order to see whether they were wrongful, we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely, in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

H What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seems to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging

I another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. M'Gawley* (10)); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon* (11); *Gregory v. Brunswick* (12)); the disturbance of wildfowl in decoys by the firing of guns (*Carrington v. Taylor* (13) and *Keeble v. Hickeringill* (3)); the impeding or threatening servants or workmen (*Garret v. Taylor* (14)); the inducing persons under personal contracts to break their contracts (*Bowen v. Hall* (15); *Lumley v. Gye* (16)); all are instances of such forbidden acts.

But the defendants have been guilty of none of those acts. They have done nothing more

against the plaintiffs than pursue to the bitter end a war of competition waged in the interests of their own trade. To the argument that a competition so pursued ceases to have a "just cause or excuse," when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would, but for such a motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract their business to his own shop, would be a strange and impossible counsel of perfection.

But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not "fair or reasonable." The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" to be determined by the internal consciousness of judges and juries beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates, provided they did not lower them beyond a "fair freight" — whatever that may mean. But where is it established that there is any such restriction upon commerce, and what is to be the definition of a "fair freight?" It is said that it ought to be a "normal" rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future, and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs: "Thus far shall they go and no further."

To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's rights: *sic utere tuo ut alienum non lædas*. If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider "reasonable": see *Chasemore v. Richards* (6). If there is no such fetter upon the use of property known to the English law, why should there be any such fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: see *Skinner v. Guntton* (17); *Hutchins v. Hutchins* (18); BIGELOW'S LEADING CASES ON TORTS, 207.

But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act or to do a lawful act by unlawful means: *O'Connell v. R.* (19); *R. v. Parnell* (20). And the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to,



**A** if any, between the defendants, must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only.

**B** The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own; and one individual merchant may lawfully do that which a firm or a partnership may not. What limits on such a theory would be imposed by law on the competitive action of a joint-stock company (limited) is a problem which might well puzzle a casuist.

The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one with a view to harm him as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade, for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital when used for purposes of competition in the manner proposed by the argument of the plaintiffs would in the present day be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought, to buy up by preconcerted action all the provisions in a market or a district in times of scarcity: see *R. v. Waddington* (21); to combine to purchase all the shares of a company against a coming settling day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match vendors combine to sell matches below their value in order, by competition, to drive a third match vendor from the street?

In cases like these where the element of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional and that it is calculated to do harm to others. Then comes the question: Was it done with or without "just cause or excuse?" If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing up of *ERLE, J.*, and the judgment of the Queen's Bench in *R. v. Rowlands* (22). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was

**I** said by *ERLE, J.*, in *R. v. Rowlands* (22) (17 Q.B. at p. 687) of workmen and of masters: "The intention of the law is to allow them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the plaintiffs' conference or association illegal as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade are not, in my opinion, illegal in any sense except that the law will not enforce them. It does not prohibit the making of such contracts—it merely declines

after they have been made to recognise their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of COMPTON, J., in *Hilton v. Eckersley* (1) is I think not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. LORD ELDON's equity decision in *Cousins v. Smith* (23) is not very intelligible even if it be not open to the somewhat personal criticism passed on it by LORD CAMPBELL in his LIVES OF THE CHANCELLORS. If, indeed, it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these was always necessarily injurious to the public—a view which involves perhaps the disputable assumption that, in a country of free trade and one which is not under the iron régime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result I agree with LORD COLERIDGE, C.J., and differ with regret from the Master of the Rolls. The substance of my view is that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights" to which commercial adventurers, otherwise innocent, were bound to conform. In my opinion, accordingly, this appeal ought to be dismissed with costs.

**FRY, L.J.**, stated the facts and continued: The parties having agreed to leave the question of damages, if any, to reference or arbitration, I shall assume that the plaintiffs may show that in point of fact they have sustained damage from the defendants' acts. The plaintiffs allege that the conference was an unlawful conspiracy; that the agreement then entered into was carried into execution by the sending up of the three ships expressly to compete with the plaintiffs' vessels, by the circular, and the reduction of freights; that these acts were wrongful and have caused damage to them, and, consequently, were actionable.

I cannot doubt that whenever persons enter into an agreement which constitutes at law an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators. Was the agreement in the present case an unlawful conspiracy? TINDAL, C.J., speaking for the judges attending the House of Lords in *O'Connell v. R.* (19), said (11 Cl. & Fin. at p. 233):

"The crime of conspiracy is complete if two or more than two should agree to do an illegal thing—i.e., to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful."

WILLES, J., in *Mulcahy v. R.* (24), said (L.R. 3 H.L. at p. 317):

"A conspiracy consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

In all cases, therefore, a conspiracy is an agreement to do an unlawful act. It is immaterial whether that act be (a) the principal object and end of the agreement, as an agreement to kill, or (b) a subordinate act towards the principal object, as in an agreement to support a true title by forged deeds or suborned witnesses. Again, the act may be unlawful (a) because it would be unlawful in each of the agreeing parties even if he did it alone; or (b) because, though lawful in one, it is unlawful in two or more.

The first inquiry then which arises is this: Was the principal object and end of the agreement illegal? I answer that that object and end was the acquisition of gain by the defendants. That is lawful, and I suppose even commendable according to the law of this country, provided the means used be lawful. What, then, were the means intended to be used? They were, as I have already said, the exclusion of competition in the remoter future by severe competition in the near future. Was that lawful or unlawful? It is not necessary to consider whether competition directed by one man or by a combination of men against

A another man, if instigated and put in motion from mere malice and ill-will towards him, as a means of doing him ill-service and for no benefit to the doer would or would not be unlawful or actionable. There is in the present case no evidence of express malice or of any activity of the defendants against the plaintiffs except as rival and competing shipowners. The defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency; they only desired to drive them from particular parts where the defendants conceived that the plaintiffs' presence interfered with their own gain; the damage B to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves. In the observations I am about to make I shall, therefore, lay out of consideration the case of competition used as a mere engine of malice even where I do not in terms repeat the exception. I will only add on this part of the case that the charge of ERLE, J., in *R. v. Rowlands* (22) (17 Q.B. at p. 687, n.) draws the same distinction which I have taken between combinations to promote the interests of those who combine and combinations of which the hurt of another is the immediate purpose.

C We have then to inquire whether mere competition directed by one man against another is ever unlawful. It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is, not an absolute, but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition. I know no limits to the right of competition in the defendants; I mean no D limits in law; I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. I say mere competition for I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by E molesting his customers or those who would be his customers whether by physical obstruction or moral intimidation. *Garret v. Taylor* (14); *Tarleton v. M'Gawley* (10); *Keeble v. Hickeringill* (3); *Carrington v. Taylor* (13), are all cases of interference by physical acts, driving away either the birds or the customers from the plaintiffs' places of business. Other cases were cited in which one man had persuaded another who is under some contract of service to a third to break that contract to the damage of such third person, and the persuasion has been held actionable. But no case has been or I believe can be cited where the only means used F by the defendant to injure the plaintiff has been competition pure and simple. I think that if we were now to hold interference by mere competition unlawful we should be laying down law both novel and at variance with that which modern legislation has shown to be the present policy of the State.

But if one man may by competition strive to drive his rivals out of the field, is it lawful or unlawful for several persons to combine together to drive from the field their competitor in G trade? It is said that such an agreement is in restraint of trade, and, therefore, illegal. Be it so. But in what sense is the word "illegal" used in such a proposition? In my opinion, it means that the agreement is one upon which no action can be sustained and no relief obtained at law or in equity, but it does not mean that the entering into the agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. In *Mitchel v. Reynolds* (25) PARKER, C.J., in discussing contracts in restraint of trade, says:

H "It is not a reason against them that they are against law, I mean in a proper sense, for in an improper sense they are."

In *Price v. Green* (26) PATTESON, J., in delivering the judgment of the Exchequer Chamber upon a covenant held void as in restraint of trade, said expressly that it was "void only, not illegal." In *Hilton v. Eckersley* (1) the bond was addressed, not as in *Mitchel v. Reynolds* (25), I only to negative acts, such as not trading, but to positive acts, such as carrying on works under particular directions and closing the works at the dictation of a majority of the combining owners. In this case all the judges both in the Court of Queen's Bench and the Exchequer Chamber held that the bond could not be enforced, but CROMPTON, J., alone thought it created an indictable offence, LORD CAMPBELL, C.J., and ERLE, J., expressing an opposite opinion, and the Court of Exchequer Chamber carefully abstaining from expressing any opinion on the point. The language of all the judges in *Hornby v. Close* (27) and *Farrer v. Close* (28) is consonant with that of LORD CAMPBELL and ERLE, J., in *Hilton v. Eckersley* (1); and CROMPTON, J., is, I believe the only judge who has ever hitherto held such contracts illegal as well as void.



If every agreement in restraint of trade were not only void but unlawful in the stricter sense of the word, it would follow that, as every agreement must be at least between two persons, every such agreement would constitute an indictable offence, and yet not a single case has been cited of a conspiracy constituted by a mere agreement between two persons in undue restraint of the trade of one of the contractors. This silence of the books is very significant. It was forcibly urged upon us that combinations like the present are in their nature calculated to interfere with the course of trade, and that they are, therefore, so directly opposed to the interest which the State has in freedom of trade and in that competition which is said to be the life of trade, that they must be indictable. It is plain that the intention and object of the combination before us is to check competition; but the means it uses is competition, and it is difficult, if not impossible, to weigh against one another the probabilities of the employment of competition, on the one hand, and its suppression, on the other; nor is it easy to say how far the success of the combination would arouse in others the desire to share in its benefits and by competition to force a way into the magic circle. In *Wickens v. Evans* (29) it was suggested that the brewers or distillers of London might enter into an agreement to divide the metropolis into districts, the effect of which might be to supply the public with an inferior commodity at a higher price. This argument was met by HULLOCK, B., by this observation (3 Y. & J. at p. 330):

"If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated, and the consequence would perhaps be that the public would obtain the articles they deal in at a cheaper rate."

A similar observation may be made in the present instance and corroborated by what has actually happened. For the case before us strikingly illustrates the difficulty of foretelling the probable results of such a combination in the public interest. In fact, the competition between the plaintiffs and the defendants in May and June, 1885, brought down the freights from Hankow to the benefit, it must be supposed, of the consumer in England. The conference came to an end in August, 1885, and in the summer of 1886 the rate of freight from Hankow was determined by free competition in an open market, in which the defendants were competing with one another.

But I do not rest my conclusion on any speculations as to the probable effect of such agreements as the one before us, but on this—that the combination, if in restraint of trade, is *primâ facie* void only and not illegal; that no statute in force makes such competition criminal; and that the policy of our law, as at present declared by the legislature, is against all fetters on combination and competition unaccompanied by violence or fraud or other like injurious acts. The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; and they were held criminal accordingly. But early in the reign of George III, the mind of the legislature showed symptoms of change in this matter and the penal statutes were repealed (12 Geo. 3, c. 71), and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past, the indication of a new policy for the future. And this new policy has been more clearly declared and acted upon in the present reign, for the legislature has by 7 & 8 Vict., c. 24, altered the common law by utterly abolishing the several offences of badgering, engrossing, forestalling, and regrating. At the same time this repeal was accompanied by a proviso that nothing in the Act contained should apply to the offence of knowingly and fraudulently spreading, or conspiring to spread, any false rumour with intent to enhance or decri the price of any goods or merchandise, or to the offence of preventing, or endeavouring to prevent, by force or threats, any goods, wares, or merchandise being brought to any fair or market, but that every such offence might be punished as if this Act had not been made. The comparison of the operative part of the statute with this proviso goes far to draw the line between lawful and unlawful interference with the ordinary course of trade or of the market.

A consideration of the statutes relative to trade unions leads me to a similar conclusion. It is not necessary to consider in detail the provisions of the Trade Union Acts, 1871 and 1876, but one of their principal results was to enlarge the power of combination between workmen and workmen, and between masters and masters, for the purpose of maintaining and enforcing their respective interests, and to remove the objection of being in restraint of trade to

A which some of such combinations had been obnoxious. But while the legislature thus set masters and men respectively free to combine, they re-asserted the illegality of using violence, threats, molestation, obstruction, or coercion; and here, again, the contrast between the two pieces of legislation which stand side by side in the statute-book, the one declaring mere combinations lawful, and the other declaring violence and other like acts unlawful, helps to draw the line in the same direction as does the legislation in respect of trade combinations: cf. the Trade Union Act, 1871, and the [repealed] Criminal Law Amendment Act, 1871. Thus the stream of modern legislation runs strongly in favour of allowing great combinations of persons interested in trade and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of trade if unaffected by such combinations. I, therefore, conclude that the combination in the present case cannot be held illegal as opposed to the policy of the law.

It remains to inquire whether the authorities assist in the decision of the question before us. As regards an individual, I have already pointed out that for one man to interfere with the lawful trade or business of another by molestation or any physical interference, or by fraud or misrepresentation, may be an actionable wrong. But no authority appears to show that for one man to injure the business of another by mere competition, even though it may be successfully directed to driving the rival out of the town where he dwells, or out of the business which he carries on, is actionable. And the silence of the books is strong evidence that such acts are not actionable. With regard to like acts done by a combination of persons, the authorities are not very numerous. There are certain general statements in text-books, of which the following passage in HAWKINS' PLEAS OF THE CROWN (vol. 1, p. 446), may be taken as a fair specimen:

"There can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person."

E For this proposition HAWKINS cites authorities relative to two cases—first, *R. v. Kimberty and North* (30), which was a conspiracy to indict the prosecutor for having begotten a bastard child on the body of one of the conspirators—a case, therefore, which has nothing to do with the question now in hand. Secondly, *R. v. Sterling* (31), in which the indictment charged certain brewers of London with a conspiracy to refuse to sell small beer, with a view to impoverish the excisemen, and with intent to move the common people to pull down the Excise house, and to bring the excisemen into hatred of the people, and to impoverish and disable them from paying their rent to the King. The defendants were found guilty of counselling and assembling to impoverish the excisemen, and not guilty of the residue; and thereupon ultimately judgment went for the Crown. The real ground of the decision was, as stated by HOLT, C.J., in *R. v. Daniell* (32), that the offence of the defendant was of a public nature, and levelled at the government, and it is, therefore, no authority in respect of a combination which has no such object or effect. But one argument as it appears in SIDERFIN'S REPORTS (1 Sid. 174) is important. It was urged for the defendants that it was not an offence punishable by our law for one man to depauperate another, with a view to enrich himself, by selling commodities at cheaper rates. The court did not deny this proposition, but drew a distinction based upon the allegations of the information, which were supported by the verdict, that the Excise was parcel of the revenue of the King, and that to impoverish the excisemen was to render them incapable of paying these revenues to the King. So far, therefore, as the case goes, it is an authority rather for the defendants than for the plaintiffs.

H The next case that seems relevant is *R. v. Eccles* (33), before LORD MANSFIELD and the Court of King's Bench. The defendant and six other persons had been convicted on two counts, charging that the defendants and others, devising unlawfully and by indirect means to impoverish one Booth, and to hinder him from exercising the trade of a tailor, conspired by wrongful and indirect means to impoverish him, and to hinder him from exercising his said business; and the defendants, according to their said conspiracy, did so hinder him. It was moved, in arrest of judgment, that the means by which the mischief was to be effected ought to have been set out, but the indictment was held sufficient. The nature of the acts done by the defendants does not appear, nor is it easy to learn precisely on what principles the court proceeded. LORD ELLENBOROUGH in *R. v. Turner* (34) said that the case seemed to have been determined on the ground of restraint of trade, in which case it would probably be no authority since the legislation of this reign with reference to trade unions. If regarded as an authority merely on the sufficiency of the indictments, it appears open to some question. In any event, it throws no clear light on the matter now for decision. *Cousins v. Smith* (23) is probably not applicable, since it proceeded on the view of a court of equity of forestalling

and regrating, and those practices are not now unlawful. The equitable shadow of these crimes must, I think, have disappeared from the crimes themselves. **A**

These are, so far as I am aware, all the relevant authorities, and none of them appears to me to support the proposition that mere competition of one set of men against another man, carried on for the purpose of gain, and not out of actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. For these reasons, I hold that the judgment of the Lord Chief Justice was right, and that the appeal should be dismissed with costs. **B**

## Re LACON. LACON v. LACON

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), April 20, 21, 1891]

[Reported [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429;  
39 W.R. 514; 7 T.L.R. 457] **C**

*Portions—Double portions—Presumption against—Need for both gifts to be in nature of portions—Rebuttal of presumption—Circumstances showing that earlier gift not intended as advancement.*

For the presumption to arise of the satisfaction by a gift by father to son inter vivos of a legacy given by the father to the son by his will both gifts must be in the nature of a portion, e.g., a gift given to establish the son in life. If both gifts are in the nature of portions, the presumption arises that the father intended that the gift inter vivos should be an advancement of the gift subsequently given by the will, a presumption which, it is said, is made in favour of equality among children. That presumption (which, per LINDLEY, L.J., is not a very strong one) is rebutted where the circumstances of the case show that the gift given during lifetime was not intended as an advancement of the bequest. **D**

Per BOWEN, L.J.: Where there is a substantial and material difference between a gift inter vivos and a gift under the will the courts have abstained from treating one as an advancement in respect of the other. **E**

**Notes.** Considered: *Re Scott, Langton v. Scott*, [1900-3] All E.R.Rep. 221; *Re Hayward, Kerrod v. Hayward*, [1957] 2 All E.R. 474. Referred to: *Re Dawson, Swainson v. Dawson*, [1918-19] All E.R.Rep. 866; *Re Vaux, Nicholson v. Vaux*, [1938] 2 All E.R. 177; *Re George's Will Trusts, Barclays Bank v. George*, [1948] 2 All E.R. 1004. **F**

As to satisfaction and ademption, see 14 HALSBURY'S LAWS (3rd Edn.) 598 et seq.; and for cases see 20 DIGEST (Repl.) 472 et seq. **G**

Cases referred to:

- (1) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 34 E.R. 271; 20 Digest (Repl.) 487, 1961.
- (2) *Shudal v. Jekyll* (1743), 2 Atk. 516; 26 E.R. 710; 20 Digest (Repl.) 487, 1955.
- (3) *Watson v. Earl of Lincoln* (1756), Amb. 325; 27 E.R. 218, L.C.; 20 Digest (Repl.) 480, 1862.
- (4) *Taylor v. Taylor* (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 23 W.R. 719; 20 Digest (Repl.) 482, 1898.
- (5) *Pym v. Lockyer* (1841), 5 My. & Cr. 29; 10 L.J.Ch. 153; 5 Jur. 620; 41 E.R. 283, L.C.; 20 Digest (Repl.) 477, 1840. **H**

Also referred to in argument:

*Re Lawes, Lawes v. Lawes* (1881), 20 Ch.D. 81; 45 L.T. 453; 30 W.R. 33, C.A.; 20 Digest (Repl.) 497, 2061. **I**



- A** *Bengough v. Walker* (1808), 15 Ves. 507; 33 E.R. 847; 20 Digest (Repl.) 497, 2060.  
*Re Vickers, Vickers v. Vickers* (1888), 37 Ch.D. 525; 57 L.J.Ch. 738; 58 L.T. 920; 36 W.R. 545; 20 Digest (Repl.) 497, 2063.  
*Watson v. Watson* (1864), 33 Beav. 574; 55 E.R. 491; 20 Digest (Repl.) 487, 1964.
- B** *Roome v. Roome* (1744), 3 Atk. 181; 26 E.R. 906; 20 Digest (Repl.) 481, 1882.  
*Russell v. St. Aubyn* (1876), 2 Ch.D. 398; 46 L.J.Ch. 641; 35 L.T. 395; 20 Digest (Repl.) 501, 2096.  
*Montefiore v. Guedalla* (1859), 1 De G.F. & J. 93; 29 L.J.Ch. 65; 1 L.T. 251; 6 Jur.N.S. 329; 8 W.R. 53; 45 E.R. 294, L.C. & L.JJ.; 20 Digest (Repl.) 479, 1854.
- C** *Lord Chichester v. Coventry* (1867), L.R. 2 H.L. 71; 36 L.J.Ch. 673; 17 L.T. 35; 15 W.R. 849, H.L.; 20 Digest (Repl.) 472, 1814.  
*Re Pollock, Pollock v. Worrall* (1885), 28 Ch.D. 552; 54 L.J.Ch. 489; 52 L.T. 718, C.A.; 20 Digest (Repl.) 494, 2028.  
*Davys v. Boucher* (1839), 3 Y. & C.Ex. 397; 3 Jur. 674; 160 E.R. 757; 20 Digest (Repl.) 497, 2056.
- D** *Backwell v. Child* (1755), Amb. 260; 27 E.R. 173, L.C.; 44 Digest 409, 2408.  
*Weall v. Rice* (1831), 2 Russ. & M. 251; 9 L.J.O.S.Ch. 116; 39 E.R. 390; 20 Digest (Repl.) 495, 2040.  
*Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch.D. 363; 47 L.J.Ch. 849; 39 L.T. 113; 26 W.R. 874, C.A.; 20 Digest (Repl.) 501, 2099.  
*Lady Thynne v. Earl of Glengall* (1848), 2 H.L.Cas. 131; 12 Jur. 805; 9 E.R. 1042, H.L.; 20 Digest (Repl.) 500, 2095.
- E** *Schofield v. Heap* (1858), 27 Beav. 98; 28 L.J.Ch. 104; 32 L.T.O.S. 114; 4 Jur.N.S. 1067; 54 E.R. 36; 20 Digest (Repl.) 483, 1901.

**Appeal** from a decision of ROMER, J., in an action for a declaration.

**F** By his will, dated Dec. 22, 1884, Sir Edmund Henry Knowles Lacon devised and bequeathed all his parts or shares, estate and interest of and in the trade or business of a brewer, then carried on by him in Great Yarmouth, the city of London, and elsewhere, in copartnership, under the style or firm of "Sir Edmund Lacon & Sons, the Great Yarmouth Brewery," and of and in all messuages, tenements, beer-houses, public-houses, buildings, lands, and other hereditaments of every tenure, whereon such trade or business should at the time of his death be carried on, or

**G** which should then belong to the copartnership (with certain immaterial exceptions), and of and in all the engines, machinery, fixtures, and all other effects and things which at the time of his death should be used in the business, and the goodwill and book-debts, unto his sons, Thomas Beecroft Ussher Lacon, Henry Sidney Hammett Lacon, and Ernest de Montesquieu Lacon, in equal shares, as tenants in common. At the date of his will the testator was entitled to twenty-one equal

**H** twenty-fourth shares in the copartnership business. From 1874 Ernest Lacon was actively employed in the London branch business at a salary, but his two brothers were not engaged in the business in any way. In 1884, on the death of the manager, he became manager at a salary of £1,000 a year. The business having increased, and with it the duties and responsibilities, Ernest Lacon applied to his father, the testator, for an increased salary. To this the testator at first made no

**I** response, but in 1886, after the death of one of the partners, the testator informed his son that a fresh partnership arrangement was in contemplation, and that he should be admitted as a partner, and receive two equal twenty-fourth shares upon such admission.

Ernest Lacon assented to this, and signed the new articles of partnership, dated Dec. 19, 1887. He also refunded to the partnership the salary received by him from September, 1886, to September, 1887. The articles of partnership contained a recital to the effect that the testator had assigned or made over two of his twenty-one shares to Ernest Lacon, and, although no deed of assignment was actually

executed, he was credited with those two shares in the partnership books, and duly received a corresponding proportion of the net profits upon the yearly division of profit. This proportion largely exceeded his former salary. In 1889 the testator died, without having altered his will, and thereupon this action was brought by Thomas Lacon against Ernest Lacon, Henry Lacon, and Edward P. Youell (an executor of the will). A

By his statement of claim the plaintiff submitted that, by the assignment and taking over of the two shares, in 1887, the gift in the will to the defendant Ernest Lacon was adeemed to the extent of such two shares, and he was only entitled to five of the testator's remaining nineteen shares. The plaintiff claimed a declaration that he was entitled to seven nineteenth shares. By his defence Ernest Lacon stated that the two shares were intended to be a remuneration for his services as acting partner, and not as an advancement by way of portion; that there was an actual purchase for value of the two shares from the testator; and, that, therefore, there could be no case of ademption. In 1891 ROMER, J., decided that the defendant, Ernest Lacon, did not become a purchaser for value of the two shares which he obtained on being admitted a partner, but that they were a gift to him from the testator. In his Lordship's opinion there was nothing in the case to rebut the presumption against double portions to which the circumstances gave rise. The plaintiff was, therefore, entitled to the declaration for which he asked. The defendant, Ernest Lacon, appealed. B

*Rigby, Q.C., Neville, Q.C., and Begg* for Ernest Lacon. C

*Sir Horace Davey, Q.C., and Borthwick* for Thomas Lacon. D

*Haldane, Q.C., and P. S. Gregory* for Henry Lacon. E

*E. S. Ford* for E. P. Youell.

**LINDLEY, L.J.**—The question raised by this case is one of importance, and one of difficulty. It is in form an appeal from a decision of ROMER, J., making a declaration to the effect that the shares in the brewery which have been referred to, are divisible in sevenths. The defendant, Mr. Ernest Lacon, contends that he is entitled to eight and a third shares, and two of his brothers to six and a third shares each. F

The point depends upon what is called the presumption against double portions. Before going into the facts, I may state at once what that doctrine is. I cannot do better than read the judgment of LORD ELDON in *Ex parte Pye* (1). He says this (18 Ves. at p. 151): G

"Without going through all the cases that were cited and those referred to in them, having compared the case in ATKYNS [*Shudal v. Jekyll* (2)] with manuscript notes of that case and looked into some other cases, one in AMBLER [*Watson v. Earl of Lincoln* (3)], and some earlier, I may state, as the unquestionable doctrine of the court, that where a parent gives a legacy to a child not stating the purpose with reference to which he gives it, the court understands him as giving a portion; and, by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part." H

He goes on to say what has been done in some of the cases. I

What we have to consider are, first, the will of the late Sir Edmund Lacon, and, secondly, some partnership articles which were entered into by him, after the date of his will, and the circumstances under which those articles were entered into. What we have to see is whether this is a case in which there are two portions, and also whether, assuming that there are two portions, and assuming, therefore, that the presumption to which I have referred arises, there are, or are not, circumstances in this case which rebut that presumption. The will I can run through shortly, for

**A** nothing turns upon the construction of it. The testator had four sons and two daughters. He had two businesses. He had a banking business at Norwich and at Yarmouth, and he had a brewery business at Yarmouth. He leaves his banking business (besides other property to which I need not refer) to his eldest son, the present baronet, of whom I need say nothing more. He leaves his brewery business, in which he had twenty-one out of twenty-four shares, to his younger children, Thomas, Henry, and Ernest. He then, after making various bequests in favour of his daughters and so on (which I pass over), bequeaths the residue of his property among all his children. That is the general scheme of the will. To use LORD ELDON's language in *Ex parte Pye* (1), there is nothing in the will which enables us to say the purpose for which these brewery shares were given to the three sons. In 1884 the third son, Ernest, was being brought up to the brewery business. He was being trained by his father to attend to that business, with a view ultimately, no doubt, of becoming a partner in it. The same observation is not true of the eldest son. It is not true of the two intermediate sons. It was the youngest son, and the youngest son alone, who was brought up to this business. Having, I suppose, become useful he was paid a salary of £500 a year.

**B** In 1887 his salary was £1,000 a year. In that year it was considered desirable that some modifications should be made in the partnership in the brewery business. There had to be modifications as regarded the provision for Mr. Nightingale, one of the partners, and it appears from the evidence that the son Ernest was urging his father to increase his salary. That salary was not paid by the father. It was paid by the firm, though, of course, the father (having so large a share in the business) was the principal paymaster. It seems from the evidence which we have **E** (which is the evidence of Mr. Ernest Lacon and also the evidence of Mr. Waters, the testator's solicitor) that there was a discussion—perhaps, however, it would be hardly right to call it a "discussion" because the father seems to have held his tongue; being a very reticent man, he did not discuss much, but he listened to the statements made by Ernest, and he so far acquiesced that upon one occasion, when Ernest was pressing his father for an increase of the allowance, his father said, "I have made you a partner." **F** The evidence of Mr. Waters, the solicitor, tends to show conclusively that what the father was doing, among other things, unquestionably was to increase the allowance to his son Ernest. He thought at one time he would do that sufficiently by giving him one share (Mr. Waters tells us that), and then he changed his mind and told Mr. Waters he would give him two shares. Then there was a question as to what the effect of that would be upon the allowance. That question arose by reason of a **G** query put into the draft by Mr. Nightingale's solicitor as to Mr. Nightingale's allowance. The matter as to Mr. Ernest Lacon's allowance was brought to the father's attention, and he said at once: "The allowance will have to be given up. The shares are in substitution for that."

**H** So it came about that, in 1887, Mr. Ernest Lacon ceased to be a salaried clerk or assistant, or whatever he was, in the concern, and became a partner in respect of two twenty-fourth shares which had been given him by his father. They were not contributed by the other partners; they came out of the father's twenty-one twenty-fourth shares. The partnership articles recite the arrangement in this way. Then they recite an agreement (this is common form) that a partnership should be constituted between the parties thereto; and the value of the two shares given to **I** Ernest is stated at the sum of £21,500. That is the capital sum, the sum at which these two shares are to be treated in the books, I suppose. We have the usual partnership articles between the partners, and there is nothing of any importance that I know of until we come to cl. 28. The son who is taken in is bound to attend to the business and devote his whole time to it. That is more or less common form, and then cl. 28 is addressed to the introduction by the father of his sons or legatees as partners under his will. It provides:

"if any partner shall die during the continuance of the partnership his executors



or legatees shall be at liberty, within four months, to give notice in writing of their intention to discontinue the partnership."

If, however, the executors, administrators, or legatees of a deceased partner shall desire to continue in the partnership, or shall not give notice to discontinue they shall be and be considered as partners and be admitted partners into the partnership

"in the place of the deceased partner, and in respect of his share and interest therein, upon the terms of these presents so far as the same shall be applicable to the altered circumstances then existing, and so that the new partners or partner admitted under this clause shall have all the rights and powers of the deceased partner in whose place they or he shall be substituted (save and except that they or he shall not be acting partners or partner without the consent of the other partners or partner), and the share and interest of the deceased partner and the share of profits coming to such new partners (if more than one) shall be divided amongst such new partners in shares and proportions as they may be entitled thereto, and may mutually agree upon."

There is a proviso that

"every partner admitted under this clause shall execute a deed covenanting with the other partners or partner for the time being jointly and separately to perform and observe the provisions of these presents so far as the same shall be applicable."

A further proviso provides that, if the surviving partners or partner refuse

"to admit into partnership as acting partners or partner the executors, administrators, or legatees of the deceased partner claiming admission under the clause, then the said executors, administrators, or legatees shall have the option, to be exercised in manner hereinafter mentioned, within two calendar months after such refusal, of purchasing the shares and interest of the surviving partners or partner in the capital and assets (including the goodwill) of the partnership."

It is a very curious clause.

What is the effect of that? The effect is that it was competent for the testator to bequeath his shares to anybody he liked—to sons or to anybody else, that the legatees should thereupon be at liberty to become partners, and that if they became partners they would be bound to attend to the business unless the survivors said that they should not. It is not intended that these legatees could become partners and escape the duty and burden of working as acting partners. The option of working or not working would not be on them, but on the survivors. Ernest Lacon is certainly given rights under this deed as a partner admitted under the deed which he would not have, and which his brothers would not have, if they were claiming simply under the will. About eight or nine months after this the testator died without having altered his will. Upon the will and the deed Ernest Lacon's position is unassailable. He has got two shares under the deed. He has got under the will one-third of all the remaining shares of his father. As a matter of construction there is no difficulty about it and no controversy about it. But then comes in the presumption against double portions, and his brothers say that, by reason of the presumption against double portions, Ernest Lacon must treat the two shares which their father gave him in 1887 as given him in anticipation of and on account of and in part satisfaction of the seven shares which he would have taken, and which they would all have taken, if no provision had been made for him. That rests upon the presumption.

On the question whether these two provisions—the one by the will and the one by the deed—are portions, it appears to me that there is very considerable difficulty in saying that they are not. Certainly the purpose for which a provision is given is important, as appears from the language of LORD ELDON in *Ex parte Pye* (1). I think that what the learned lord said about "purpose" in considering the nature

A of a provision by will is a point reasonably applicable to a provision made by a deed, instrument, or will. But, assuming that these two provisions are both portions (and having regard, as I have said, to the language used in the cases upon this subject, and especially of SIR GEORGE JESSEL, M.R., in *Taylor v. Taylor* (4), I shall assume that they are portions), the question then arises whether there is or is not, under the circumstances of this case, enough to rebut the presumption  
B that these shares are to be taken as given on account of and in anticipation of and in part satisfaction of what otherwise would have been taken if they had not been given by the testator in his lifetime.

Here we differ from ROMER, J. We think that the circumstances here are peculiar; and we think that there are circumstances sufficient to indicate not simply an intention on the part of the father to anticipate the provision which he  
C had made to one of his sons, but an intention and desire to prefer that one son to the others, not only in point of time but in point of the provision and the nature of the provision which he was making. It is, to my mind, very significant that this son alone had been brought up in the business. It is very significant that this provision was made for that son when he was asking for a further advance of salary. As Mr. Water's evidence and Ernest Lacon's own evidence (though, of course, that must be taken as interested evidence) goes to show, it was one method of increasing his allowance. It was not simply giving him now what he would have when his father died. It was something very different. It was that and a great deal more. When we consider that it was to the advantage of the family that one son at all events should be brought up in the business and be there when his father  
E died and ceased to be a partner, it appears to me that there is amply enough for us to say that the presumption (which is not a very strong one) is rebutted, and that, looking at what was done in 1887 and the reasons which brought about what was done, the purpose which the testator had in his mind, or apparently had when he re-cast those partnership articles in 1887, was deliberately to prefer Ernest not only in point of time but in point of amount also. I think, therefore, that the  
F appeal ought to be allowed.

**BOWEN, L.J.**—The question we have to decide is whether it was the intention of the father that the two shares which were received by Ernest Lacon during his father's lifetime should be received by him as an advancement against the shares which he was to receive under the will on the father's death. In order to establish  
G that intention the plaintiff has invoked what is called the doctrine of double portions—a doctrine which is, no doubt, originally judge-made, and is established by this court, but respecting which I should be the last person to endeavour to introduce any subtle or frivolous distinction. The doctrine, so far as it applies to a case of this peculiar character, seems to me to have been made clear to the world by the judgment of LORD COTTENHAM in *Pym v. Lockyer* (5), which I will read  
H because it will make the few remarks that I am about to offer perhaps clearer than they otherwise would be. This I take substantially to be the law. LORD COTTENHAM says (5 My. & Cr. at p. 46):

“A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each,  
I but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced.”

To establish a case for the application of this rule as to double portions, there must be two matters made out, and it will be seen upon analysis that there are two presumptions which are applied, and not one. In the first place, both of the gifts or donations must be gifts, and gifts in the nature of a portion. The first presumption here arises. It is said that whatever gifts are made by the father which it may be supposed will have to be distributed among the children or are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have here to ask ourselves, in the first place, whether these two shares which were received by Ernest Lacon during the lifetime of his father were received under such circumstances as to justify their being treated and considered as a portion. But supposing both are gifts in the nature of portions, then comes a further question for the solution of which a further presumption is invoked. That question is whether it is intended that the former gift or portion shall take the place of an advancement of the gift which is given by the will. There the presumption which is invoked to answer the question is that the former gift, the gift *inter vivos*, is intended as an advancement *pro tanto* of the gift under the bequest. That is a presumption which, it is said, is made in favour of equality among children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend. This is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest. Circumstances may show—to put it slightly differently—that equality was not the intention of the father.

The two questions, first, whether the gifts are both given in the way of portions, and, secondly, whether it was intended by the father that the first gift should be an advancement in satisfaction of the second, may well run together, and be blended together; and, in my opinion, this is just the case in which they do. I myself am not satisfied, to begin with, that the former gift, the gift of the two shares—I call it a “gift” although perhaps the expression “gift” is not exactly an appropriate term—which was made by the father in his lifetime to Ernest Lacon was in the nature of a portion within the meaning of the rule. To my mind the circumstances of the case displace the notion that the father here was giving them simply by way of advancement to the son. Secondly, I think (for reasons which I will give in a moment) that here in every view the presumption in favour of equality is rebutted by the circumstances of the case. The circumstances show that the gift given during the lifetime was not intended as an advancement of the bequest. The son had been thirteen years in the firm, at first in a subordinate position, and afterwards as the manager of the London business, receiving as salary £1,000 a year. He had acquired experience, and he had earned confidence. He had become a person in 1887 unquestionably of use and value to the firm. He was a person who, if he had not been a son, might have dreamed, at all events not unreasonably, of in time, and at no very distant time, being promoted to a share in the business of the firm. In 1887 he wished for an increase of salary, and was in such a position that he could press it upon his father. Doubtless he would also look to be a partner at some time or another in the house.

A person in that position, who in the business of his father has done service and substantial service, might well, if a favourable view was taken of it, be rewarded with a share or shares. When Ernest Lacon received the shares from his father he received what, perhaps, his father would have given with much more hesitation, or which, perhaps, he would not have given at all, if the relationship of father and son had not existed. He received what can hardly be characterised as mere bounty. It is not a pure gift, although the element of free liberality enters into it. He may, perhaps, be given more than he deserves, but he deserves something. It is a portion in the sense that it is a provision which the father would not have made if the recipient had not been his son. But it is a portion which has in part been earned by previous services, and which is intended of course to be justified by services in the future. I doubt whether, under such circumstances, it would be



**A** safe to say that the two shares which are bestowed upon the son were simply a portion.

But the further question remains whether, assuming the two shares to be a gift in the way of a portion, we can see reason sufficient to displace the presumption of double portions. In other words, whether there is not a reason here from which we may safely infer that the gift of the two shares was not intended as an advancement pro tanto of the bequest. These shares were active shares; they were shares which actually gave the son a veto upon introduction at a later date, the period of which was perfectly uncertain and which might be delayed for years, of his other brothers. He had a grant of power and place given to him in the firm of a kind wholly incommensurate with the gift which he was to receive under the will. That grant and gift to him, treating it as a grant and gift, to my mind being wholly incommensurate with the gift under the will, is coloured with such a difference as to render it impossible for us to presume with safety that the gift of the shares was intended in any way to be an advancement towards the bequest. It seems to me to be exactly upon that kind of reasoning the courts have abstained, when there is a substantial and material difference between a gift inter vivos and a gift under the will, from treating one as an advancement in respect of the other. The doctrine of double portions must be applied faithfully wherever it is found to be equitable; but, on the other hand, it is not to be extended. The circumstances of this case convince me that the dealing between the father and the son in the year 1887 was not intended in any way by the father to be an advancement towards what the son was to receive under the will, and that it was not intended as a part performance of the distribution which the will was designed by the father to make of what the father should leave at his death. Upon these grounds I agree that the judgment of the learned judge of the court below ought to be reversed, although, like LINDLEY, L.J., I agree in thinking that this is a very delicate and difficult case, and I am not surprised that judges should not be of one mind upon the subject.

**KAY, L.J.**—The question is: What was the intention of the father in this case? Did he intend, when he made this gift (if it is to be called a gift) to his youngest son in his lifetime, that it should be taken as an anticipation of the provision that he, at that time, had made by the will, which ultimately became operative on his death? There is a rule which has been referred to which is a guide where you can have no other guide, in order to find out what the intention was. The rule is that, if there are two provisions, the one made by the will and the other in the lifetime of the testator, or what, in equity, are ordinarily called "portions," then arises the presumption that one portion is made in part satisfaction of the other. If that presumption arises and is not rebutted, the donee has to bring into hotchpot that portion which he received in his lifetime, and in that way deduct it from that which he otherwise would take under the will.

By this will it is quite clear. I think, that the provision which was made for this and the other younger sons by dividing among them the testator's share and interest which he might have at his death in his brewery business, was in the nature of a "portion" for each of those children. I take it that, for the purpose of determining that question, a "portion" means such a share of the father's personal property as he intends to be a provision for that son, or, as in this case, a substantial part of the provision for that son. The will was conceived in this way so far as these younger sons are concerned. The shares which the testator might have at his death in the brewery business, and in the property comprised in that business, were to be divided equally among them. Besides that, there was a certain share of the residue of the testator's property given to each, and also their names came in with a series of limitations of strict settlement of the testator's real estate. Still, I do not doubt myself that these shares of the business (which seems to have been a valuable and extensive business) were such a substantial part of the provision made for the younger sons that a gift among them may properly be considered as coming within the definition of "portions" for those children.

The next question is: Was the gift made of two twenty-fourth shares in that same business by the testator in his lifetime to his youngest son, Ernest, a provision by way of portion? On that subject, I confess I have the same doubt which the other members of the court have expressed. One must look carefully at the circumstances under which that provision was made, and what presses very much upon my mind is that this youngest son had been for thirteen years engaged as a clerk and ultimately as a salaried manager of the London branch of that brewery business. Before this gift (if it be, I repeat, a "gift") of the shares was made to him, he went to his father and pressed him, not for a share in the partnership, but for an increase in his salary. The father, it is said, was a very reticent man, and this application was renewed at different times, and on one occasion when the conversation took place he asked his son to visit him at his country house, evidently for the purpose of renewing the conversation, and in order that he might have an interval in which to make up his mind as to what he should do. The son did visit his father at his country house, and he details (and there is no attempt at contradiction of what he says) what took place between him and his father. According to his description his father certainly on that occasion maintained his character for reticence; but the son pressed him very much that his salary should be increased, and the father told him that he had come to the determination—I am not attempting to quote the precise words—instead of increasing his salary to give him two twenty-fourth shares in the business, and to make him an acting partner. The father indicated that that should take effect as from a date which had passed (I think fifteen months before), and that the son was to bring into account the salary which he had received in the meantime, taking a share of the profits from that back date.

That was the arrangement which the father made with the son in answer to repeated pressure from the son that he should have a larger remuneration for his work as manager of the business. To my mind, that indicates plainly that the father was satisfied that the son had become a valuable manager of a part of the business; that he evidently desired to comply with the son's request, and something more, because the profits of the shares which he gave amounted to a larger amount than the son expected or was asking for; and that he did so for the purpose of encouraging the son to carry on the management of the business and to be an acting partner in it. The father evidently considered that that was very much for the advantage of the business.

Let us consider what the effect of that was. What was done was this. A new deed of partnership was executed, and the other partners made no kind of objection to the same, and these two twenty-fourth shares were given to the son by diminishing to that extent the shares which the father had in the business. So that practically they came out of the father's own shares. There was an advantage in making this arrangement to the other partners because it relieved them of the payment of the salary which the business up to that time had been paying the son. From the time when this arrangement was made the remuneration of the son was in fact paid by the father, because the father handed over to him, as I have pointed out, two of his own shares. If the father was right—and I cannot for one moment doubt that he was right—in giving every possible encouragement to this son to continue as an acting partner in the business, then he was doing the best thing he could do for the objects of his bounty mentioned in his will, because he was doing what he thought was the best thing to do to secure that the business should be so carried on that at the time of his death it should be as valuable or more valuable—and probably it was—than it was at the time when he admitted the son into this partnership.

I am not satisfied that that is fairly to be considered a gift in the nature of a portion. SIR GEORGE JESSEL, M.R., as has been pointed out, attempted something like a definition in the case of what amounted to a portion within the meaning of the advancement clause in the Statute of Distributions. He held in that case that small sums of money did not amount to advancement for that purpose. But

**A** whether his definition applies to a case of this kind or not, I confess I think it would be a dangerous thing to say that in a case of this kind such a benefit given to the youngest son of the testator in the testator's lifetime was a gift of such a nature as to raise the presumption of double portions. Without expressing any final opinion, or saying more than that I seriously doubt that, I will proceed to the next question. If by any proper use of language this can be called an advancement by way of portion, then we have to consider whether the presumption that would arise that it was given in part of the provision which had been made by the father's will is or is not rebutted.

As I began by saying, it all comes round to this: What, on the whole of these facts, must be considered to have been the intention of the testator? Was it his intention to put this son, who was a skilled manager of the business and had learnt it by some thirteen years' experience, when he was admitted as a partner in the father's lifetime in consideration of that skill which he had shown, in a somewhat better position than the other younger sons of the testator in respect of the business? I cannot divest my mind of the conviction that the more reasonable conclusion is that the testator did intend, in consideration of the experience which he had of the son's capabilities in carrying on an important part of the business, to put him in a somewhat better position in respect of his interest in the business than the other younger children, who had never taken any part in the business at all. Observe (and it is important to observe) that the other younger children are all older than this youngest son, yet they were not admitted into the business during the father's lifetime at all. They were not experienced in the management of the business in any way. Why they were not does not appear. It may have been from some disinclination on their part, or it may have been because the father wished them not to take part in the business. Of that I know nothing, but the fact remains, that here it appears that the one brother was a skilled manager in the business, and the others, who are now seeking to invoke this doctrine of double portions against him, were not skilled managers in the business at all. It seems to me that, in respect of that fact that he was a skilled manager of the business, it is right and reasonable to suppose that the father intended that he should have this advantage which he gave to him in the father's lifetime.

I cannot help being moved a little by the consideration—though that of course by itself would not be enough to rebut the presumption—that the father never attempted to make any alteration in his will. There is a good deal to be said for the argument that those who are now insisting that the doctrine of double portions applies are trying to introduce it to alter the natural effect of the admission of this man as a partner in his father's lifetime and the provision made by the will. For all these reasons I agree with the other lords justices. I think that this is a case in which, if that doctrine applied at all—as to which I have said I have considerable doubt—it is completely rebutted when we examine carefully all the circumstances of the case, and that, therefore, Ernest, the son in question, is not bound to bring into hotchpot or account for the two twenty-fourth shares which he took in this partnership during his father's lifetime.

Solicitors: *Grover & Humphreys; W. Taylor; Maples, Teesdale & Co. for G. B. Kent, Norwich; Robins & Co.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]



A

## HANFSTAENGL v. BAINES &amp; CO. AND ANOTHER

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten and Lord Shand), December 8, 17, 1894]

[Reported [1895] A.C. 20; 64 L.J.Ch. 81; 72 L.T. 1;  
11 T.L.R. 181; 11 R. 88]

B

*Copyright—Infringement—Paintings—Tableaux vivants representing pictures—Publication of sketches of tableaux vivants—Rights of owner of copyright in pictures—Fine Arts Copyright Act, 1862 (25 & 26 Vict., c. 68), s. 1.*

C

The manager of a theatre exhibited on the stage tableaux vivants, which were grouped and dressed in imitation of certain pictures, of which the copyright was in the appellant. The respondents, the proprietors and publisher of an illustrated newspaper, published sketches of the tableaux exhibited at the theatre.

D

**Held:** the sketches were not copies of the appellant's paintings, or of the design thereof, within s. 1 of the Fine Arts Copyright Act, 1862.

Per LORD WATSON: The idea created by a painting is something different from the design, and is not within the protection of the statute.

**Notes.** The Fine Arts Copyright Act, 1862, has been repealed. Copyright in paintings is now regulated by the Copyright Act, 1956, s. 3.

Considered: *Bolton v. Aldin* (1895), 65 L.J.Q.B. 120; *Hanfstaengl v. Smith*, [1905] 1 Ch. 519; *Bradbury, Agnew & Co. v. Day* (1916), 32 T.L.R. 349; *McCrum v. Eisner* (1917), 87 L.J.Ch. 99; *Chabot v. Davies*, [1936] 3 All E.R. 221. Referred to: *Boosey v. Whight*, [1899] 1 Ch. 836; *King Features Syndicate Inc. v. O. and M. Kleemann, Ltd.*, [1941] 2 All E.R. 403.

E

As to imitation of an idea and as to infringement by a tableau vivant of copyright in a painting, see 8 HALSBURY'S LAWS (3rd Edn.) 425, 426, 428; and for cases see 13 DIGEST (Repl.) 111. For the Copyright Act, 1956, s. 3, see 36 HALSBURY'S STATUTES (2nd Edn.) 76.

F

Case referred to:

(1) *West v. Francis* (1822), 5 B. & Ald. 787; 1 Dow. & Ry. K.B. 400; 106 E.R. 1361; 13 Digest (Repl.) 123, 632.

Also referred to in argument:

G

*Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1; 62 L.J.Q.B. 347; 68 L.T. 676; 57 J.P. 407; 9 T.L.R. 390; 37 Sol. Jo. 510; 5 R. 358; 13 Digest (Repl.) 103, 443.

*Ex parte Beal* (1868), L.R. 3 Q.B. 387; 37 L.J.Q.B. 161; 32 J.P. 628; sub nom. *Beal v. Graves*, *Ex parte Beal*, 9 B. & S. 395; sub nom. *Graves v. Beal*, 18 L.T. 285; 16 W.R. 852; 13 Digest (Repl.) 110, 521.

H

*Turner v. Robinson* (1860), 10 L.Ch.R. 510; 13 Digest (Repl.) 112, \*133.

*Dicks v. Brooks* (1880), 15 Ch.D. 22; 49 L.J.Ch. 813; 43 L.T. 71; 29 W.R. 87, C.A.; 13 Digest (Repl.) 113, 548.

**Appeal** from an order of the Court of Appeal (LINDLEY, LOPES and DAVEY, L.JJ.), reported [1894] 3 Ch. 109.

The appellant, Hanfstaengl, a fine art publisher and dealer in works of art carrying on business in Munich, London and elsewhere, appealed from a decision of the Court of Appeal discharging an order of STIRLING J., granting him until trial of the action or until further order, an injunction restraining the respondents, E. Baines & Co. and E. J. Mansfield, the proprietors and publisher of the "Daily Graphic," from copying or colourably imitating or from printing, selling or exhibiting copies of certain of the appellant's copyright pictures and ordering (the appeal being treated by consent as the trial of the action) that the action should stand dismissed as against the respondents.

I

- A The pictures were first published in Munich after the conclusion of the Berne Convention in 1887, and the appellant was entitled to the exclusive copyright therein throughout the German empire and he contended that, by virtue of the International Copyright Act, 1886, and of an Order in Council made thereunder in 1887, he was entitled to the exclusive copyright in the works in the United Kingdom. The Empire Palace, Ltd., presented in their music-hall on the stage
- B within a solid gilt picture-frame representations of various pictures, the figures in which were living persons, the scenery being painted on canvas. The appellant alleged that these representations were copies of his pictures, and as such constituted an infringement of his copyright, and that the "Daily Graphic," in publishing sketches of such representations, had also infringed his copyright. The following questions were argued before STIRLING, J.: (i) whether the appellant, not being
- C registered as the proprietor of the pictures in this country, could maintain the action; (ii) whether, assuming him to be entitled to the copyright in the pictures, the extent of that right was to be determined by German or English law; and (iii) whether what the respondents had done was an infringement of the appellant's copyright under either the English or the German law, who decided all three points in favour of the appellant, and granted an injunction. The Court of Appeal reversed
- D the decision on the third point, holding that the sketches in the "Daily Graphic" were so rough and incomplete that they did not represent any of the artistic merits of the appellant's pictures.

*Finlay, Q.C., Scrutton and Jessel* for the appellant.

*Crackanthorpe, Q.C., Grosvenor Woods, Q.C., and Forman* for the respondents.

- E Their Lordships took time for consideration.  
Dec. 17, 1894. The following opinions were read.

**LORD HERSCHELL, L.C.**—The appellant is the owner of the copyright in certain paintings. An exhibition took place on the stage of the Empire Theatre of what were called living pictures. These were formed by living persons who had

F assumed the dress, attitude, and position of the figures to be found in the appellant's copyright paintings, and had been placed, as far as possible, in apparently the same surroundings. In short, the living picture was intended to be a representation of the artist's work. The respondents are the publishers of the "Daily Graphic" newspaper. They published, in their issue of Feb. 8, 1894, sketches of the living

G pictures, taken by one of their artists. These were accompanied by an account of the performance, and were intended to convey information, by pictorial means, of the entertainment to be witnessed at the theatre. The appellant complains that the sketches so published constitute an infringement of his copyright. STIRLING, J., came to this conclusion, but the Court of Appeal reversed his decision, and gave judgment for the respondents.

- H The copyright in paintings is regulated by the Fine Arts Copyright Act, 1862, which, by s. 1, confers the sole and exclusive right of copying, engraving, reproducing, and multiplying the painting and the design thereof, and, by s. 6, imposes a penalty on any person who shall, without the consent of the proprietor of the copyright,

- I "repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition or distribution, any such work, or the design thereof."

The appellant's counsel felt it difficult to say that the alleged infringement was a copy or reproduction or multiplication of the appellant's paintings, but they relied on the words "or of the design thereof." And I think that the appellant cannot succeed in this action unless he can show that the respondents have copied the design of some or one of his paintings. It is obvious that the appellant cannot successfully claim to have a monopoly of every treatment of such common subjects

as Love and Courtship, or Charity. I take these as examples. The paintings of which he alleges his copyright to have been infringed were all of this class, and it would be impossible to give the word "design," as used in the statute, so wide a meaning as to confer such a right as this. What is covered by that word must depend in each case upon the nature of the painting. A

The appellant puts his case in this way. The living pictures exhibited at the Empire Theatre were, he says, copies from the paintings of which he owns the copyright, and the sketches published in the respondents' paper were copies of these living pictures, therefore, they must be copies of the design, at least, of his copyright paintings. It is not accurate to say that the living pictures were copies of the paintings. It is admitted that the faces, at all events, were different. It is not shown that the countenances of the living persons who figured upon the stage bore any close resemblance to those depicted by the artist. In some cases this difference would be all-important. The skill of the artist might have been mainly devoted to this part of the picture, and the faces depicted might be of the very essence of the design. The other details might be so subordinated to these that even if a drawing showed some resemblance in other respects, yet, if the faces were different, no one would dream of saying that the one was a copy or reproduction of the other. On the other hand, there might be cases where the grouping of the figures and their accessories might be more important in comparison, and a change in the countenances represented might leave the design of the painting substantially the same. B C D

It must always be a question of fact whether what is complained of as an infringement is a copy of the design. I mention these merely as illustrations. It is impossible to lay down any hard-and-fast rule. I am far from saying that what is called a living picture might not be so arranged to represent an existing painting, that a photograph or drawing of the living picture would be a copy of the design of that painting. All I say is, that this must depend upon the character of the picture, and what is justly to be regarded as its design. E

It is not necessary to refer in detail to each of the sketches of which complaint is made. It is admitted that the one most favourable for the appellant's case is that representing "First Love." If he cannot succeed in showing that this picture infringes his copyright, it is out of the question that he should be entitled to relief in respect of any of the others. There is, no doubt, a resemblance between the sketch and the photograph from the painting. In each case a young man and a young woman are standing beside one another close to a stile or fence. In each case the woman is shading her head by a parasol, and the dress of the man is somewhat similar in the two. The idea suggested is, of course, the same; each represents "First Love"; but the idea of a young man courting a young woman at a country stile is of great antiquity. It has often formed the subject of pictorial representation. This cannot be said to be the design of the appellant's painting within the meaning of the Act. Much more must be comprehended than this. There can only be a copy of such a design if the treatment of the subject be the same. Comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the woman's hair is arranged is different; the dress, especially in the case of the woman, is different; the pose is different; the attitudes are different; the background is different, and, in the case of the sketch, the foreground is wanting. F G H

In the artist's design all these things play a part, and though I do not say that a variation in one or even more of these respects would prevent the sketch being a copy of the design, yet, comparing the two and considering the design of the painting as a whole, I cannot avoid the conclusion that the sketch is not a copy of the painting or of the design thereof, and, therefore, that there has been no infringement. It is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now before your Lordships. I have tried to indicate some of those which have led me to my I



A conclusion; but it depends really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it, or at least of its design. I think the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

B **LORD WATSON.**—The appellant has acquired the copyright of four pictures by foreign artists entitled “First Love,” “Loves me loves me not,” “Charity,” “Pets,” which he has reproduced and sold in this country as engravings or photographs, and he complains in this action that the respondents have published in the “Daily Graphic” certain sketches which he alleges to be copies or colourable imitations of these copyright works. In both courts below it was a matter of controversy whether under the Order in Council of Nov. 28, 1887, the appellant can claim the full privileges conferred by the Fine Arts Copyright Act, 1862. The judges of the Court of Appeal did not decide the point. They dealt with the case upon the assumption that the appellant was entitled to all the protection which is afforded by the Act, and they refused to grant an injunction, on the ground that none of the sketches complained of constituted an infringement of his copyright. The argument addressed to this House proceeded upon the same assumption; and I understand all your Lordships to be of opinion that the decision of the Court of Appeal is right.

The only question which your Lordships have found it necessary to determine appears to be mainly one of fact. It is, no doubt, necessary to ascertain the import of the statutory prohibition before considering whether it has been contravened; and so far legal construction may be involved. But the ascertaining of the statutory rule is, in my opinion, a very simple matter in comparison with the task of determining in some cases whether in point of fact one picture or drawing is a colourable copy or imitation, or represents the design of another. Section 1 of the Act of 1862 gives to the author of an original painting, drawing, and photograph, and his assigns, the sole exclusive right of “copying, engraving, reproducing, and multiplying such painting or drawing, the design thereof, or such photograph, and the negative thereof, by any means and of any size,” for the term of his natural life, and for seven years after his death. For the protection of the right thus conferred, s. 6 enacts penalties against any person who, not being the proprietor for the time being “of copyright in any painting, drawing, or photograph,” shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply “any such work, or the design thereof.” It will be noticed that the language of the statute expressly forbids not only copies and colourable imitations of the copyright works, but all reproductions of the design of such work. I do not doubt that the addition of the words relating to design was intended by the legislature to reach invasions of copyright which might possibly escape the imputation of being copies, or colourable imitations of the work itself, and yet appropriated and incorporated the substance of what is described as the design of the work.

H The possibility of laying down any canon which will afford in every case a useful test of what constitutes a copy or colourable imitation of the work or its design, is, in my opinion, very doubtful. At all events, it is much easier to arrive at what does not, than to define what does, constitute a proper test. Thus it is clear that the statute does not exempt copies or imitations which do not reproduce the artistic qualities of the original. A slavish copy of a picture or drawing may be utterly wanting in the artistic merit exhibited by the original; and a copy by an eminent hand may display merits which the original does not possess. But the one is as much prohibited as the other. The language of BAYLEY, J., in *West v. Francis* (1) comes nearer to a definition of what constitutes copying than anything which is to be found in the books. It runs thus (5 B. & Ald. at p. 743):

I “A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.”

He was construing for the purposes of the case before him the Prints Copyright Act, 1777, which differs in expression from the Act of 1862, and contains no reference to reproducing the design of the protected work. As I read the Act of 1862, the idea created by a picture or drawing does not necessarily form an element in the original work or its design, which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing, which is in no sense a copy, and does not borrow its design. To take by way of illustration the appellant's picture of "First Love," or his photograph of it, upon which reliance was chiefly placed, as showing, when compared with the respondent's sketch, an invasion of copyright. The idea conveyed by his copyright picture and photograph is simply love-making (why it should be called "First Love" is not very apparent), and the medium selected for its conveyance is a representation of two figures, male and female, standing in close proximity to each other, and to a rustic stile. It can hardly be seriously maintained that no other artist is at liberty, without the appellant's leave, to suggest the same sentimental idea by grouping together in the neighbourhood of a stile two individuals of opposite sexes, having no resemblance either in personality, dress, or attributes to the loving pair, who are the chief feature of the appellant's photograph.

In all cases where the alleged invasion is not a mere copy, the statute makes it imperative to consider how far there is an identity of design. But the design which the legislature had in contemplation is, to my mind, a very different thing from the idea created by the copyright work. So far as I can judge, the expression "design," as it is used in the statute, means nothing more than the particular forms and arrangements, whether of lines or colouring, which the copyright author has selected as the vehicle for conveying his idea to those who see his work. There may very well be—I can see no reason to doubt that there are—cases in which his design, and the idea to which it gives birth, are both of them so novel and exceptional that it would be difficult, if not impossible, for another author to create the same idea without trenching upon his design. When that occurs, the definition of *BAYLEY, J.*, might come very near the mark. But in cases where copyright is claimed for pictures or drawings which treat an old and common subject, such as love-making beside a stile, the privilege of the author must, in my opinion, be strictly confined to the particular design which he has chosen.

I refrain from applying these observations to the facts of the present case, because I accept without reservation the comments which have already been made by the Lord Chancellor. The respondents relied to some extent in their argument upon the fact that their sketches were not taken from the appellant's copyright works, but from scenes represented by living actors; and that they were merely intended to inform the public of what might be seen at the Empire Theatre. I agree with *LINDLEY, L.J.*, that the circumstance is one of the facts of the case which ought to be taken into consideration. It is clear evidence that the respondents had not the *animus furandi*. At the same time I am of opinion that it would not be available as a defence to the present action if it were shown that their sketches, intended to represent living pictures, were *de facto* either copies of the appellant's copyright works, or embodiments of their design. Having, however, come to the conclusion that these sketches are not copies, and do not reproduce the design of the works in question, I concur in the judgment which has been proposed.

**LORD ASHBOURNE.**—I concur. The question is largely one of fact. Are the sketches in the "Daily Graphic" such copies of the pictures of the appellant, or such reproductions of their designs, as are prohibited by the statute? I arrive clearly at the conclusion that they are not. We have had the advantage of seeing excellent photographs of the pictures, and also copies of the "Daily Graphic" with the sketches complained of, and with every opportunity, assisted by the able arguments of the appellant's counsel, of making comparison, I cannot regard

- A** the sketches as copies or reproductions of the designs. The subjects dealt with in the pictures are not special or exceptional. They deal with ideas as old as the world, and it would be impossible, as pointed out by the Lord Chancellor, to hold that the appellant could claim anything like a monopoly in every treatment of such common subjects. The idea of the representation at the Empire, as pointed out in the Court of Appeal, was no doubt suggested by the appellant's pictures, and
- B** the representation was made as exact as could be with such materials as were procurable. But ideas of such subjects are different from copies and designs, and the Lord Chancellor has pointed out many differences between the sketches and the pictures. Although an innocent intention would afford no defence if the protection given by the statute was clearly infringed, yet it is well to bear in mind that the sketches were intended to represent what could be seen at the Empire
- C** Theatre, and were not intended as copies or to reproduce the designs of the appellant's pictures. As a fact, I arrive at the conclusion that they are not such copies or reproductions.

- LORD MACNAGHTEN.**—I am of the same opinion. If the object of the Act of 1862 be, as I suppose it is, to protect the reputation of the artist, and to preserve
- D** intact the commercial value of the artist's work, it appears to me that the sketches in the "Daily Graphic" which are complained of are not within the mischief which the Act was designed to repress. They cannot, I think, by any possibility have any injurious effect on the artist's reputation, nor can they, I think, under any conceivable circumstances detract in the slightest degree from the commercial value of the artist's work or come into competition with it, or any
- E** reproduction of it. It is quite enough, as it seems to me, to place the sketches in question alongside of any photograph of the pictures of which they are alleged to be piratical copies. In these circumstances, in a case in which there has been no copying and no unfair use of anything which the artist can claim as his, I think it would be straining the Act unduly, and using it to no good purpose, if your Lordships were to hold the plaintiff as against the respondents entitled
- F** to any relief under the provisions of the Act.

- LORD SHAND.** I agree in thinking that the present appeal ought to be dismissed for the reasons which have been stated by your Lordships. It seems to me to be clear that a painting, drawing, or engraving may be a copy or reproduction of the work of another, though it has not been made directly from that
- G** work itself, but by the use of intermediate copies or other indirect means, such as the living pictures which were exhibited in the present instance, and were intended to give a close representation of the paintings, the copyright in which is assumed to belong to the appellant. Whether the particular painting or drawing complained of is a copy or reproduction of another picture "or the design thereof" is a question of fact, and it is not easy, if indeed possible, to formulate
- H** the considerations which must be taken into view in all cases in answering the question. The inquiry involves a comparison between two works. The idea of the original, the subject and treatment of it in all its details, the grouping and dress of the figures, in some cases the expression, as intended to convey feelings it may be of resignation, horror, pity, revenge, or the like, the background, and the accessories generally must be taken into account in the comparison to be
- I** made. In some cases, the peculiar and distinguishing feature of the work, the copyright of which is said to have been infringed, may be in the special nature of the subject, and its mode of treatment, apart from minor accessories of detail, which may be of a very subordinate character. All that can, I think, be said is, that the question of infringement of the right depends on the degree of resemblance, and must be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as



would lead one to say that the alleged infringement is a copy or reproduction of the original or the design, having adopted its essential features and substance. I concur in thinking that there are such essential differences between the sketches or illustrations complained of and the paintings belonging to the appellant, that the former cannot be regarded as copies or reproductions of the paintings or of their design. A

Appeal dismissed. B

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

### Re CLARK. Ex parte BEARDMORE C

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Davey, L.JJ.), May 4, 1894]

[Reported [1894] 2 Q.B. 393; 63 L.J.Q.B. 806; 70 L.T. 751;  
10 T.L.R. 459; 38 Sol. Jo. 492; 1 Mans. 207; 9 R. 498]

*Bankruptcy—Property available for distribution—After-acquired property—Bankrupt trading without knowledge of consent of trustee—Second bankruptcy—Right of trustee in first bankruptcy to property acquired in subsequent trading—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), ss. 44, 54.* D

An undischarged bankrupt, without the knowledge or consent of the trustee or creditors, carried on business, acquired property, and incurred liabilities. He executed an assignment of all his property to a trustee for the benefit of his creditors, and was again adjudicated a bankrupt upon that act of bankruptcy. An application was made to the court to determine how the debtor's assets at the time of the second adjudication were to be determined. E

**Held:** the trustee in the first bankruptcy was entitled to all the property acquired by the bankrupt since the first bankruptcy, without any obligation to satisfy any of the liabilities incurred by the bankrupt since the first bankruptcy. F

*Re Caughey, Ex parte Ford* (1) (1876), 1 Ch.D. 521, followed. G

*Cohen v. Mitchell* (2) (1890), 25 Q.B.D. 262, distinguished.

**Notes.** The Bankruptcy Act, 1883, ss. 44 and 54 (1), have been replaced by the Bankruptcy Act, 1914, ss. 38 and 53 (1), respectively.

Considered: *Hunt v. Fripp*, [1898] 1 Ch. 675. Distinguished: *Re Wilson, Ex parte Salaman, The Trustee v. Keith Prowse & Co.* (1925), 133 L.T. 814. Referred to: *Re Cullwick*, [1918] 1 K.B. 646; *Re Cohen, Ex parte Official Receiver*, [1919] 2 K.B. 271; *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *Re Pascoe, Ex parte Northumberland County Council v. Trustee* (1944), 170 L.T. 169. H

As to the estate taken by the trustee in bankruptcy and the position where there is a second or subsequent bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 421-422, 430, 432; and for cases see 5 DIGEST (Repl.) 792-793. For the Bankruptcy Act, 1914, ss. 38 and 53 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 373, 388. I

Cases referred to:

(1) *Re Caughey, Ex parte Ford* (1876), 1 Ch.D. 521; 45 L.J.Bey. 96; 34 L.T. 634; 24 W.R. 590, C.A.; 5 Digest (Repl.) 792, 6715.

(2) *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.)

- A** (3) *Meggy v. Imperial Discount Co., Ltd.* (1878), 3 Q.B.D. 711; 48 L.J.Q.B. 54; 38 L.T. 309; 42 J.P. 740; 26 W.R. 342, C.A.; 5 Digest (Repl.) 789, 6694.  
 (4) *Morgan v. Knight* (1864), 15 C.B.N.S. 669; 3 New Rep. 469; 33 L.J.C.P. 168; 9 L.T. 803; 12 W.R. 428; 143 E.R. 947; 5 Digest (Repl.) 1047, 8463.  
 (5) *Herbert v. Sayer* (1844), 5 Q.B. 965; 2 Dow. & L. 49; Dav. & Mer. 723; 13 L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex. Ch.; 5 Digest (Repl.) 1068, 8606.
- B**

Also referred to in argument:

- Re Roberts, Ex parte Watson* (1879), 12 Ch.D. 380; 41 L.T. 516; 28 W.R. 205, C.A.; 4 Digest (Repl.) 191, 1736.
- C** *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; sub nom. *Re New Land Development Association, Ltd. and Fagence's Contract*, 61 L.J.Ch. 495; 66 L.T. 694; 40 W.R. 551; 36 Sol. Jo. 446, C.A.; 5 Digest (Repl.) 788, 6678.
- Re Rogers, Ex parte Woodthorpe* (1891), 8 Morr. 236; 5 Digest (Repl.) 787, 6676.  
*Butterfield v. Heath* (1852), 15 Beav. 408; 22 L.J.Ch. 270; 20 L.T.O.S. 242; 51 E.R. 595; 40 Digest (Repl.) 163, 1263.
- D** *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; sub nom. *Re Rivett-Carnac, Ex parte Simmonds*, 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, 2032.
- Re Clarke, Ex parte Newton v. Kearly* (1889), 60 L.T. 335; sub nom. *Re Clark, Ex parte Kearley*, 5 T.L.R. 247; 6 Morr. 42, D.C.; 5 Digest (Repl.) 787, 6673.
- E** *Jameson & Co. v. Brick and Stone Co., Ltd.* (1878), 4 Q.B.D. 208; 48 L.J.Q.B. 249; 39 L.T. 594; 27 W.R. 672; 5 Digest (Repl.) 1070, 8623.
- Re Riddcough, Ex parte Vaughan* (1884), 14 Q.B.D. 25; 33 W.R. 151; 1 Morr. 158, D.C.; 5 Digest (Repl.) 1190, 9586.

**F** **Appeal** from a decision of the Divisional Court (VAUGHAN WILLIAMS and WRIGHT, JJ.), sitting in bankruptcy, reversing a decision of the judge of Hanley County Court.

The debtor, Clark, was adjudicated bankrupt in May, 1884. A trustee was appointed, who was released in 1887, when the official receiver became trustee. No dividend was paid in the bankruptcy and the bankrupt did not obtain his discharge. After 1884 the debtor, without the knowledge or consent of the trustee in bankruptcy or of the creditors, carried on business as a building contractor, and acquired considerable property. In May, 1893, he executed a deed of assignment of all his property for the benefit of his creditors. A bankruptcy petition was presented against him founded on the act of bankruptcy committed by the execution of that deed of assignment, and in June, 1893, a receiving order was made against him, and he was adjudicated bankrupt. The official receiver became the trustee in that bankruptcy. The official receiver applied to the judge of Hanley County Court for directions as to the way in which a sum of over £500, representing the debtor's assets at the time of the second adjudication, was to be administered. The judge directed the official receiver to apply the money first towards discharging the debtor's liabilities in the first bankruptcy and then to apply any surplus in discharging the debtor's liabilities in the second bankruptcy.

**G** A creditor in the second bankruptcy appealed against that decision, and the Divisional Court sitting in Bankruptcy (VAUGHAN WILLIAMS and WRIGHT, JJ.), reversed the decision of the county court judge. Beardmore, a creditor in the first bankruptcy, appealed.

**H**

*Muir Mackenzie* and *Ringwood* for Beardmore.

*Edward Clayton* (*Herbert Reed, Q.C.*, with him) for the creditors in the second bankruptcy.

*Arthur Russell* for the official receiver.

**LORD ESHER, M.R.**—In this case the debtor was adjudicated a bankrupt in 1884, and the official receiver subsequently became the trustee in bankruptcy. Certain creditors in that bankruptcy now claim to have certain property dealt with as assets in that bankruptcy. On the other side it is said that, after the adjudication of bankruptcy, and while the official receiver was the trustee, the bankrupt carried on a business and incurred debts and had creditors in that business, and that he then assigned all his property to a trustee for the benefit of his creditors. That assignment was an act of bankruptcy, and thereupon there was a bankruptcy petition and an adjudication, and the debtor was adjudicated a bankrupt for the second time, and the official receiver became the trustee in the second bankruptcy also. Then a dispute arose as to the bankruptcy in which the official receiver was to administer the property acquired by the debtor while he was an undischarged bankrupt. The Divisional Court held that the trustee in the second bankruptcy ought to have the administration of that property, but declined to determine the rights of the creditors in the first bankruptcy.

The question is, what are the rights of the trustee in the first bankruptcy, which has not come to an end because the debtor is an undischarged bankrupt. The rights of the trustee in bankruptcy are determined by the Bankruptcy Act, 1883, s. 44 of which provides that

“the property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt, shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.”

That is the property which is divisible by the trustee in bankruptcy. At the commencement of the bankruptcy there may be property for which the debtor has not paid. If there is, the trustee takes that property because it belongs to the bankrupt, but he does not take it with the obligation to pay for it. Those who supplied that property, but were not paid for it, have to prove in the bankruptcy and take a dividend only. How does a bankrupt acquire property after the commencement of his bankruptcy? He acquires it largely by buying it, and upon credit. If the rights of the trustee of the first kind of property are as I have stated, it is difficult to say that he is not to take the after-acquired property in the same way without the obligation of paying for it. If, therefore, the Act stood alone I should say that such property could not be dealt with in any other way. The view of the Court of Appeal expressed in *Ex parte Ford* (1) is the same, and is based upon the true construction of the Act. After that case came *Cohen v. Mitchell* (2), which was not a case between two trustees in two bankruptcies, or between the bankrupt and the trustee, but between the trustee in bankruptcy and a person who had dealt with the bankrupt after his bankruptcy. The court in that case, being actuated by a desire to protect such persons, said that in the particular circumstances the case was not governed by the strict interpretation of the Bankruptcy Act, 1883, but was taken out of the operation of s. 44. Under those circumstances it was laid down that,

“until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.”

That was going a long way.

Is this case within that rule? I cannot see how it can be, and for these reasons. The person here did not deal with the bankrupt for value within the meaning of that proposition, and this case, therefore, is governed by s. 44, and is not within the exception established by *Cohen v. Mitchell* (2). It is impossible to suppose that the judges who decided *Cohen v. Mitchell* (2) intended to overrule *Ex parte Ford* (1) which was cited to them, and they, therefore, must have thought that *Cohen v. Mitchell* (2) was a different case from *Ex parte Ford* (1). There are then



- A two classes of cases : one the ordinary case, as in *Ex parte Ford* (1); and the other the exceptional cases, as in *Cohen v. Mitchell* (2). There is also another exceptional case, where the bankrupt trades with the knowledge and consent of the trustee. That is not this case. This case, therefore, is within the ordinary operation of s. 44, according to the decision in *Ex parte Ford* (1), and is not an exception within any rule which has yet been established. It has been suggested that a bankrupt
- B when he trades is trading as the agent of the trustee, and that the trustee must, if he takes to the property, take it with all its burdens and obligations. For myself I cannot see how, according to the law of principal and agent, the bankrupt can be the agent of the trustee. If that proposition is true, then *Ex parte Ford* (1) was wrongly decided. I am of opinion, therefore, that this case must be decided in the same way as *Ex parte Ford* (1), and that we must reverse the decision of the
- C Divisional Court and allow this appeal.

A. L. SMITH, L.J.—In this case Clark was adjudicated a bankrupt in 1884, and the official receiver ultimately became the trustee in that bankruptcy. Then Clark, without the knowledge or permission of the trustee or creditors, traded, and in 1893 was adjudicated a bankrupt for the second time, the act of bankruptcy being an assignment of all his property to a trustee for the benefit of his creditors generally.

- D The question which now comes before us for decision is whether the property amounting to over £500, which Clark acquired while so trading, is to be administered in the second bankruptcy or in the first bankruptcy. The judges in the Divisional Court held that it must be administered in the second bankruptcy, and
- E we have to say whether that decision was correct. By s. 54 (1) of the Bankruptcy Act, 1883, which governs this case, it is enacted that

“until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately upon a debtor, being adjudged bankrupt the property of the bankrupt shall vest in the trustee;”

- F and, by s. 44, that

“the property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.”

- G Therefore, as has been pointed out by the Master of the Rolls, it appears from the Act, that all property belonging to the bankrupt at the commencement of the bankruptcy, and also all property acquired by him after the bankruptcy and before discharge, will be property belonging to the trustee in the first bankruptcy, and not to the trustee in the second bankruptcy.

- H An exception has been grafted upon these sections, and a distinction drawn as to property belonging to the bankrupt at the commencement of the bankruptcy and property afterwards acquired by him. This was laid down in cases which held that, as to after-acquired property, until the trustee intervenes the bankrupt can deal with persons who deal with him bona fide and for valuable consideration. In *Cohen v. Mitchell* (2) it was held that, where an undischarged bankrupt enters into transactions in respect of property acquired by him after the bankruptcy, until the trustee intervenes all such transactions with any person dealing with the bankrupt bona fide and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee. That was a case between the trustee and a person who had so dealt with the bankrupt. This dispute is between the trustee in the first bankruptcy and the trustee in the second bankruptcy, and *Ex parte Ford* (1) has been cited as an authority in point.
- I

That case was not prominently brought to the attention of the court below, and I think that that fact accounts for their decision being what it was. I cannot distinguish this case from *Ex parte Ford* (1), which, decided by the Court of Appeal,

seems to me to be on all-fours with this case. There a person, who was in effect an undischarged bankrupt, traded without the knowledge or consent of the trustee or creditors, and thereby acquired some property, and was then in effect made bankrupt a second time, and the question was, whether the trustee in the first bankruptcy or the trustee in the second bankruptcy was entitled to that property. That is the question in this case. I think, therefore, that *Ex parte Ford* (1) is conclusive upon this point, that, if the trustee in the first bankruptcy has not permitted and known of the trading by the bankrupt, he is entitled to the after-acquired property. *Ex parte Ford* (1) was subsequently dealt with in *Meggy v. Imperial Discount Co., Ltd.* (3), where COTTON, L.J., affirms the doctrine laid down in that case, and says:

"The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by SIR GEORGE JESSEL, M.R., in *Ex parte Ford* (1)."

There are then two cases in the Court of Appeal which establish that doctrine. In my opinion, this case is not distinguishable from, and is governed by, *Ex parte Ford* (1). The Divisional Court had not its attention properly called to *Ex parte Ford* (1), and decided this case upon the principle laid down in *Cohen v. Mitchell* (2), which I have already stated, and held that the trustee in the second bankruptcy was a person who had dealt with the bankrupt bona fide and for valuable consideration. In *Cohen v. Mitchell* (2) the court was not deciding the rights of the trustee in the first bankruptcy and the trustee in the second bankruptcy, but the rights of a third person who had dealt with the bankrupt before the trustee intervened. It is then argued that, as held by WRIGHT, J., because this property was assigned to a trustee for the benefit of creditors, that assignment was within the rule laid down in *Cohen v. Mitchell* (2). I think that there is nothing in that argument.

Then a third point was raised, that, if it is held that this property belongs to the trustee in the first bankruptcy, the result will be that, the subsequent creditors having really provided this property, their money will go to the creditors in the first bankruptcy and they will get nothing at all. It is urged that the trustee in the first bankruptcy, if he takes such after-acquired property of the bankrupt, must first pay the debts of the business. The Master of the Rolls has pointed out that such a contention is not in accordance with the rules of bankruptcy. All property belonging to the bankrupt at the commencement of the bankruptcy vests absolutely in the trustee without any such liability to pay debts in respect of the property, and creditors must prove for their debts. The same rule must apply to property afterwards acquired by the bankrupt. I agree that this appeal must be allowed.

**DAVEY, L.J.**—I am of the same opinion. I think that this case is governed by authority, and I would add nothing if I were not differing from the judgment of the Divisional Court. We must first look at the words of the Bankruptcy Act, 1883, itself. Section 44 says that

"the property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt . . . shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge;"

and s. 54 vests that property in the trustee in bankruptcy for the time being. Therefore, all property acquired by, or devolving upon, the bankrupt before his discharge vests in the trustee and is divisible amongst the creditors who are entitled to prove in the bankruptcy. Upon the literal words of the statute there can be no doubt, but we have been referred to cases in which the question has been considered how far a bankrupt dealing with a third person bona fide and for value can enable such third person to maintain his title against the trustee in bankruptcy. That was the only question in those cases,

A In *Morgan v. Knight* (4) ERLE, C.J., says (15 C.B.N.S. at p. 677):

"The result of the cases is, not only that he may acquire property, but that he may hold it against all the world, except his assignees, and may create rights to hold it against them, if they, expressly or impliedly, consent to such property being in his order and disposition at the time of a subsequent bankruptcy."

B In *Cohen v. Mitchell* (2) the rule is thus stated (25 Q.B.D. 262):

"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

C That lays down a beneficial and just rule with respect to the rights of third persons who have dealt with a bankrupt bona fide and for value. Nothing in those cases, however, affects the question as to the rights of the trustee in the first bankruptcy, in the circumstances of a case like the present, as against the trustee in the second bankruptcy.

D In my opinion, the question in the present case is conclusively settled by the decision in *Ex parte Ford* (1), and I agree that the present case is not distinguishable from that case. I do not think that *Ex parte Ford* (1) is in any way impeached by the decision in *Cohen v. Mitchell* (2), and the former decision was confirmed in

E *Meggy v. Imperial Discount Co., Ltd.* (3). In the court below, VAUGHAN WILLIAMS, J., decided this case upon the authority of *Cohen v. Mitchell* (2), and thought that the rule laid down in that case was to be extended to the case of the trustee in the second bankruptcy. I think that he cannot have adequately considered *Ex parte Ford* (1). I entirely dissent from the proposition that the trustee in the second bankruptcy is on the same footing as a bona fide assignee for value.

F A general assurance of property is very different from an assignment of particular property, and I doubt whether a general assurance of property can come within the rule laid down in *Cohen v. Mitchell* (2). The broad and general principle is, that the trustee in bankruptcy takes all property of the bankrupt with the same title as the bankrupt, unless he takes it by virtue of special provisions of the Bankruptcy Act. In the Divisional Court WRIGHT, J., took another point. He said that there had been an assignment by Clark for the benefit of his creditors, and that placed the trustee in the first bankruptcy in a dilemma. I think that the short answer to that is, that *Cohen v. Mitchell* (2) only decides that a person dealing with the bankrupt bona fide and for value has a good title against the trustee in bankruptcy, and that rule is established only in favour of persons who have so dealt. In this case the trustee in the second bankruptcy is not claiming under the assignment, and therefore the question does not arise.

G As to the last point which has been urged, that, if this property is taken away from the creditors in the second bankruptcy, it will be taking away property which has been created by means of the liabilities incurred to such creditors during the carrying on of the business, it has been pointed out that TINDAL, C.J., in *Herbert v. Sayer* (5) (5 Q.B.D. at p. 981) expresses the opinion that an undischarged bankrupt acquires property or contracts for the benefit of his trustee "in the nature of an agent;" and it is argued that the trustee is, therefore, bound to satisfy the liabilities incurred by the agent in such case. That might be reasonable and just, but the answer is, that the words of the statute make this property vest in the trustee in the first bankruptcy, and that the statute contains no words showing any intention either to bind or to permit the trustee to divert such property from the payment of all the debts of the bankrupt. That argument also cannot prevail against the decision in *Ex parte Ford* (1). I agree, therefore, that this appeal must succeed.

*Appeal allowed.*

Solicitors: A. Godwin Hammack for Bennett & Baddeley, Hanley; Charles Robinson & Co. for Hooper, Dudley; Solicitor, Board of Trade.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]



## THOMASSET v. THOMASSET

[COURT OF APPEAL (Lindley and Lopes, L.JJ.), June 20, July 16, 1894]

[Reported [1894] P. 295; 63 L.J.P. 140; 71 L.T. 148;  
42 W.R. 658; 10 T.L.R. 591; 38 Sol. Jo. 630; 6 R. 637]

*Divorce—Maintenance of child—Custody—Education—Age limit for order—  
Twenty-one years—Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85),  
s. 35—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 4.*

The jurisdiction conferred on the court by the Matrimonial Causes Acts, 1857 and 1859, to make orders thereunder respecting the custody, maintenance, and education of infants **held** to be capable of being exercised during the whole period of infancy, that is, until the children attain 21 years of age.

*Blandford v. Blandford* (1), [1892] P. 148, overruled.

**Notes.** Section 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859, have been replaced by s. 26 of the Matrimonial Causes Act, 1950.

Considered: *Stark v. Stark and Hitchins*, [1910] P. 190. Followed: *Re Mathieson* (1918), 87 L.J.Ch. 445. Considered: *Le Mare v. Le Mare*, [1960] 2 All E.R. 280. Referred to: *Bishop v. Bishop*, *Judkins v. Judkins*, [1897] P. 138; *B. v. B.*, [1924] P. 176; *Millard v. Millard and Addis*, [1945] 2 All E.R. 525; *C. v. C.*, [1947] 2 All E.R. 50; *Galloway v. Galloway*, [1954] 2 All E.R. 143.

As to power of the court to order custody, see 21 HALSBURY'S LAWS (3rd Edn.) 191-192, 197; and for cases see 28 DIGEST (Repl.) 484-486. For the Matrimonial Causes Act, 1950, s. 26, see 29 HALSBURY'S STATUTES (2nd Edn.) 413.

Cases referred to:

- (1) *Blandford v. Blandford*, [1892] P. 148; 61 L.J.P. 97; 67 L.T. 392; 8 T.L.R. 381; 28 Digest (Repl.) 570, 853.
- (2) *R. v. Greenhill* (1836), 4 Ad. & El. 624; 6 Nev. & M.K.B. 244; 111 E.R. 922; 28 Digest (Repl.) 621, 1240.
- (3) *R. v. Clarke*, *Re Race* (1857), 7 E. & B. 186; 26 L.J.Q.B. 169; 28 L.T.O.S. 250, 252; 3 Jur.N.S. 335; 5 W.R. 222; 21 J.P.Jo. 53; 119 E.R. 1217; 28 Digest (Repl.) 628, 1305.
- (4) *R. v. Howes*, *Ex parte Barford* (1860), 3 E. & E. 332; 30 L.J.M.C. 47; 3 L.T. 467; 7 Jur.N.S. 22; 9 W.R. 99; 8 Cox, C.C. 405; 121 E.R. 467; sub nom. *R. v. Howse*, *Ex parte Barford*, 25 J.P. 23; 28 Digest (Repl.) 628, 1298.
- (5) *R. v. Delaval* (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E.R. 913; 28 Digest (Repl.) 626, 1283.
- (6) *Ex parte Hopkins* (1732), 3 P.Wms. 152; 24 E.R. 1009, L.C.; 28 Digest (Repl.) 612, 1196.
- (7) *Re Agar-Ellis*, *Agar-Ellis v. Lascelles* (1883), 24 Ch.D. 317; 53 L.J.Ch. 10; 50 L.T. 161; 32 W.R. 1, C.A.; 28 Digest (Repl.) 606, 1167.
- (8) *Re Spence* (1847), 2 Ph. 247; 16 L.J.Ch. 309; 9 L.T.O.S. 241, 329; 11 Jur. 399; 41 E.R. 937, L.C.; 28 Digest (Repl.) 630, 1314.
- (9) *R. v. Gyngall*, [1893] 2 Q.B. 232; 9 T.L.R. 471; 4 R. 448; sub nom. *Re Gyngall*, 62 L.J.Q.B. 559; 57 J.P. 773; sub nom. *R. v. Gyngall*, *Re Hausherr* (otherwise *Austen*), 69 L.T. 481, C.A.; 28 Digest (Repl.) 485, 25.
- (10) *Hall v. Hall* (1749), 3 Atk. 721; 26 E.R. 1213, L.C.; 28 Digest (Repl.) 650, 1429.
- (11) *Anon.* (1751), 2 Ves. Sen. 374; 28 E.R. 240, L.C.; 28 Digest (Repl.) 612, 1189.
- (12) *Todd v. Lynes* (1873), Times, July 26; sub nom. *Todd v. Todd*, Seton's Judgments and Orders, 7th Edn., p. 1002; 28 Digest (Repl.) 711, 2200.

- A** (13) *Re McGrath (Infants)*, [1893] 1 Ch. 143; 62 L.J.Ch. 208; 67 L.T. 636; 41 W.R. 97; 9 T.L.R. 65; 37 Sol. Jo. 45; 2 R. 137, C.A.; 28 Digest (Repl.) 644, 1372.
- (14) *Marsh v. Marsh* (1858), 1 Sw. & Tr. 312; 28 L.J.P. & M. 13; 32 L.T.O.S. 197; 5 Jur.N.S. 46; 7 W.R. 129; 164 E.R. 744; 28 Digest (Repl.) 303, 2488.
- B** (15) *Spratt v. Spratt* (1858), 1 Sw. & Tr. 215; 31 L.T.O.S. 269; 6 W.R. 860; 164 E.R. 699; 27 Digest (Repl.) 500, 4432.
- (16) *Ryder v. Ryder* (1861), 2 Sw. & Tr. 225; 30 L.J.P.M. & A. 44; 3 L.T. 678; 9 W.R. 440; 164 E.R. 981; 27 Digest (Repl.) 503, 4453.
- (17) *Webster v. Webster* (1862), 31 L.J.P.M. & A. 184.
- (18) *Mallinson v. Mallinson* (1866), L.R. 1 P. & D. 221; 35 L.J.P. & M. 84; 14 L.T. 636; 14 W.R. 973; 27 Digest (Repl.) 665, 6295.
- C** (19) *Benyon v. Benyon and O'Callaghan* (1876), 1 P.D. 447; 45 L.J.P. 93; 24 W.R. 950; 27 Digest (Repl.) 650, 6126.

Also referred to in argument:

- Bacon v. Bacon and Bacon* (1860), 2 Sw. & Tr. 86; 29 L.J.P.M. & A. 125; 2 L.T. 438; 8 W.R. 552; 164 E.R. 925; 27 Digest (Repl.) 637, 5989.
- D** *Seatel v. Seatel* (1860), 4 Sw. & Tr. 230; 30 L.J.P.M. & A. 216; 164 E.R. 1504; 27 Digest (Repl.) 642, 6042.
- Bent v. Bent and Footman* (1861), 2 Sw. & Tr. 392; 30 L.J.P.M. & A. 175; 5 L.T. 139; 164 E.R. 1047; 27 Digest (Repl.) 620, 5788.
- Milford v. Milford* (1869), L.R. 1 P. & D. 715; 38 L.J.P. & M. 63; 21 L.T. 155; 17 W.R. 1063; 27 Digest (Repl.) 607, 5695.
- E** *Hunt v. Hunt* (1883), 8 P.D. 161; 52 L.J.P. 98; 31 W.R. 724; 27 Digest (Repl.) 669, 6335.
- R. v. Shanahan* (1852), 20 L.T.O.S. 183.
- R. v. Connor*, 16 I.C.L.R. 112; *Re Brown* (1884), 13 Q.B.D. 614; sub nom. *Re Rowe*, 51 L.T. 793; sub nom. *Re Rowe*, *Rowe v. Rowe*, 33 W.R. 79; 28 Digest (Repl.) 622, 1248.
- F**

**Appeal** by the petitioner wife from an order of SIR FRANCIS JEUNE, P.

*Inderwick, Q.C.*, and *Searle* for the petitioner wife.

*Bayford, Q.C.*, and *Barnard* for the respondent husband.

*Cur. adv. vult.*

- G** July 16, 1894. The following judgments were read.

**LINDLEY, L.J.**—This is an appeal from an order of the President of the Divorce Court discharging the respondent from further maintaining one of his children, who has recently attained sixteen.

- On Mar. 15, 1892, the petitioner, Mrs. Thomasset, obtained a decree for divorce from the respondent. On Aug. 8, 1893, an order was made for the payment by the respondent to the petitioner of permanent alimony at the rate of £266 per annum, and £23 6s. 8d. per annum for each of the four younger children of the marriage for their maintenance and education. On Mar. 27, 1894, the eldest of these four children, Theodore, attained sixteen, and on June 1, 1894, an order was made by the registrar, on the application of the respondent, that the
- I** allowance of £23 6s. 8d. for the maintenance of such child should cease. This order was affirmed by the President, not because he was of opinion that under the circumstances of the case it was just or expedient to vary the former order of Aug. 8, 1893, but simply because as a matter of law that order ought to be discharged as regards the child who had attained sixteen. The object of this appeal is to have the view of the law reconsidered.

The question thus raised is one of very considerable importance, and renders it necessary to consider the jurisdiction and practice of the Divorce Court as regards the custody, maintenance, and education of children. Before, however,

referring to the statutes which relate to this matter it is desirable to state, shortly, the law and practice of the courts of common law and Chancery and of the ecclesiastical courts as regards infants. In former times the ecclesiastical courts appointed guardians for infants in testamentary causes and cases of intestacy (see BURNS'S ECCLESIASTICAL LAW (9th Edn.), vol. 4, p. 142), but it is so long since these courts have interfered between parent and child that it is needless to refer further to them. The jurisdiction of courts of law was exercised by habeas corpus. The principles on which courts of common law act in dealing with persons brought up under a habeas corpus are very clearly stated in the judgment of COLERIDGE, J., in *R. v. Greenhill* (2) (4 Ad. & El. at p. 643). [His LORDSHIP read an extract from that judgment, and continued:] The age at which a child is deemed to have a discretion is fourteen in the case of a boy and sixteen in the case of a girl: see *R. v. Clarke* (3). The age of sixteen appears to have been adopted by reason of the language used in the statute 4 & 5 Phil. & M., c. 8 [1557], s. 3, relating to the abduction of girls [repealed by Offences Against the Person Act, 1828]: see *R. v. Howes* (4). After a child has attained the age of discretion a court of common law will set it free if illegally detained, but will not force a child against his or her will to remain with his or her father or legal guardian, although LORD MANSFIELD said that the court had a discretion as to the order it would make: see *R. v. Delaval* (5); and see the note to *Ex parte Hopkins* (6), 3 P.Wms. at p. 153.

It must not, however, be inferred from the decisions referred to above that a father has no legal right to the custody of his child after he or she has attained the age of fourteen or sixteen. The father's right to such custody exists until the child attains twenty-one. This is clearly stated in HARGRAVES'S note to COKE UPON LITTLETON, p. 88 b. This right of the father was extended by the Tenures Abolition Act, 1660, s. 8, which enabled him by deed or will to appoint a guardian for any of his children until they attain twenty-one. The right of the father himself as guardian of his children to their custody until they attain twenty-one is taken for granted, although not expressly declared in this statute. Such right, moreover, was distinctly recognised by PATTESON, J., in an opinion given by him when a judge to SIR ERSKINE PERRY: see *R. v. Clarke* (3), 7 E. & B. at p. 199; and was again recognised by COCKBURN, C.J., in *R. v. Howes* (4). Lastly, this right was recently emphatically asserted by the Court of Appeal in *Re Agar-Ellis* (7), where an attempt was made to remove a girl over sixteen from the care of her father.

The jurisdiction of the Court of Chancery over infants is twofold. In so far as it depends on the law relating to writs of habeas corpus, the power of the court appears to have been the same as that of courts of common law. But quite independently of those writs the Court of Chancery exercised the power of the Crown as *parens patriæ* over infants, and in the exercise of this jurisdiction the power of the court has always been much more extensive than that possessed by courts of common law under a writ of habeas corpus: see *Re Spence* (8), 2 Ph. at p. 252; per COTTON, L.J., in *Re Agar-Ellis* (7) (24 Ch.D. at p. 330); and *R. v. Gyngall* (9). The Court of Chancery has exercised this larger power in aid of fathers and guardians over children who have attained the age of discretion. Thus, in *Hall v. Hall* (10) and in *Anon.* (11), boys over sixteen have been compelled to go to the schools selected by their guardians, and in *Todd v. Lynes* (12), referred to in SIMPSON ON INFANTS (2nd Edn.), p. 144, a boy of seventeen was taken from a monastery and given up to the father. What the wishes of the boy were does not, however, appear. In the exercise of this jurisdiction the rights of fathers and legal guardians were always respected, but were controlled to an extent unknown at common law by considering the real welfare of the infants: see *Re McGrath (Infants)* (13), and the cases there referred to.

As regards maintenance the parent's obligations were measured both at law and in equity by the poor laws. I know of no case in which a father has been ordered by a court of equity to maintain his child. Courts of equity ordered



**A** children to be maintained out of their own property. But the jurisdiction as to maintenance and education was limited to such property. By the Supreme Court of Judicature Act, 1873, each division of the High Court can exercise the jurisdiction of the old Court of Chancery, and by s. 25 (10), it is enacted that

“in questions relating to the custody and education of infants the rules of equity shall prevail.”

**B** This enactment enables all divisions of the High Court, even on habeas corpus, to regard something more than strict legal rights of fathers and guardians and requires all the divisions to recognise the cardinal principle on which the Court of Chancery always proceeded, viz., that in dealing with infants the primary consideration is their benefit. This view of the enactment was distinctly adopted and acted upon by the Court of Appeal in *R. v. Gynngall* (9), in which LORD ESHER, M.R., explained some previous observations made by him in *Re Agar-Ellis* (7), and which observations had apparently been somewhat misunderstood.

**C** Having made these preliminary observations, I proceed to consider the jurisdiction of the Divorce Court as regards the custody and maintenance of the children of persons divorced or judicially separated. The Matrimonial Causes Act, 1857, s. 35, runs thus:

“... on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit . . .”

**E** This power was extended to applications made after decree by the Matrimonial Causes Act, 1859, s. 4. [HIS LORDSHIP read the section, and continued:] The jurisdiction thus conferred is far greater than that exercised by any court previously existing. This was early seen, and is explicitly stated in *Marsh v. Marsh* (14) and *Spratt v. Spratt* (15). Nothing can be wider than the discretion and power conferred upon the Divorce Court by those two sections. It can order parents to maintain and educate their children at their own expense, which no court could do before. And if it were not for the decisions to which I am about to refer, I should have thought that the power to order payment of a proper sum for the maintenance and education of the children under twenty-one of persons who had been divorced or judicially separated too clear for reasonable doubt. I can discover no ground

**G** for saying that infants between the ages of fourteen or sixteen and twenty-one are not children within the meaning of the above enactments. The necessity for providing children with maintenance and education does not stop at fourteen or sixteen, and neither the necessities of the case nor the language of the statutes require or, in my opinion, admit of a construction which limits the power of the court to provide for children under fourteen or sixteen.

**H** However, there are decisions to the effect that the power of the court is so limited, and the President has considered himself bound by those decisions. It is necessary to examine them. There are five in all, viz., three before the Supreme Court of Judicature Act, 1873, and two since. Those before the Act are—(1861) *Ryder v. Ryder* (16), custody; (1862) *Webster v. Webster* (17), maintenance; (1866) *Mallinson v. Mallinson* (18), custody. *Ryder v. Ryder* (16) was a decision

**I** of the full court, consisting of SIR CRESSWELL CRESSWELL, WILLES, J., and CHANNELL, B.; and it was there decided that the court had no jurisdiction to make any order as to the custody of children over sixteen. The main ground for this decision appears to have been that courts of common law did not make orders disposing of the custody of children over sixteen, and the Divorce Court had not the children before it, and could not, therefore, enforce against them any order it might make. This reasoning does not appear to me satisfactory. The Divorce Court could decide as between the parents which parent should have the custody of the children. And even if the Divorce Court could not

bring the children before it and exercise jurisdiction over them, still, if the Divorce Court had made an order binding on the parents, such an order might, if necessary and proper, have been enforced by proceedings in Chancery. A

The effect of *Ryder v. Ryder* (16) practically was to enable a delinquent father to set up the age of his infant child as an answer to an application for an order for its custody. This was, in my opinion, an unfortunate decision; but it is one from which the Judicature Acts have, in my opinion, set us free. It was also wrong to hold as a matter of law that maintenance followed custody, and that the court had no jurisdiction to order maintenance for a child over sixteen. This was decided in *Webster v. Webster* (17), although WILLES, J., in *Ryder v. Ryder* (16) had pointed out that it did not follow from that decision that maintenance could not be ordered for a child over sixteen. B

Even before the Supreme Court of Judicature Act, 1873, the cases, in my judgment, went too far. But after that Act I confess my inability to understand how it can be right to hold that the statutory discretion conferred upon the court is restricted within the narrow limits previously supposed. And in *Benyon v. Benyon and O'Callaghan* (19) an allowance was made for a child until twenty-one. However, in *Blandford v. Blandford* (1) SIR CHARLES BUTT, P., distinctly held that the court had no power to make an order as to the custody, or maintenance, or education of a child who was over sixteen years of age. The attention of the President does not, however, appear to have been called either to the Supreme Court of Judicature Act, 1873, or to *Re Agar-Ellis* (7), and his decision, in my judgment, was erroneous. In the present case the President has simply followed *Blandford v. Blandford* (1), which he considered to be binding on him. C D

In my judgment the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decision. Such discretion ought to be exercised in each particular case as the circumstances of that case may require. And in exercising such discretion the Divorce Court, which has now all the powers of the old Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, or education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts on which this case turns can, since the Judicature Acts at all events, be exercised during the whole period of infancy—that is, until the children, whether males or females, attain twenty-one, although I do not, however, say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes. The appeal must therefore be allowed, and the case must be remitted to be dealt with on its merits, freed from the fetter by which the discretion of the judge was previously considered to be restricted. The costs of the appeal must be borne by the respondent. E F G H

**LOPES, L.J.**—This is a very important case, and as we are expressing a view different from that previously entertained, I desire to give my reasons for the conclusion at which we have arrived.

The jurisdiction of the Divorce Court with regard to the custody, maintenance, and education of the children of parents divorced or judicially separated is derived from s. 35 of the Matrimonial Causes Act, 1857, extended to applications made after decree by s. 4 of the Matrimonial Causes Act, 1859. It is this section which the court is now called upon to construe. If I was construing this section for the first time apart from authority, I should have no hesitation in holding that a wide and comprehensive power was conferred on the Divorce Court, enabling the court in the case of parents who by their misconduct had subjected themselves to its jurisdiction to order them to educate and maintain at their own cost the I

A children of the marriage so long as they should be under the age of twenty-one; a power, however, to be exercised at the discretion of the court according to the particular circumstances of each case in which its interference is invoked. It is difficult to see on what ground infants under the age of twenty-one are not to be regarded as children within the meaning of s. 35. Nor can I understand on what ground the obligation to maintain and educate them is to determine at the

B ages of fourteen in the case of males and sixteen in the case of females, even if the right to their custody was to terminate at those periods. There is nothing in s. 35 warranting such a conclusion, and, having regard to the words of the section, I should be slow to adopt such a construction of the section unless compelled so to do. Education and maintenance are as necessary between the

C ages of fourteen or sixteen and twenty-one as before those periods. To leave a child at the age of fourteen or sixteen without any provision for its maintenance and education in the case of parents divorced or judicially separated would be inhuman, and could never have been intended by the legislature. Apart from authority, I do not understand that the President would so have interpreted the section in question. I rather gather that his view was in favour of the construction which I place upon the section, but he considered himself bound, as

D he was, by previous decisions of his court.

I proceed to consider those decisions and the grounds upon which they were based. *Ryder v. Ryder* (16) was decided in 1861 by the full court, consisting of SIR CRESSWELL CRESSWELL, WILLES, J., and CHANNELL, B., and it was held that the court under s. 35 of the Act of 1857 has no jurisdiction to make any order as to the custody of children upwards of sixteen years of age; but WILLES, J.,

E said at the conclusion of his judgment:

"The question as to any order in respect of the maintenance of children above sixteen, if necessary, is not affected by our present decision."

And this dictum is more fully given in the report of the same case in 30 L.J.P.M. & A. at p. 47, where the judge said:

F

"It is not to be inferred that the court has no power to order the maintenance of children between the ages of sixteen and twenty-one. It may well confer a benefit on parties not before it, but that is a very different thing from its interfering with their liberty, and ordering them to do something which they may not approve."

G *Webster v. Webster* (17) was decided in 1862 by SIR CRESSWELL CRESSWELL, and in that case the Judge Ordinary, although the dictum of WILLES, J., in *Ryder v. Ryder* (16) was brought to his notice, held that the court had no power to order that a provision should be made for the maintenance and education of a child above the age of sixteen, saying "that in his opinion the maintenance followed the custody." I am at a loss to understand on what he based this

H opinion, even if he thought the power with regard to the custody terminated at that age.

*Mallinson v. Mallinson* (18) came before the court in 1866, and LORD PENZANCE, following *R. v. Howes* (4), considered that the power of the court to control the custody of children terminated at the age of sixteen. These are all the decisions before the Supreme Court of Judicature Act, 1873. Since that Act

I there are two cases to which it is necessary to refer. One is *Benyon v. Benyon and O'Callaghan* (19) where an order for maintenance was made for a child until twenty-one; the other is *Blandford v. Blandford* (1), the case upon which, as I understand, the President acted. In that case SIR CHARLES BUTT, P., held that the court had no power to make provision for the maintenance of children above the age of sixteen. He says ([1892] P. at p. 151):

"It is perfectly clear, on principle and authority that, if I were dealing with the first of the matters mentioned in the sections, that is, with custody,



I should have no power to make an order as to the custody of a child who had attained the age of sixteen years. When we come to the next matter—education—the sections can only be intended to apply to the education of young persons, and are certainly not intended to apply to the education of a child as long as he or she may live. Am I to put a different construction on the sections in regard to maintenance? My own opinion is, that the sections dealing with the custody, maintenance, and education of children apply only to infants, and deal with all these matters exactly in the same way.”

Such is the state of the authorities at the present time.

In the Divorce Court, therefore, it has been held that, the right of parents to the custody of their children terminating at sixteen, no provision for education or maintenance can be ordered after that age. As I have said before, even if the right to the custody did terminate at sixteen, I should not be prepared to hold that the power to order a provision for education and maintenance was to be so limited. The Act of Parliament does not, in my opinion, associate custody, education, and maintenance together with a view of subjecting them to the same incidents, but intends the court to deal with each in such a way as it thinks fit. The basis upon which the decisions are founded is the assumption that the right of the parent to the custody of his children terminates at the age of sixteen. But is this correct? No doubt a writ of habeas corpus would not go to compel a child over the age of sixteen to return into the custody of the parent when such child was unwilling to submit to such custody. But, subject to such unwillingness on the part of the child, I can entertain no doubt but that the parent is entitled to the custody of his child as against anybody detaining the child against its will up to the age of twenty-one. There can be, I think, no doubt but that the right of parents to the control and guardianship of their children exists up to the age of twenty-one years, unless the parents have, by their own grossly immoral and improper conduct, forfeited their rights or abdicated their parental authority.

The Tenures Abolition Act, 1660, gives the father the power of appointing a testamentary guardian: s. 8 gives to a father power by will, or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time. That Act authorises the father to delegate to others the custody and tuition of his children until they are twenty-one. Nothing can be a clearer declaration of the law than that the father himself, when living, has the right to the custody and tuition of his children while they are under the age of twenty-one years. *R. v. Howes* (4) was a habeas corpus case, but COCKBURN, C.J., says:

“Now, the cases which have been decided on this subject show that, although a father is entitled to the custody of his children until they attain the age of twenty-one, this court will not grant a habeas corpus to hand a child which is below that age over to its father, provided it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests.”

The Lord Chief Justice distinctly recognised that during infancy and over sixteen the right of the father still continues. The right of the father to control and direct the education of children until twenty-one was very fully considered in *Re Agar-Ellis* (7), and it was held that the right continued until the age of twenty-one was attained. I am unable, therefore, to agree with the assumption upon which the cases in respect of maintenance in the Divorce Court have proceeded, viz., the right of the parent to the custody of his children terminating at the age of sixteen.

In my judgment, the Divorce Court has power under the sections in question to make orders for the custody, education, and maintenance of children up to the age of twenty-one—a power to be exercised with discretion, according to

A the particular circumstances of each case in which its interference is invoked. The appeal must be allowed, and the case go back to be dealt with on its merits.

*Appeal allowed.*

Solicitors: *Field, Roscoe & Co.; G. D. Byfield.*

B [Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

C

## STAMPS COMMISSIONER v. HOPE

[PRIVY COUNCIL (Lord Field, Lord Hannen and Mr. Shand), June 9, July 25, 1891]

D

[Reported [1891] A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268; 7 T.L.R. 710]

*Chose in Action—Situs—Debt—Simple contract debt—Place of debtor's residence—Specialty debt—Place where sealed instrument found.*

E

*Contract—Discharge—Merger—Merger of simple debt in specialty debt—Contract to purchase realty—Merger in mortgage deed.*

Some time before his death, H. sold real property situated in the colony of N. Part of the purchase money was paid in cash, and the purchaser agreed to pay the balance by promissory notes falling due at various dates, the due payment of which was secured by a mortgage. The mortgage deed contained an express covenant to pay the promissory notes when due, and a proviso for the execution of a release by H. on full payment. It also contained a proviso that "no simple contract shall be considered as having merged in the specialty created by or contained in these presents." At the time of his death, H., who was resident and domiciled in the colony of V., had the mortgage deed with him in V. and the promissory notes were at a bank in V. The purchasers were resident in N. In order to determine whether probate duty was payable in N. on this debt, it had to be decided where the debt was situated.

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**Held:** (i) although a debt could have no absolute local existence, it might be treated as possessing an attribute of locality which in the case of a contract debt was the place where the debtor resided, and in the case of a specialty debt was the place where the sealed instrument was found at the creditor's death; and (ii) even if the contract debt had not merged, the debt was still a specialty debt, and, accordingly, it was situated in V. and probate duty was not payable on it in N.

H

*Gurney v. Rawlins* (1) (1836), 2 M. & W. 87, applied.

*Price v. Moulton* (2) (1851), 10 C.B. 561, considered.

I

**PER CURIAM:** Their Lordships would hesitate to assent to the proposition that merger is an implication of law so strong that it takes effect even against the intention of the parties.

**Notes.** Considered: *Velasquez v. I.R.Comrs.*, [1914] 3 K.B. 458. Distinguished: *Toronto General Trusts Corp. v. R.*, [1919] A.C. 679. Considered: *Royal Trust Co. v. A.-G. for Alberta* (1929), 46 T.L.R. 25; *English, Scottish and Australian Bank, Ltd. v. I.R.Comrs.*, [1931] All E.R.Rep. 212; *Barclays Bank, Ltd. v. Beck*, [1952] 1 All E.R. 549. Referred to: *Smelting Co. of Australia v. I.R.Comrs.* (1896), 66 L.J.Q.B. 137; *Re Maudslay and Field, Maudslay v. Maudslay*

and *Field*, [1900] 1 Ch. 602; *I.R.Comrs. v. Muller & Co.'s Margarine, Ltd.*, [1900-3] All E.R.Rep. 413; *Winans v. R.*, [1908] 1 K.B. 1022; *R. v. Lovitt*, [1912] A.C. 212; *New York Life Insurance Co. v. Public Trustee* (1924), 93 L.J.Ch. 449; *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669; *R. v. Williams*, [1942] 2 All E.R. 95; *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to the locality of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 478; as to merger, see 8 HALSBURY'S LAWS (3rd Edn.) 220. For cases, see 8 DIGEST (Repl.) 546.

Cases referred to :

- (1) *Gurney v. Rawlins* (1836), 2 M. & W. 87; 2 Gale, 235; 6 L.J.Ex. 7; 21 Digest (Repl.) 182, 1081.
- (2) *Price v. Moulton* (1851), 10 C.B. 561; 20 L.J.C.P. 102; 15 Jur. 228; 138 E.R. 222; 12 Digest (Repl.) 581, 4480.
- (3) *Blackwood v. R.* (1882), 8 App. Cas. 82; 52 L.J.P.C. 10; 48 L.T. 441; 31 W.R. 645, P.C.; 11 Digest (Repl.) 394, 509.
- (4) *Twopenny v. Young* (1824), 3 B. & C. 208; 5 Dow. & Ry.K.B. 259; 107 E.R. 711; 35 Digest 629, 3630.
- (5) *Boaler v. Mayor* (1865), 19 C.B.N.S. 76; 34 L.J.C.P. 230; 12 L.T. 457; 11 Jur.N.S. 565; 13 W.R. 775; 144 E.R. 714; 35 Digest 629, 3628.

**Appeal** by the Commissioner of Stamps for New South Wales from an order of the Supreme Court of New South Wales of Mar. 6, 1890, on a Special Case stated for the opinion of the court, by which order the appellant was directed to repay to the respondent the sum of £4,114, erroneously assessed upon and paid by her by way of probate duty, as executrix of the will of George Hope.

At the time of the testator's death he was resident and domiciled in the colony of Victoria, but he died possessed of estate liable to probate duty within the jurisdiction of the Supreme Court of New South Wales, and it became necessary, therefore, for the respondent to clothe herself with probate from that colony. By the Royal Charter of Justice for New South Wales, the Supreme Court was authorised to grant probates of the last wills and testaments of the inhabitants of the colony, limited, however, to such "money, goods, chattels, and effects as the deceased person shall be entitled to within that part of the said colony within the island of New Holland," and by various Stamp Duty Acts duties were authorised to be charged upon "all estates, whether real or personal, which belonged to any testator." It was also provided that the applicant for probate should lodge an affidavit and inventory setting forth an account of the estate of the deceased, with power to the Commissioner of Stamps for the colony, if dissatisfied with the account so given, to cause a new account and inventory to be made, upon the footing of which he is to assess the duty, subject to a right of appeal, of which the present case was an exercise. Under this Act the respondent accordingly furnished an inventory, in which she admitted assets within the colony to the value of £26,114, but the appellant was dissatisfied with this account, and assessed the duty upon the footing of a new inventory, in which he charged the estate with duty upon the unpaid balance of certain promissory notes to the testator, which had been given to him under the following circumstances.

The testator, in the year 1882, was the owner of a station within the colony of New South Wales called Beemery, which he in that year agreed to sell to Alfred Kirkpatrick and two other persons, the agreement being that the purchasers should pay to the testator the sum of £46,316 13s. 4d., part of the purchase money, in cash, and that the sum of £92,633 6s. 8d., the balance, with interest, should be paid by twelve promissory notes, falling due at various dates, the due payment of which should be secured by mortgage of the station. The cash payment was accordingly made, and the notes set out in the inventory, and dated July 21, 1882—the last of which was payable on July 24, 1886 (after the testator's death)—were handed over, and possession of the station was given, and on Mar. 12, 1883, the



A purchasers executed the agreed mortgage by deed under seal. By this deed the station and effects were assigned to the testator, with the powers and provisions usual in the case of mortgage. The deed also contained a proviso for the execution of a release by the testator if the mortgagors duly retired and paid the promissory notes at maturity, the usual power of entry and sale in case of default, and in particular an express covenant by the mortgagors with the deceased "to retire and pay the said several promissory notes as and when the said several promissory notes respectively shall become due and payable according to the effect and tenor thereof respectively."

This deed, therefore, clearly created a debt by "specialty," in which, under ordinary circumstances and without any expression or implication of a contrary intention, the simple contract debts created by the promissory notes would have been merged. But such was not the intention of the parties, and accordingly the deed contained a proviso of great importance, that

"no simple contract shall be considered as having merged in the specialty created by or contained in these presents, and that in any action upon any simple contract the defence that such simple contract was merged in or extinguished in any specialty created by or contained in these presents shall not be available or be used, and that no negotiable security or securities taken for or in respect of any moneys for the time being owing on the security of these presents shall in any way postpone or affect this security, or all or any of the powers or provisions hereof or hereby created."

The latter part of the proviso was intended to meet a provision in the mortgage by which, if default was made in the payment of any of the promissory notes, the whole of the moneys thereby secured should become immediately due and payable, and an analogous provision in the declaration of trusts of the proceeds of any sale made in the event of such default so to appropriate the proceeds. So that in such event the remedy under seal might, at the option of the deceased, at once be brought into operation for the whole remaining balance.

F The testator died on April 25, 1884. Such of the promissory notes as fell due during his lifetime had been duly paid, leaving the balance to become payable as the notes respectively should come to maturity. The testator, as before stated, resided within the colony of Victoria at the time of his death, and had at that time the deed with him in that colony; the debtors were resident in New South Wales; the promissory notes were held by a bank in Victoria.

G *Sir H. Davey, Q.C., Vaughan Hawkins and Leverson* for the appellant.  
*Finlay, Q.C., and Sutton* for the respondents.

July 25, 1891. **LORD FIELD** stated the facts as set out above, and continued :—

H It was stated in the Case, and apparently is the fact, that the respondent was assessed in the colony of Victoria, and paid duty upon this debt; but the appellant insisted upon his right to charge the duty in New South Wales, and the respondent, therefore, paid the amount under protest, and subject to the decision of the Supreme Court upon a Special Case, which was agreed to between the parties, and in which the question was whether the balance of £75,727 15s. was liable to probate duty in New South Wales as assessed. On the argument of the case it was correctly held by the Supreme Court, on the authority of *Blackwood v. R.* (3), I decided by this Board, that the general words in the statute "personal estate" must be read as limited to such estate as the grant or probate confers jurisdiction to administer, and that the appellant therefore, in order to establish the liability he alleged, must make out that the asset is one existing within the local area of the limited jurisdiction created by the Act.

A debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the courts of this country, and is a well-settled rule governing all questions as to which court can confer the required authority,

that a debt does possess an attribute of locality arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was “conspicuous,” i.e., within the jurisdiction within which the specialty was found at the time of death: see WENTWORTH ON THE OFFICE OF EXECUTORS, Edn. 1763, pp. 45, 47, 60.

This rule received an apt illustration in the comparatively modern case of *Gurney v. Rawlins* (1). In that case executors claimed a right to recover under a diocesan probate, and the subject-matter of their claim was a policy of insurance under seal, by which the capital stock of an insurance company was made chargeable with the amount assured. The defendants disputed the authority of the plaintiffs to recover under that probate, alleging that they were resident in London, and that the capital stock of the company was out of the diocese, so that a prerogative probate was essential, but the replication that the policy was within the diocese at the time of his death was held good, on the ground that the debt was by specialty and so bona notabilia where it was found at the time of death.

The correctness and application of the rule was not disputed at their Lordships' Bar, but it was contended on the part of the appellant that under the circumstances of this case the debt was one by simple contract. It was urged that in substance it was the balance of the purchase money, or at the least that it was due by virtue of the promissory notes, and that it was part of the testator's estate in New South Wales, where the debtors resided at the time of death, and it was urged that the mortgage was under the circumstances of the case merely a collateral security, was never in fact acted upon, and was of no value.

On the other side their Lordships were asked to hold that such was not the case, but that the taking of the mortgage under seal operated by act of law as a merger or satisfaction of the prior simple contract debt, and it was contended that such was the case, notwithstanding the express contract of the parties to the contrary.

This contention was founded upon the authority of *Price v. Moulton* (2) which was decided by judges of very great authority. That case, however, was decided upon special demurrer, and the pleadings, as observed by the court, are far from clear. The pleading in answer to the indebitatus count certainly admitted that a subsequent contract under seal, identical with the parol contract pleaded to, had been entered into between the parties, and thus a good technical answer to the claim under the indebitatus count was undoubtedly set up. But the plaintiff sought to get rid of this technicality, not by setting out the deed which would have shown its nature and specific terms, and whether it did or did not operate as a merger, but by an averment that it was made by way of security and so expressed; and it seems to their Lordships that the court may well have considered that this mode of pleading did not deny that the terms of the deed in themselves effected the merger, but only asserted the intention of the parties that it was to be by way of collateral security only.

The reported language of the court in some places indeed seems to imply a larger and broader meaning; but if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary, that is a proposition to which their

**A** Lordships would hesitate to assent. It would appear to be contrary to other decided cases (*Twopenny v. Young* (4)), and the authorities collected and classified in 2 FISHER ON MORTGAGES (3rd Edn.), ss. 1328 to 1334. Indeed, in the subsequent case of *Boaler v. Mayor* (5), in the same court, one of the learned judges, who had been a party to and concurred in the judgment in *Price v. Moulton* (2), seems to have implied that the court in *Price v. Moulton* (2) had no intention

**B** of laying down any such general rule, and to have done so with the assent of the very learned counsel who had argued the case in the contrary sense. But it does not seem to their Lordships to be necessary, for the decision of the case now before them, to come to any definite conclusion as to the effect which ought to be given to *Price v. Moulton* (2).

If merger is an implication of law, so strong that it takes effect even against

**C** intention, then the simple contract in the present case was undoubtedly merged and extinguished, and the debt was no other than a debt by specialty. But, upon the contrary supposition, that the effect of the proviso was to preserve the remedies by simple contract to the extent stipulated for, it appears to their Lordships that the debt was still a specialty debt. The deed contains an express covenant to retire and pay the promissory notes; between the same parties it was an existing security

**D** under seal, at the time of the testator's death, for the balance then due; it would continue to be a security for a much longer period, and would be attended with advantages not belonging to debt by simple contract. Although it never became necessary to act upon the deed by taking possession or seeking any remedy under it, it was and remained a registered deed under the system of colonial registration, and of full force and validity. There is but one debt, whether in Victoria or

**E** New South Wales, and their Lordships fail to see how it can be said that that debt has not become a debt by specialty.

This is the conclusion at which the Supreme Court has arrived, and their Lordships think it is correct, and they will, therefore, humbly advise Her Majesty that the order below should be affirmed. The appellant must bear the costs of this appeal.

**F**

*Appeal dismissed.*

Solicitors: *R. C. Want; Burton, Yeates & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]



# Re AMOS. CARRIER v. PRICE

[CHANCERY DIVISION (North, J.), May 27, 28, 1891]

[Reported [1891] 3 Ch. 159; 60 L.J.Ch. 570; 65 L.T. 69;  
39 W.R. 550; 7 T.L.R. 559]

*Will—Gift to donees for lives and lives of heirs—Strict construction—Intestacy on death of heirs.*

*Trade Union—Property—Right to hold—"Purchase"—Gift under will—Trade Union Act, 1871 (34 & 35 Vict., c. 31), s. 7.*

By his will a testator gave a leasehold house to T.P. "for his life and for the life of his heir, after which it becomes the property of" a trade union registered under the Trade Union Act, 1871. The testator also gave two freehold houses to H.P. and T.H.W., respectively, in precisely similar terms.

**Held:** (i) in s. 7 of the Trade Union Act, 1871, which allowed a registered trade union to hold property, the word "purchase" was used in the ordinary sense as meaning to buy for money and not in the technical sense as meaning to acquire otherwise than by descent or escheat; and as the trade union could not hold land except under the Act, the gift to it was void; (ii) the gifts to the donees must be construed literally as conferring on each donee an estate during his own life and the life of the person who on his death became his heir; thereafter there was an intestacy so that the freehold houses went to the testator's heir and the leasehold house to his next-of-kin.

**Notes.** The words "not exceeding one acre" in s. 7 of the Trade Union Act, 1871, were repealed by s. 207 and Sched. 7 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427 et seq.).

Considered: *Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110. Referred to: *Re Levy (deceased), Barclays Bank, Ltd. v. Board of Guardians and Trustees for the relief of the Jewish Poor*, [1960] 1 All E.R. 42.

As to gifts to non-charitable societies, see 39 HALSBURY'S LAWS (3rd Edn.) 867, 868, and as to what interests may be created by will, see *ibid.*, p. 909; and for cases see 44 DIGEST 908 et seq. As to the right of a registered trade union to hold property, see 38 HALSBURY'S LAWS (3rd Edn.) 365 et seq.; and for cases see 43 DIGEST 101. For the Trade Union Act, 1871, s. 7, see 25 HALSBURY'S STATUTES (2nd Edn.) 1247, and for the Wills Act, 1837, s. 29, see *ibid.*, vol. 26, p. 1350.

Cases referred to:

- (1) *Carne v. Long* (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, 1278.
- (2) *Re Clark's Trust* (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 437, 1280.

Also referred to in argument:

- Pease v. Pattinson* (1886), 32 Ch.D. 154; 55 L.J.Ch. 617; 54 L.T. 209; 34 W.R. 361; 2 T.L.R. 306; 8 Digest (Repl.) 355, 346.
- Re Pumfrey, Ex parte Hillman* (1879), 10 Ch.D. 622; 48 L.J.Bey. 77; 40 L.T. 177; 27 W.R. 567, C.A.; 5 Digest (Repl.) 904, 7499.

**Adjourned Summons** by the executors of the testator, James Amos, to determine the construction of the gifts contained in the will.

By his will, dated Oct. 20, 1888, the testator, James Amos, a boiler maker, appointed executors, and after directing the payment of his debts and funeral and testamentary expenses the testator gave to Thomas Price, a leasehold house, No. 27, Bath Terrace, New Swindon, in the county of Wiltshire, the conditions to be as follows:

"That the property be left to him for his life and for the life of his heir, after

A which it becomes the property of the Boiler Makers and Iron Ship Builders Society."

In identical words and with the same conditions the testator also gave to Henry Poole, a freehold house, No. 41, Regent Street, New Swindon; and to Thomas Henry Williams, a freehold house, No. 40, Regent Street, New Swindon. The testator then directed as follows:

B "That each of the above keep the property held by them in good repair, and shall pay to the trustees the sum of 4s. per week until the whole of the mortgage be paid; and that the further sum of £3 6s. 8d. each per annum should be paid by them to be disposed of as follows: viz., £5 per annum to the Boiler Makers Benevolent Fund and £5 per annum to the executors. Should either  
C of the parties refuse or fail to comply with the foregoing conditions, they shall forfeit all right to the property, and the executors shall cause the same to be handed over to the Boiler Makers Society forthwith."

No residuary devise or bequest was contained in the will.

The United Society of Boiler Makers and Iron Ship Builders was instituted on Aug. 20, 1834, and was duly registered as a trades union, under the Trade Union  
D Acts, 1871 and 1876; and the rules of the society were also registered with the registrar. It was not necessary, in order that a member should be entitled to receive out of the funds of the society the allowances and benefits provided by the rules, that he should be in poor circumstances; poverty was not a necessary ingredient in the qualification of members to receive the benefits of the society. The society was rather in the nature of a club or friendly society than a charitable  
E institution. The question whether the society was a charity was raised in argument, but the validity of the gifts to the society in the will of the testator was decided independently of that question, which was not dealt with in the judgment. It was admitted that the Boiler Makers Benevolent Fund was a charity.

*Robertson Macdonald* for the executors.

*Charles Church* for Thomas Price and Thomas Henry Williams.

F *J. C. Gordon* for Henry Poole.

*Hood* for the heiress-at-law and next-of-kin of the testator.

*Upjohn* for the United Society of Boiler Makers and Iron Ship Builders and the Boiler Makers Benevolent Fund.

G **NORTH, J.**—Under the will the testator appoints two persons to be his executors, and directs

"That all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease."

There is no devise or bequest of any sort to those persons, although, of course, the personal estate would vest in them for the purpose of doing their duty as executors.

H Then comes this:

"I give, devise, and bequeath unto Thomas Price the property known as 27, Bath Terrace, New Swindon . . . the conditions to be as follows: That the property be left to him for his life and for the life of his heir, after which it becomes the property of the Boiler Makers and Iron Shipbuilders Society."

I Then two houses are given to two other persons in identical words, the only difference being that the first house is leasehold and the other two houses are freehold. The conditions in each case are exactly the same as those I have read. Then it is provided:

"That each of the above [that means each devisee] keep the property held by them in good repair, and shall pay to the trustees the sum of 4s. per week until the whole of the mortgage be paid."

That, I take it to be clear, throws the burden of the mortgage on the three houses in equal proportions, and all that is to be done is to pay the sum of 4s. per week

until the whole is paid, if the mortgagee is content with that. If he wants more A  
he has his rights.

"And that the further sum of £3 6s. 8d. each per annum should be paid to them to be disposed of as follows—viz., £5 per annum to the Boiler Makers Benevolent Fund, and £5 per annum to the executors. Should either of the parties refuse or fail to comply with the foregoing conditions, they shall forfeit B  
all rights to the property, and the executors shall cause the same to be handed over to the Boiler Makers Society forthwith."

So that the limitation of each house is complete in itself to the devisee for the lives of himself and his heir, after which it becomes the property of the society. The society, therefore, under those words, would take in remainder after the estate given by the previous words. The final words are: C

"They shall forfeit all rights to the property, and the executors shall cause the same to be handed over to the Boiler Makers Society forthwith."

The point there is, the interim estate having come to an end, the Boiler Makers remainder is accelerated.

I think the most convenient way of dealing with the matter is to consider what D  
the effect of this gift to the Boiler Makers Society is. There are the two bodies mentioned—the Boiler Makers Society and the Boiler Makers Benevolent Fund. I think it is clear, when one looks at the rules, that the Boiler Makers Benevolent Fund merely means a fund administered by the Boiler Makers Society under r. 39. Under the rules a certain sum is appropriated as a benevolent fund, and is to be applied under the control of the executive council, and the meaning of this bequest, E  
as I read it, is to add £5 per annum to that fund, so that there will be so much more at the disposal of the persons who administer that fund. In my opinion, it is a gift to the Boiler Makers for the purposes of the benevolent fund which they have to administer.

Construing the ultimate gift first, what is meant by the property being handed over to the Boiler Makers Society? That is a trades union, registered under the Act of 1871, but not a corporation in any way. It is a body which exists for F  
certain purposes contemplated by the Act, but for no others. In my opinion, the bequest to the Boiler Makers Society is a bequest that cannot take any effect at all. In the first place, independently of the Act, what is the meaning of it? It is, beyond question, a perpetuity, or a gift tending to a perpetuity. It is not for the benefit of the particular individuals constituting the society at the time. It was suggested that the gift might have the effect of vesting all the property it comprises G  
in the existing members as joint tenants or tenants in common. But, in my opinion, it has no such meaning. That is not the effect of the gift. If it were, it would be entirely contrary to the testator's intention, because, instead of the property being administered by the executive body of the Boiler Makers Society for the purposes of the society, it would be a property belonging to a number of individuals as their common property, with respect to which anyone might at any moment commence an action for partition or sale, taking the control out of the society altogether, and simply dividing the property among themselves. That is not the intention of the testator. The only other thing is this: It is a gift to the society for the purposes of the society. But beyond all question that is a perpetuity, and the authorities which have been cited of *Carne v. Long* (1) and the observations of HALL, V.-C., in *Re Clark's Trusts* (2) are conclusive on the point. I

Besides, there is another difficulty. I do not understand how this body is capable of taking land in any way, whether for a perpetuity or anything else. It is said that, assuming that to be so, the Trade Union Act, 1871, authorises the union to receive this land and to hold the land. The Trade Union Act, 1871, s. 7, provides:

"It shall be lawful for any trade union registered under this Act to purchase or take upon lease in the names of the trustees for the time being of such union



A any land [not exceeding one acre] and to sell, exchange, mortgage, or let the same."

It is said here that this trades union takes these three separate houses in remainder under the will because it is lawful for them to purchase; and it is said that "purchase" means "acquire otherwise than by descent or escheat," and therefore B a devise or bequest of property operates as conferring on the person to whom it is given an interest by purchase, because he has not acquired it by descent.

In my opinion, that is not the meaning of the word "purchase" as used here. No doubt "purchase" is sometimes legally used in that sense, but that is not the natural ordinary meaning of the word. It is something additional to the ordinary meaning of the word, and is a meaning which it has sometimes. But, in my C opinion, it is not the meaning of the word in this section. If it were, I should have to alter the section very much. First of all, it is to be lawful for them to

"purchase, or take upon lease." If "purchase" meant "acquire otherwise than by descent or escheat," taking on lease would be a "purchase" and the words "or take on lease" would be absurd; they would be tautologous, they would be suggesting as an alternative what is comprised in the previous words. But "purchase or take on lease" are put in contrast with one another—"purchase" referring, I D do not say necessarily, to a purchase out and out on payment of a sum down, as distinguished from a yearly tenancy at a yearly rent. I do not say "purchase" means nothing else. I think it would be satisfied by their buying up a lease. I think, if they bought up an existing lease, it would be a "purchase" within the meaning of that section; but by "purchase or take on lease," I understand to be

E meant acquiring by paying money for property which they acquire by purchase, or, if they pleased, property which they might take a lease of.

Then again, the subsequent words are not immaterial. What is contemplated is a purchase in the names of the trustees for the time being. How a devise to the society could be a purchase in the names of the trustees for the time being, I fail to understand. Then again, the rest of the section limits the amount to be taken F to "any land [not exceeding one acre]." That again points to the acquisition for particular purposes connected with the administration of their duties among their members, of land probably for an office. I do not say it is confined to that only. There might be other purposes for which it would be desirable to get it; but that is the sort of thing which it is considered the acquisition of land might be desirable for. But in my opinion it has nothing to do with the acquisition of land as forming G part of the substratum of the society itself. In my opinion this power to take land by "purchase or on lease" does not authorise this society to take land by devise under the terms of this will. Therefore the devise to them is void, and the person to take would be the heir-at-law as to the two freehold houses, and the next-of-kin as to the leasehold.

Then there is the bequest of £5 a year to the Boiler Makers Benevolent Fund. I cannot distinguish that from the gift in remainder to the Boiler Makers Union. H This, in my opinion, was an interim gift to them for the purposes of their benevolent fund by way of anticipation of what they would get when the life interest came to an end, and, in my opinion, that is a gift connected with the land. It is made payable by the person who has the land, and, in my opinion, it is open to objection on many grounds, one being that it is contrary to the Statute of Mortmain.

I The only remaining question is, what is the interest the tenants for life take? I confess I do not understand what the testator had in his mind in the language he used, and all I can do is to construe it as I find it. In my opinion the property is left to each legatee for a limited interest, the limited interest being what is described as his life and the life of his heir. For his life it is clearly good. The question is whether the interest he takes comes to an end upon his death, the interest for the life of his heir being too vague to be recognised. I do not see anything in point of law to prevent the gift being a good gift. There is no hiatus of any sort. The gift to him for his life would necessarily come to an end at his

death, but at the very moment at which he dies the person who is his heir is ascertained; and I see nothing discontinuous in the limitation which prevents a limitation so made being a good one. A

Then, as to the person to take, I see no ground for saying that the heir takes beneficially. In my opinion, it is a limitation to the tenant for lives, the lives being his own and his heir's in each particular case. I see nothing to prevent it being good, I think that is what the testator meant by the words, and I see nothing in law to prevent their taking effect. I will make a declaration that the costs of the proceedings are a charge on the estate, as far as the trustees are concerned, as between solicitor and client. The two annual payments are void. I do not rule that the heir is entitled. The payment to the executors and the payment to the benevolent fund are both void. They are conditions subsequent, and as the person who takes the land cannot legally pay them, he is not liable to forfeit his land by not doing what he cannot legally do. Henry Poole is the person who takes 41, Regent Street, for the period during which he lives and the life of the person who at his death shall be his heir; and as regards the leasehold I think the same thing applies, the word heir, although he cannot take the leasehold, being a mode of describing the life that has to be added to that of the first taker. B

Order accordingly. C

Solicitors: *Prior, Church & Adams* for *A. E. Withy*, of New Swindon; *Darley & Cumberland* for *Clifton, Carter & Co.*, Bristol; *C. L. Kingdon*; *Woodcock, Ryland & Parker*. D

[Reported by J. TRUSTAM, ESQ., Barrister-at-Law.] E

## Re WALKER. MEREDITH v. WALKER F

[CHANCERY DIVISION (Kekewich, J.), March 3, 4, 10, 1893]

[Reported 68 L.T. 517; 3 R. 455]

*Solicitor—Lien—Costs—Work done in capacity of land agent—Payment of premiums on life policies assigned to him as security for mortgagees.* G

By indentures of assignment the testator, who lived in England, assigned to M. B. two policies on his life. M. B. had for many years acted as solicitor and land agent for the testator on his estate in Ireland, and the policies were assigned to him as trustee to secure to mortgagees the repayment of a loan on Irish property. M. B. acted as solicitor both for the testator and the mortgagees. M. B. died on July 19, 1889, and the testator died on Mar. 14, 1890. C. B., widow and executrix of M. B., claimed to have a lien on the proceeds of the policies in court for two sums of money: (i) in respect of professional charges of M. B. acting as solicitor to the testator; (ii) partly for work done as a land agent, and partly for two premiums in respect of the assigned policies paid by M. B. for the testator. The chief clerk allowed a claim made by the mortgagees, but disallowed the claim of C. B. to be entitled to a lien on the proceeds of the policies. On a summons by C. B. to vary the chief clerk's certificate. H

**Held:** (i) as to the professional charges of M. B. incurred while acting as the testator's solicitor, C. B., as M. B.'s personal representative, was entitled to a lien subject to the mortgage; (ii) this lien applied only to work done in his capacity as solicitor and did not extend to work done as a land agent; (iii) as to the premiums paid by M. B., C. B. was entitled to be repaid out of the proceeds of the fund in court. I

**A** **Notes.** Distinguished: *Barratt v. Gough-Thomas*, [1945] 2 All E.R. 414. Considered: *Barratt v. Gough-Thomas*, [1950] 2 All E.R. 1048.

As to solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 42 DIGEST 259 et seq.

Cases referred to:

- B** (1) *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234; 56 L.J.Ch. 707; 56 L.T. 220; 35 W.R. 143; 3 T.L.R. 141; C.A.; 12 Digest (Repl.) 588, 4552.
- (2) *Re Snell* (1877), 6 Ch.D. 105; 46 L.J.Ch. 627; 37 L.T. 350; 25 W.R. 823; 42 Digest 268, 3024.
- C** (3) *Macfarlane v. Lister* (1887), 37 Ch.D. 88; 57 L.J.Ch. 92; 58 L.T. 201; 4 T.L.R. 106, C.A.; 42 Digest 298, 3316.
- (4) *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434; 61 L.J.Ch. 256; 65 L.T. 745; 8 T.L.R. 158; 42 Digest 269, 3026.
- (5) *Re Messenger, Ex parte Calvert* (1876), 3 Ch.D. 317; 45 L.J.Bey. 134; 34 L.T. 920; 42 Digest 268, 3023.
- D** (6) *Colmer v. Ede* (1870), 40 L.J.Ch. 185; 23 L.T. 884; 19 W.R. 318; 42 Digest 260, 2944.

Also referred to in argument:

*Champernown v. Scott* (1821), 6 Madd. 93; 56 E.R. 1026; 42 Digest 261, 2952.

*Re Clark, Ex parte Newland* (1876), 4 Ch.D. 515; 35 L.T. 916; 25 W.R. 275; 42 Digest 261, 2955.

**E** *Sheffield v. Eden* (1878), 10 Ch.D. 291; 40 L.T. 288; 27 W.R. 477, C.A.; 42 Digest 263, 2980.

**Summons** taken out by the applicant, the widow of the land agent and solicitor of the testator, asking for a variation of the chief clerk's certificate refusing her claim to have a lien on the proceeds of certain life policies assigned to her husband by the testator.

**F** By an indenture of assignment, dated 25 June, 1874, the testator assigned to Michael Bourke a life policy in the Standard Life Assurance Co. numbered 52,409 N., dated April 30, 1874, for the sum of £800. By an indenture of assignment, dated May 29, 1883, the testator assigned to Michael Bourke another life policy in the same company numbered 54,217 N., and dated April 13, 1883, for the sum of £500. Pursuant to an order made for the convenience of all parties in the action and dated Dec. 8, 1890, a sum of £1,490 7s. 4d. was paid into court by the Standard Life Assurance Co.

**H** Michael Bourke for many years acted as solicitor and agent for the testator, who lived in England, Bourke managing as agent for the testator the Waterpark estate in the county of Cork. This estate being subject to certain mortgages, the two policies were assigned by the testator to Michael Bourke as a trustee to secure to certain other persons the moneys owing to them upon the mortgages. Michael Bourke acted as solicitor for the testator and for the mortgagees.

**I** The sum of £228 7s. 11d., being the first item in respect of which his widow, Caroline Bourke, claimed a lien, was made up of general professional charges of Michael Bourke as solicitor, against the testator, incurred between May 18, 1882, and October, 1888. The sum of £147 12s. 10d., being the second item in respect of which Caroline Bourke claimed a lien, was partly in respect of work done by Michael Bourke as land agent, and also included two insurance premiums, namely, £56 17s. 6d. and £53 18s. 8d. paid by Michael Bourke for the testator. Michael Bourke died on July 19, 1889, and the testator died on Mar. 14, 1890. The chief clerk allowed the claim of the mortgagees to a charge on the moneys in court, but disallowed the claim of Caroline Bourke to have a charge or lien on the said moneys.

*Warmington, Q.C.*, and *Frank Evans* for the applicant.



*Renshaw, Q.C.*, and *Swinfen Eady* for the defendants, the executors of the A  
testator.

*C. M. Le Breton* for the plaintiff.

**KEKEWICH, J.**—The money in court represents two policies granted by the Standard Life Assurance Co. on the life of John Tyrwhit Walker, the testator. The money was paid into court under an order dated Dec. 8, 1890, for the B  
general convenience of all parties in the action, that the insurance company may be indemnified, the money received from the company, and kept in medio pending the decision of the court. There was an inquiry, and the chief clerk made his certificate, and now there is a summons to vary the certificate, the application being made by Caroline Bourke, the legal personal representative of Michael Bourke, the solicitor and land agent of the testator. C

The applicant seeks to vary the certificate in three particulars. The certificate found nothing due to her, and, as representative of her husband Michael Bourke, she seeks to have it declared that there is due to her a considerable sum which ought to be paid out of the proceeds of the policies. The items are stated as two: first, £228 7s. 11d. for costs and disbursements due to Bourke as solicitor; secondly, £147 12s. 10d., balance due for services rendered and money paid. The D  
sum of £147 12s. 10d. is divisible in this way: two sums of £56 17s. 6d. and £53 18s. 8d. are claimed in respect of two premiums paid by Michael Bourke, and sought to be recovered from the estate of the testator. The balance of the £147 12s. 10d. is money said to be due to the applicant on the ground that Bourke was the testator's agent for landed property in Ireland. There is something due, there is no contest as to the amount; but the defence as to this part is, that E  
the money is due to Bourke only in his character of land agent, and a solicitor can have no lien in the different character of a land agent. Counsel for the applicant urged that solicitors derived much profit from agency business, though not properly the business of a solicitor, and were so entitled to a solicitor's lien in respect of it. But being pressed, he did not carry his argument further. Whether it is expedient that a solicitor should do other business or not, the law F  
is settled that a solicitor's lien extends only to debts due to him for work done and money spent in his character of solicitor; and the business of a land agent and solicitor being distinct, this part of the claim fails.

The rest of the item consists of the two premiums: as regards those also I do not see how lien attaches in respect of the policies. The premiums were paid by Bourke on behalf of Walker; it is not argued that Bourke had a lien for them G  
in his character of solicitor. The claim may be put on many grounds, and the applicant, in my opinion, is entitled to succeed as to the premiums. I must not say, with *Falcke v. Scottish Imperial Insurance Co.* (1) before me, that she is entitled on the ground of salvage. In the head-note I read (34 Ch.D. at p. 234):

"*Seemle* the maritime doctrine of salvage has no application to the payment H  
of premiums on a policy."

Both BOWEN and FRY, L.JJ., held that the doctrine of maritime salvage did not apply to such a matter as a claim for premiums paid by an agent. But the agent is not therefore precluded from being repaid the money by his principal. These policies were assigned to Bourke. If Bourke paid the premiums because he was the owner of the policies and could only keep the policies alive by paying I  
the premiums, it seems to me that Walker's estate cannot redeem without paying the premiums which Bourke paid so as to preserve the property. If Bourke had not paid the premiums, there would have been no policies at all. On the general rules of equity, in my opinion, Walker's estate must repay the premiums. This case differs from *Falcke v. Scottish Imperial Insurance Co.* (1) as to the relations of the parties. The moneys were paid by Bourke at the request of Walker; that gives a right to be repaid out of the policies; anyhow it would give a right of action, and Bourke would be able to recover the amount, whether you call it

A set-off or something else. It is impossible for the testator's estate to recover the money without paying these premiums. On any of the grounds Mrs. Bourke has a right that these two premiums should be paid out of the proceeds of the policies in court. There is this difficulty: it is said that the premiums are contained in an agency account; but if Mrs. Bourke has a charge in the policies, she is entitled to marshal the security so as to throw the sums on the policies.

B The other item is a clean item of costs, £228 7s. 11d. It is said that for these costs Bourke had no lien. Why? The policies were in his possession, policies on his client's life, policies of the kind to which lien attaches. The policies were assigned to Bourke for the purpose of raising money; the only question is the rights of the mortgagees. Mrs. Bourke does not claim against the mortgagees—it would have been useless; but she claims subject to the mortgage, and independently of the mortgagees that she is entitled to a lien. I must assume that she has the policies: I must consider that they are still in her hands, and she must be treated as sitting upon them. The answer to her claim is, that the lien could not have existed when the policies were delivered to Bourke, and not having existed then cannot exist now. Lien is of a possessory character; a man must not only have possession, but also possession on behalf of a client. The two policies were never delivered to Bourke to hold on behalf of Walker; they were assigned to him for the purpose of raising money for Walker. Though there was no declaration of trust, it is conceded that Bourke held the policies for that purpose. If so, why does not lien attach as against Walker, but subject to the mortgage?

E I am referred to some cases; but I do not see that any of them prevent me with ordinary justice from giving effect to the lien. In *Re Snell* (2), SIR GEORGE JESSEL, M.R., says (6 Ch.D. at p. 107):

"Can a solicitor, who in the preparation of a mortgage acts both for mortgagor and mortgagee, claim a lien upon the title deed for costs due to him from the mortgagor, so as to be entitled to withhold the deeds from his mortgagee client until payment of those costs?"

F Again, in *Macfarlane v. Lister* (3), COTTON, L.J., says (37 Ch.D. at p. 94):

"I am of opinion that the order is wrong so far as it gives the lien of the solicitors priority over the mortgage of the appellants."

G The way in which it is put shows that it is conceded that the lien does not exist against the mortgagor. There is nothing in the words of SIR GEORGE JESSEL, M.R., or COTTON, L.J., to show that as against the mortgagor the lien does not remain. Again, COTTON, L.J., says (*ibid.*):

"In *Re Snell* (2) the title deeds were in the hands of the solicitors, who acted for both parties. Their duty as solicitors for the mortgagee was to obtain the title deeds for him, and it was held that they could not insist on a right which they could only acquire by neglecting their duty to him and retaining them as solicitors to the mortgagor."

H There is nothing there to show that the solicitor could not insist on his lien as against the mortgagor. I expressed a similar view in *Brunton v. Electrical Engineering Corpn.* (4). There is no case against that view; and certainly BACON, V.-C.'s decision in *Re Messenger, Ex parte Calvert* (5), confirms it. The Vice-Chancellor says (3 Ch.D. at pp. 318, 319):

"The law is clear that a person who from his position has a right of lien, does not lose that right unless there is some special agreement that he shall do so. No such agreement is alleged in the present case. Is not then the result this, that the property was subject to the mortgage, and also to the solicitor's lien?"

The Vice-Chancellor cites *Colmer v. Ede* (6) in support of that view, and says, in the terse language he was accustomed to use, that property may be subject to a

mortgage, and also to a solicitor's lien. I think I should be cutting down the well-established right of a solicitor to lien, if I were to hold, merely because a mortgage was made to clients of his, and he held the deeds of the mortgage, that he should lose his lien. Where the deeds remain in the solicitor's possession, I think the lien is preserved subject to the mortgage. A

Counsel for the defendants relied on the law of bankers, namely, that if a cheque is handed over for a particular purpose, it cannot be retained except for that particular purpose. What is the purpose here? The policies were assigned to Bourke by Walker for the purpose of raising money thereon, and subject thereto for Walker. Therefore, in my opinion, the solicitor is entitled to a specific lien subject to the mortgage. B

The certificate, therefore, must be varied by finding that Mrs. Bourke is entitled to the two sums for solicitor's costs and the premiums, and she must have her costs. The defendants must also have their costs, and the applicant having served the plaintiff, he must have his costs, though the action is not intituled a creditor's action. C

Solicitors: *Bell & Jervis Amos*; *Martelli* for Prior, Norwich; *Edmund Pooley*.

[Reported by F. E. ADY, ESQ., Barrister-at-Law.] D

## Re RYMER. RYMER v. STANFIELD

[COURT OF APPEAL (Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ.), November 5, 6, 1894]

[Reported [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590;  
43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22]

*Charity—Cy-près doctrine—General charitable intent—Failure of object—Named charity ceasing to exist—Seminary for education of priests—Seminary existing at date of will—Closure before date of testator's death.*

By his will dated August 2, 1883, a testator bequeathed the following legacy: "To the rector for the time being of St. Thomas' Seminary for the education of priests in the diocese of Westminster, for the purposes of such seminary, £5,000." The testator died on June 5, 1893. At the date of the will there existed at Hammersmith a seminary for the education of Roman Catholic priests for the diocese of Westminster known as St. Thomas' Seminary, but it was closed in March, 1893, the buildings were sold, and the students were removed to another seminary near Birmingham. G

**Held:** the bequest was not a general charitable gift, but a gift to a particular institution, and that, as that institution had ceased to exist at the testator's death, the legacy was not to be applied *cy-près*, but lapsed and fell into the residue. H

*Clark v. Taylor* (1) (1853), 1 Drew. 642, applied. I

**Notes.** Considered: *Re Withall*, *Withall v. Cobb*, [1932] 2 Ch. 236. Applied: *Re Tharp*, *Longrigg v. Peoples Dispensary for Sick Animals of the Poor*, [1942] 2 All E.R. 358. Considered: *Re Goldney*, *Goldney v. Queen Elizabeth Hospital for Children* (1946), 115 L.J.Ch. 337; *Re Hutchinson's Will Trusts*, *Gibbons v. Nottingham Area No. 1 Hospital Management Committee*, [1953] 1 All E.R. 996; *Re Dawson's Will Trusts*, *National Provincial Bank v. National Council of the Y.M.C.A. Inc.*, [1957] 1 All E.R. 177. Referred to: *Re Watt*, *Hicks v. Hill*, [1932] 2 Ch.



**A** 243, n.; *Re Lucas, Sheard v. Mellor*, [1948] 2 All E.R. 22; *Re Pochin, Midland Bank Executor and Trustee Co. v. Godkin*, [1948] Ch. 182, n.

As to a bequest to a charitable institution which has ceased to exist before the testator's death and its application *cy-près*, see 4 HALSBURY'S LAWS (3rd Edn.) 278, et seq.; and for cases see 8 DIGEST (Repl.) 418 et seq.

**B** Cases referred to:

(1) *Clark v. Taylor* (1853), 1 Drew. 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287; 1 W.R. 476; 61 E.R. 596; 8 Digest (Repl.) 419, 1104.

(2) *Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed on appeal (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.

(3) *Mills v. Farmer* (1815), 1 Mer. 55; 19 Ves. 483; 35 E.R. 597, L.C.; 8 Digest (Repl.) 466, 1659.

**C**

(4) *De Costa v. De Pas* (1754), Amb. 228; Dick. 258; 3 Hare, 194, n.; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, 1615.

(5) *Loscombe v. Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, 1084.

**D**

(6) *Re Clergy Society* (1856), 2 K. & J. 615; 4 W.R. 664; 69 E.R. 928; 8 Digest (Repl.) 409, 1007.

(7) *Re Maguire* (1870), L.R. 9 Eq. 632; 39 L.J.Ch. 710; 18 W.R. 623; 8 Digest (Repl.) 411, 1035.

(8) *Biscoe v. Jackson* (1887), 35 Ch.D. 460; 56 L.J.Ch. 540; 56 L.T. 753; 35 W.R. 554; 3 T.L.R. 577, C.A.; 8 Digest (Repl.) 461, 1621.

**E**

(9) *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, 924.

(10) *Russell v. Kellett* (1855), 3 Sm. & G. 264; 26 L.T.O.S. 193; 20 J.P. 131; 2 Jur.N.S. 132; 65 E.R. 653; 8 Digest (Repl.) 468, 1692.

(11) *Re Ovey, Broadbent v. Barrow* (1885), 29 Ch.D. 560; 54 L.J.Ch. 752; 52 L.T. 849; 33 W.R. 821; 1 T.L.R. 401; 8 Digest (Repl.) 420, 1107.

**F**

(12) *Re Slevin, Slevin v. Hepburn*, ante p. 200; [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 39 W.R. 578; 7 T.L.R. 394, C.A.; 8 Digest (Repl.) 463, 1633.

(13) *Marsh v. A.-G.* (1860), 2 John. & H. 61; 30 L.J.Ch. 233; 3 L.T. 615; 25 J.P. 180; 7 Jur.N.S. 184; 9 W.R. 179; 70 E.R. 971; 8 Digest (Repl.) 420, 1111.

**Appeal** by the Attorney-General from a decision of CHITTY, J., reported [1895] 1 Ch. 19.

**G**

By his will dated August 2, 1883, Horatio Rymer, after bequeathing certain specific and pecuniary legacies, devised and bequeathed all his estate to his executors on trust to pay his funeral and testamentary expenses, and to pay and appropriate the legacies thereinbefore and thereafter given, and he directed that his trustees should stand possessed of certain legacies which were settled as therein mentioned. The will continued:

**H**

"Subject to and after payment and satisfaction of the beforementioned legacies and the duties thereon, I give the following charitable legacies to the following institutions and persons respectively, all subject to legacy duties, that is to say, to the rector for the time being of St. Thomas' Seminary for the education of priests in the diocese of Westminster for the purposes of such seminary £5,000; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the names of proper trustees so as to make the same a permanent fund. And I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector of such seminary. And I request, but not as a condition to this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or on part in this foundation."

**I**

The testator then gave a legacy of £2,000 to Cardinal Manning or the Archbishop of Westminster for the time being, to be applied for the purposes of the Westminster Diocesan Education Fund at discretion, and bequeathed other charitable legacies to a large amount, some of £2,000 and some of £1,000, and in each case he gave the legacy to the manager of the charity "for the purposes of such charity." The testator died on June 5, 1893. A

At the date of the will St. Thomas' Seminary was in existence. It was established in or about 1869 at Hammersmith, for the education of priests in the diocese of Westminster and was carried on without break and with a complete staff of professors and teachers. It was supported partly by payments made by or on behalf of the students, and partly by the income of funds belonging to the diocese and applicable for the purpose. Cardinal Manning predeceased the testator and at the testator's death Cardinal Vaughan was Archbishop of Westminster. Prior to the death of Cardinal Manning it had been found that the expenses of carrying on the seminary at Hammersmith were heavier than the resources available could discharge, and shortly before Lady Day, 1893, such of the students as were ready for ordination were ordained, and the rest of the students were removed to Oscott, near Birmingham, where a seminary had been established by the Bishop of Birmingham, and was carried on by the bishop as president, for the education of priests for Westminster, Birmingham and certain other dioceses in England. B

The executors took out a summons to determine whether the legacy of £5,000 to "the rector for the time being of St. Thomas' Seminary" had lapsed and fallen into the residuary estate, and if it had not lapsed how it should be dealt with. CHITTY, J., held that the legacy had lapsed and fallen into residue. The Attorney-General appealed. C

*Cozens-Hardy, Q.C.*, and *Ingle Joyce (the Attorney-General, Sir Robert Reid, Q.C., with them)* for the Attorney-General. D

*Levett, Q.C.*, and *T. L. Wilkinson* for the executors of the will.

*P. S. Stokes* for Cardinal Vaughan. E

**LORD HERSCHELL, L.C.**—In spite of the able argument which has been addressed to us by counsel for the Attorney-General, I entertain no doubt that the judgment of CHITTY, J., in this case was right. F

The first step to be taken is to construe the will of the testator. [HIS LORDSHIP read the terms of the bequest and continued:] That bequest is followed by a number of other bequests—legacies of £2,000 each are given to certain persons for school and orphanage purposes, the bequest in each case being described as given for the purposes of that particular institution. Then follow legacies of £1,000 each, given to representatives of institutions having some of the same objects precisely as the previous gifts, the legacy being limited in the case of these particular institutions to £1,000. G

The contention on behalf of the Attorney-General is, that from the gift now in question is to be inferred an intention on the part of the testator to benefit the priests by educating them quite apart from their education taking place in or in connection with this particular seminary; and that it is quite immaterial that the testator has designated that particular seminary, for the gift can be regarded as a charitable one, which must take effect even though that seminary should have ceased to exist at the time of the death of the testator. H

I am unable to construe this bequest. I think in all these cases (and they may all be looked at for the purpose of throwing light on this bequest) the testator had in view particular institutions, and although their object may be the same he graduates his bounty towards them, showing that it was the education of the orphans at this institution, or that which he had in his mind, and not merely the education of orphans, if I may say so, at large. In the first place, I observe that he says: I

"I give the following charitable legacies to the following institutions and persons."

- A** The persons are named in connection with the institutions. There is no institution named except in connection with a person, and therefore he indicates at the outset that the legacy is to be a legacy to the institution, although he names the officers of the institution which is to take it. It seems to me, therefore, that we start with that indication. Then the testator mentions St. Thomas' Seminary, it is true, in conjunction with the words "for the education of priests in the diocese of
- B** Westminster." It is said that those are his own words, and not part of the title. But it would be obviously a piece of prudence to insert those words in order to make sure that the bequest should go to the St. Thomas' Seminary which he had in view, and not to any institution which might possibly have existed as St. Thomas' Seminary not having that object and being a different institution. But the gift is to be for the purpose of such seminary, and then it is to be observed that, although
- C** he does not make it a condition of the gift, he does couple it with the request that a yearly mass for the repose of his soul may be said at the said seminary. The whole is localised and connected with that institution, as distinctly, it seems to me, as a bequest could be. That is the construction which I put upon the language which the testator has used. There did exist such an institution as St. Thomas' Seminary, answering in every respect the description given. That institution was
- D** no longer in existence at the time of the death of the testator.

Counsel for the Attorney-General contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable and to be applied to some cognate purpose. In support of this contention—when once the construction had been arrived at which I have put upon the will—I have been unable to find that they have cited a single authority. They placed reliance upon the decision of LORD ELDON in *Moggridge v. Thackwell* (2) and *Mills v. Farmer* (3). The nature of those cases and the effect of the decisions are, I think, very well emphasised in a short passage in LORD ELDON's judgment in the latter case. He points out that giving property "to such persons as I shall name to be my executors," and appointing no executors, leaves that in the case of an individual a void gift. He says (1 Mer. at pp. 94, 95):

- F** "But to give effect to a bequest in favour of charity, the court, will in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly perhaps on principles in the Roman law which we do not at this time perfectly comprehend, and partly, no doubt, on the religious notions
- G** which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle which it is now too late to call in question is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient."

- H** That was the principle established in *Moggridge v. Thackwell* (2), as well as in *Mills v. Farmer* (3), and, of course, would cover a considerable class of cases. The testator has defined the general character of the charity which he has in view, but has left the objects to be specified by a particular individual who can no longer specify them. That is one illustration of it, but, of course, many might be given
- I** which all come within the language to which I have referred.

Reference is made to another class of cases, such as *De Costa v. De Pas* (4), where there was a gift for a charitable purpose which the court held to be illegal, and to which therefore it could not give effect. In those cases, seeing that there was a charitable purpose, but one to which the courts could not give effect, the courts have applied the money, designed in their view for charity, upon the *cy-près* doctrine in some fashion, or, at all events, in some charitable fashion other than that designated by the testator. Of course, that is a class of cases which we need not further discuss in connection with the one now before the court.



But then follow a series of cases of another description, although coming within the same principle, it may be said, as *Moggridge v. Thackwell* (2) and *Mills v. Farmer* (3). The first of those is *Loscombe v. Wintringham* (5), where a bequest of £500 was given for a society for the encouragement of servants in good conduct. No such society was known to exist, and we may take it that none did exist. The court there said that there was a charitable purpose; the machinery for carrying it into effect—the channel through which it should be carried into effect—has not been designated by the testator, but nevertheless the court will carry it into effect. That was also the view taken in *Re Clergy Society* (6), which was a society named, but which might as well have been left unnamed, because there was no such society existing. So also in *Re Maguire* (7), where a Church Pastoral Aid Society in Ireland was mentioned, which was likewise a non-existing society. Those cases also form a class which has been established upon the same principles and considerations, I think, as guided the court in *Moggridge v. Thackwell* (2) and *Mills v. Farmer* (3) and that class of cases. But they do not seem to me to be cases at all governing the present, when once the construction has been put on the will which I have put on the will of this testator.

One other case I may allude to in connection with the class of cases beginning with *Loscombe v. Wintringham* (5), which I have just mentioned, *Biscoe v. Jackson* (8). It seems to me that COTTON, L.J., and LINDLEY, L.J., in delivering their judgment in that case, so far from using language favouring the argument on behalf of the Attorney-General in the present case, seemed to assume the case against the appellant upon the construction which I have put upon the will. They decided in favour of the bequest there on the ground that it was not a bequest to any particular institution, but a bequest for a purpose which, if it could not be carried out precisely in the way named, must be carried out as nearly as possible.

I come now to another class of cases within which the present case falls. The first of those is *Clark v. Taylor* (1), where reliance was placed upon *Loscombe v. Wintringham* (5), but the judge declined to decide the case in the same way as *Loscombe v. Wintringham* (5) had been decided, because KINDERSLEY, V.-C., regarded that case as distinguishable. He did not intend to impugn that case, as he said, in the slightest degree, but he regarded it as not governing the case then before him. The language which he uses (and there are few judges more careful in the use of their language or more accurate) is this (1 Drew. at p. 644):

“There is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails the court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention not of general charity, but to give to some particular institution, and if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognised, and it cannot be said that, wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases it is difficult to see to which particular class the case is to be referred, and this is to a certain extent one of such cases.”

There the Vice-Chancellor lays down the distinction in the clearest terms. It is said that in that case the facts show that the institution had not ceased to exist till after the death of the testator; that, therefore, the decision of the Vice-Chancellor must be read as referable to such a case; and that, if so, his decision has been overruled. I cannot think that any such point was raised in that case. It is true that on the statement of facts it would seem to have arisen, but then the statement of facts is now shown to be inaccurate. The report states that the testator died in October, 1840, and an examination of the record has shown that the testator did not die till October, 1846. It is true that DREWRY's report states that the institution came to an end in November, 1846, which would have shown that it survived the testator by a month or part

**A** of a month. But it is just as likely that there has been some mistake in the date of the cessation of the institution as in the date of the death of the testator. At all events, it is to me inconceivable that, if such a point existed, and it could have been argued in that case, that Mr. Wickens, who argued for the Crown, should not have made the point, and that there should be no allusion to it whatsoever in the judgment of the Vice-Chancellor. I, therefore, cannot regard  
**B** the judgment of the Vice-Chancellor in *Clark v. Taylor* (1) as otherwise than a decision upon the point which it purports to decide in the judgment, and as having no relation to the fact that the institution had survived the testator. That clearly was the view taken by Wood, V.-C., in *Fisk v. A.-G.* (9). He had there a similar point before him. The institution was, I think, the Women's Benevolent Institution at Liverpool, and the institution had come to an end  
**C** before the death of the testator. The Vice-Chancellor followed *Clark v. Taylor* (1), and held that, having so come to an end, the gift failed altogether.

I pass by *Russell v. Kellest* (10), because on the facts of the case there may be some discussion as to how far the principle was properly applied, but the same principle was recognised by STUART, V.-C., in that case. It was afterwards recognised and followed in *Re Ovey, Broadbent v. Barrow* (11) by PEARSON, J.,  
**D** and it seems to me that, in *Re Slevin, Slevin v. Hepburn* (12), in this court, not the slightest dissent was expressed from the view of KINDERSLEY, V.-C., in *Clark v. Taylor* (1), but rather the contrary. In delivering the judgment of the court, KAY, L.J., says ([1891] 2 Ch. at p. 243):

**E** "In the present case we think that the Attorney-General must succeed, not on the ground that there is such a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown."

**F** So that, so far from throwing any doubt upon *Clark v. Taylor* (1), it seems to me to recognise the distinction, and decides the case not on any ground inconsistent with *Clark v. Taylor* (1), but exclusively on the ground that, the charity having survived the testator, the bequest had taken effect, and when the charity ceased to exist its property fell to the administration of the Crown.

**G** One case was referred to which was said to be somewhat an exception to those with which I have been dealing, viz., *Marsh v. A.-G.* (13), and at first sight it appeared to be so. It was a gift to the President of the Nautical School at Deal, and the Nautical School at Deal was not in existence at the time of the death of the testator. But rightly or wrongly, it is quite immaterial to inquire, the court there came to the conclusion on the true construction of the will that the money was given to the president of that school, not for the benefit of the school, but that education might be given to certain boys. It was said that  
**H** the trust would have been perfectly discharged by educating the boys at Oxford and Cambridge or elsewhere than at the school. It therefore really forms no exception in the construction put on the will to the cases to which I have been alluding.

**I** I think I have now referred to every one of the cases which have been relied on by counsel for the Attorney-General. They seem to me to lead to the conclusion that this case does not come within the class of cases the first of which is *Clark v. Taylor* (1), decided forty years ago, but which has been followed in numerous cases since; and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound, and I do not think it would be in accordance with sound principle, or that any prior decisions necessitate our holding that, where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, that was of the essence of the bequest; and that if that institution has ceased to exist the charitable legacy ought still to be held as

effectual, and the money to be applied by the court on the *cy-près* principle. A  
For these reasons I think the appeal should be dismissed with costs.

**LINDLEY, L.J.**—I think the result at which CHITTY, J., has arrived is right. I have attended to and followed the arguments of counsel for the Attorney-General, and with a great many of those arguments I concur. I think with counsel that it does not do to approach a will of this kind by a short cut by saying that there is a lapse, and that there is an end of the matter. It is begging the question whether there is a lapse or not. The court must construe the will, and see what the real object of the language which it has to interpret is. I will not read the words of this gift again. I have read them very often, and studied them with care. I cannot arrive at the conclusion at which counsel for the Attorney-General wants me to arrive, that this is in substance and in truth a bequest of £5,000 for the education of priests in the diocese of Westminster. I do not think it is. It is a gift of £5,000 to a particular seminary for the purposes thereof, and I do not think it is possible to get out of that. I think the context shows it—the choice of candidates, and prayers and so on. If you get thus far then you ask yourself, “Does that seminary exist?” The answer here is, it does not. Then you arrive at the result that there is a lapse, and if there is a lapse, is there anything in the doctrine of *cy-près* to prevent the ordinary rule as to lapse from applying? I think not. Once you get the fact that there is a lapse, then it appears to me that all the authorities which are of any value tend to show that the residuary legatee takes the lapsed gift. We are asked, if the argument is pushed further, to overrule that doctrine which was laid down by KINDERSLEY, V.-C., in the earliest case of *Clark v. Taylor* (1), and also to overrule the doctrine of *Fisk v. A.-G.* (9). I think that the doctrine is perfectly right. There is always a difficulty in applying it, but when once you arrive at the fact that a gift to a particular seminary or institution, or whatever you may call it, is “for the purposes thereof,” and for no other purpose, if when once you get to the cessation of that institution or seminary, or whatever it is, and so you are driven to arrive at the conclusion that there is a lapse, there is an end of it. That is in accordance with the law, and in accordance with all the cases that can be cited. I quite agree that in coming to that conclusion you have to consider whether the mode of obtaining the object is machinery or not, or whether the mode is not the substance of the gift. Here it appears to me the gift to the seminary is the substance of the whole thing. It is the object of the testator. I think that that is so plain from the language used that it covers the case. Those are the short grounds of my judgment. I do not comment upon the various decisions, because the Lord Chancellor has done that sufficiently. B C E F G

**A. L. SMITH, L.J.**—It appears to me, in investigating whether CHITTY, J.’s judgment is correct, the first point we must make up our mind upon is this: H  
Whether he is right upon the construction he has placed on this bequest, because the construction he has placed on this bequest is this, that it was a gift to a particular institution for the purposes of that institution. The Lord Chancellor and LINDLEY, L.J., have dealt with the question as to whether that is correct or not. I entirely agree with them. In my opinion that is a bequest to a particular institution for the purposes of that institution by the testator. When I  
once that is arrived at the cases cited by counsel for the Attorney-General seem to me to be tolerably plain. The difficulty in this case is to find out whether that is in reality the intention of the testator or not.

Having got to that, then the authorities appear to me to be all one way. They begin with *Clark v. Taylor* (1), as explained by the Lord Chancellor, and, as appears from the judgment of KINDERSLEY, V.-C., going on to *Fisk v. A.-G.* (9), decided by WOOD, V.-C., and then going on to the decision of PEARSON, J., in *Re Ovey, Broadbent v. Barrow* (11). I am not saying that *Re Ovey* (11) is



A a decision exactly applicable, but one sees how the learned judge deals with the law relating to *cy-près* when considering a bequest like this. There is also *Biscoe v. Jackson* (8), where COTTON, and LINDLEY, L.JJ., also deal with the principles of the law. It seems to me that from *Clark v. Taylor* (1) down to the last of those cases the authorities are all in sequence upon this point. Therefore I am of opinion that CHITTY, J., being right in the construction he put on the bequest, he is also right as to the law, and that, therefore, this appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Hare & Co.; Frank Richardson & Sadler; Witham, Lambert & Roskell.*

C [Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

D

## CLEAVER *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), November 2, 3, December 8, 1891]

[Reported [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106]

*Husband and Wife*—Assurance policy by husband for benefit of wife—Wife to benefit if surviving husband—Murder of husband by wife—Right of husband's estate to policy money.

F *Public Policy*—Criminal not allowed to benefit from crime.

By s. 11 of the Married Women's Property Act, 1882: "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured . . ." By a policy of life assurance taken out by a husband on Oct. 3, 1888, it was agreed that there should be payable to his wife, if living at the time of his death, the sum of £2,000. The husband died on May 11, 1889, and in August, 1889, the wife was convicted of having murdered him. On a claim under the policy by the administrator of the wife's property appointed under the Forfeiture Act, 1870, s. 9, and by the husband's executors,

H **Held:** it was against public policy to allow a criminal to claim any benefit by virtue of his crime, and so the wife had rendered incapable of performance the trust in her favour provided by s. 11 of the Act of 1882; accordingly, the policy money had become part of the husband's estate and was recoverable by his executors from the insurers.

I **Notes.** Considered: *Yates v. Kyffin-Taylor and Wark*, [1899] W.N. 141. Distinguished: *Gordon v. Metropolitan Police Chief Comr.*, [1908-10] All E.R.Rep. 192. Applied: *In the Estate of Crippen*, [1911-13] All E.R.Rep. 207. Followed: *In the Estate of Hall*, *Hall v. Knight and Baxter*, [1911-13] All E.R.Rep. 381. Applied: *Re Burgess's Policy* (1915), 85 L.J.Ch. 273. Considered: *Re Engelbach's Estate*, *Tibbetts v. Engelbach*, [1923] All E.R.Rep. 93; *James v. British General Insurance Co., Ltd.*, [1927] All E.R.Rep. 442; *Royal Exchange Assurance v. Hope*, [1927] All E.R.Rep. 67; *Re Pitts, Cox v. Kilsby*, [1931] All E.R.Rep. 645; *Re Sigsworth*, *Bedford v. Bedford*, [1934] All E.R.Rep. 113; *Beresford v. Royal Insur-*

ance Co., [1938] 2 All E.R. 602. Distinguished: *Re Gordon, Lloyds Bank and Parratt v. Lloyd and Gordon*, [1940] Ch. 851; *Re Stapleton-Bretherton, Weld Blundell v. Stapleton-Bretherton*, [1941] 3 All E.R. 5. Considered: *Re Webb, Barclays Bank, Ltd. v. Webb*, [1941] 1 All E.R. 321; *Re Schebsman, Ex parte the Official Receiver, Trustee v. Cargo Superintendents (London), Ltd., and Schebsman*, [1943] 2 All E.R. 768; *In the Estate of G., M. v. L.*, [1946] 1 All E.R. 579. Applied: *Re Callaway, Callaway v. Treasury Solicitor*, [1956] 2 All E.R. 451. Considered: *Re Peacock, Midland Bank Executor and Trustee Co. v. Peacock*, [1957] 2 All E.R. 98. Referred to: *Perrin v. Dickson*, [1929] All E.R. Rep. 685; *Re Collier*, [1930] All E.R. Rep. 447; *Cousins v. Sun Life Assurance Society*, [1932] All E.R. Rep. 404; *Re Clay's Policy of Assurance, Clay v. Earnshaw*, [1937] 2 All E.R. 548; *Re Foster, Hudson v. Foster*, [1938] 3 All E.R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124; *Re Hamilton-Gordon, Lloyds Bank, Ltd. v. Lloyd* (1940), 56 T.L.R. 950; *St. John Shipping Corpn. v. Joseph Rank, Ltd.*, [1956] 3 All E.R. 683; *Pigney v. Pointers Transport Services Ltd.*, [1957] 2 All E.R. 807.

As to policies effected by husband or wife for the other's benefit, see 19 HALSBURY'S LAWS (3rd Edn.) 845, 846; and for cases see 27 DIGEST (Repl.) 136-138. For the Married Women's Property Act, 1882, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 801.

Cases referred to:

- (1) *Richardson v. Mellish* (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore, C.P. 435; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 12 Digest (Repl.) 270, 2078.
- (2) *Amicable Society v. Bolland (Fauntleroy's Case)* (1830), 4 Bli.N.S. 194; 2 Dow. & Cl. 1; 5 E.R. 70, H.L.; 29 Digest (Repl.) 400, 3009.

Also referred to in argument:

*Prince of Wales, etc. Association Co. v. Palmer* (1858), 25 Beav. 605; 53 E.R. 768; 29 Digest (Repl.) 402, 3017.

*Moore v. Woolsey* (1854), 4 E. & B. 243; 3 C.L.R. 207; 24 L.J.Q.B. 40; 24 L.T.O.S. 155; 1 Jur.N.S. 468; 3 W.R. 66; 119 E.R. 93; 29 Digest (Repl.) 398, 2999.

*Horn v. Anglo-Australian and Universal Family Life Assurance Co.* (1861), 30 L.J.Ch. 511; 4 L.T. 142; 25 J.P. 356; 7 Jur.N.S. 673; 9 W.R. 359; 29 Digest (Repl.) 395, 2984.

*Wainwright (or Wainwright) v. Bland* (1835), 1 Mood. & R. 481; 29 Digest (Repl.) 370, 2816.

*Holt v. Everall* (1876), 2 Ch.D. 266; 45 L.J.Ch. 433; 34 L.T. 599; 24 W.R. 471, C.A.; 27 Digest (Repl.) 134, 971.

*Re Dash, Darley v. King, King v. Darley* (1887), 57 L.T. 219; 44 Digest 1237, 10687.

*Smethurst v. Tomlin and Bankes* (1861), 2 Sw. & Tr. 143; 30 L.J.P.M. & A. 269; 4 L.T. 712; 25 J.P. 777; 7 Jur.N.S. 763; 164 E.R. 947; 23 Digest (Repl.) 97, 968.

**Appeal** from a decision of the Queen's Bench Division (DENMAN and WILLS, JJ.) on questions of law which had been ordered to be decided by the court before the trial of any issues of fact.

On Oct. 3, 1888, James Maybrick became a member of the defendant company, and effected an insurance on his life with them for £2,000, it being thereby agreed that

"there shall be payable to Florence E. Maybrick, wife, if living at the time of the death of the said member, otherwise to the legal personal representatives of the said member, the sum of £2,000 sterling within ninety days after receipt of satisfactory evidence to the association of the death of the said member."

He died on May 11, 1889, and by his will appointed the plaintiffs, Thomas and Michael Maybrick as his executors. In August, 1889, Florence Maybrick was tried at the Liverpool Assizes and found guilty of having murdered her husband.

**A** Before her trial she assigned by deed to the plaintiff Richard S. Cleaver the policy and all her interest thereunder, and notice of the assignment was given to the defendants. On Aug. 30, 1889, Richard Cleaver was appointed administrator of the property and effects of Florence Maybrick under the provisions of the Forfeiture Act, 1870, which abolished forfeiture for treason and felony and gave the Crown power (see s. 9) to appoint an administrator of a convict's property [section 9

**B** was repealed by the Criminal Justice Act, 1948: see s. 70]. The sentence of death passed on Florence Maybrick was afterwards commuted to penal servitude for life. The defendant company refused to pay the money under the policy to Cleaver, the assignee, or to the executors of the husband and, upon this action being brought by Cleaver and the executors to recover the money, the following question of law was ordered to be decided by the court: Whether, if it be proved that James

**C** Maybrick died from poison intentionally administered to him by Florence Elizabeth Maybrick, that would afford a defence to this action (a) as against the plaintiff Cleaver as assignee of the policy from Florence Elizabeth Maybrick, assuming the assignment to be proved; (b) as against the plaintiff Cleaver as administrator, under the Forfeiture Act, 1870, s. 9; (c) as against the plaintiffs Thomas Maybrick and Michael Maybrick, as executors of James Maybrick, deceased. The Queen's

**D** Bench Division gave judgment for the defendants, on the ground that the wife would benefit by the plaintiff's success in the action, and that it was contrary to public policy to allow a person to gain a benefit by her own felonious act. The plaintiffs appealed.

By the Married Women's Property Act, 1882, s. 11:

**E** " . . . A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the

**F** trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. . . . The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, . . . In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal

**G** representative in trust for the purposes aforesaid . . . "

*Sir Charles Russell, Q.C., and Reginald Smith for the plaintiffs.*

*The Solicitor-General (Sir Edward Clarke, Q.C.) and Hextall for the insurance company.*

*Cur. adv. vult.*

**H** Dec. 8, 1891. **LORD ESHER, M.R.**—The plaintiffs, as executors of the will of James Maybrick, deceased, are suing a life assurance company on a policy granted by them on the life of the deceased. The defendants admit the death of James Maybrick, and admit they granted the policy on his life; but they insist that they are not liable to pay to his executors the sum assured because they say the executors would hold the money in trust for the widow of the deceased, and his

**I** death was caused by the criminal act of his wife—that is to say, she murdered him. Therefore, they say it would be contrary to public policy to make them pay this money to the plaintiffs; in other words, they argue that public policy excuses and relieves them from the proper fulfilment of the contract they have entered into.

No doubt there is a rule of law that if a contract be entered into which is contrary to public policy, or if the performance of a contract would be contrary to public policy, the contract cannot be enforced either at law or in equity. But when persons use that rule to try and excuse themselves from the performance of a



contract for which they have received full consideration, and when all that remains for them to do under the contract is to pay money, the rule should not be extended and its application should be very narrowly watched. I agree with a comparison, once drawn by a learned judge [BURROUGH, J., in *Richardson v. Mellish* (1)] of public policy with an unruly horse. The policy which James Maybrick entered into is drawn up in a peculiar form which is probably of late invention. It does not state on the face of it whom it is made with; but, after mentioning certain things, it says that James Maybrick had become a member of the defendant association, and that the defendants promise to pay to Florence E. Maybrick, his wife,

"if living at the time of the death of the said member, otherwise to the legal personal representatives of the said member, the sum of £2,000."

Looking at that policy, first, as if the Married Women's Property Act, 1882, had never existed, let us consider what the legal effect of it would be. It is made with James Maybrick only, with nobody else, his wife is no party to it. It cannot be enforced till he is dead, so it was clearly intended to be enforced by his legal personal representatives, who are the only persons who can do so. The condition upon which the money becomes payable is fixed by this contract: it is the death of James Maybrick. There is no exception as to his death being caused by the criminal act of his wife or anybody else; the only condition upon which the money is to become payable is his death, and that condition has been fulfilled. The only possible plaintiffs are the executors, so that, under the contract, the defendants have no defence apart from any question as to public policy. At common law, apart from the Act of 1882, what would be the effect of naming the wife in the contract as the payee of the money? As between the present plaintiffs and defendants it would have no effect whatever. She is no party to the contract, and the defendants would have no right to follow the money they are bound to pay so as to see whether the plaintiffs were observing the trusts declared concerning it. But, further than this, there would not have been any trusts here. James Maybrick might have altered the destination of the money either by his will or a settlement, and made it payable to someone else. If he had done so, the defendants could not have made any objection. The money is earmarked by mentioning the wife in the policy, but the fact of her being named in it gave her no rights at all; she could only have claimed the money at common law under her husband's will or a settlement. It seems that the question might arise how such a policy would have to be treated at law apart from the statute.

Supposing a will or settlement were made by the insured in favour of some person not named in s. 11 of the Act—such as a nephew or niece, for instance—the question would have to be considered at law independent of statute; and supposing the person who became entitled to the money under a will or settlement, was the criminal cause of the death of the assured, one would have to consider what would be the effect of the policy apart from the statute, and what defence could be raised to a claim under the policy. It is contrary to public policy that a person who commits a murder should benefit by his criminal act, but that doctrine ought not to be stretched one bit beyond what is necessary for the protection of the public. If the matter can be dealt with so that such a person shall not be benefited by his criminal act, the defendants ought not to be allowed to refuse payment on the ground that, though they may have received premiums regularly for perhaps twenty or thirty years, public policy requires that they should not pay but yet keep the premiums. If the rule about public policy is used in that way, I say that its application should be narrowly watched.

Under the circumstances of the present case it seems to me that no question of the application of the rule about public policy arises between the plaintiffs and the defendants; that question arises only between the plaintiffs and the widow of the deceased. When the plaintiffs have recovered the money from the defendants, then, if the claimant under the policy, or under the will or settlement, is guilty

**A** of the death of the deceased, he may be prevented by the crime from insisting on the payment of the money to him by the executors on the ground of public policy. In such a case the executors may deal with the matter on that footing. But when they have recovered the money they hold it, supposing that through his crime the claimant is disentitled to claim it, not for themselves, but as part of the estate of the deceased. Therefore, in this case if there were no Married Women's

**B** Property Act in existence, I should be of opinion that upon the true construction of the policy, the only people to whom the defendants are liable to pay this money are the only people who could give a valid receipt, namely, the executors. As between the plaintiffs and defendants no rule of public policy has any application. When they have got the money the plaintiffs must deal with it subject to any rule of public policy that may apply; but the defendants have nothing to do with

**C** that; it is a question that only concerns the plaintiffs, as executors, and the legatees.

But the case goes further than this. The contract is made with reference to s. 11 of the Married Women's Property Act, 1882, by which it is provided that a policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable

**D** under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts. Under this section, therefore, a trust was created by the policy in favour of the wife. The trust does not exist always, but only so long as any object of it remains unperformed; when it has been performed, the money forms part of the estate of the deceased. The Act also provides that the insured may, by the policy, or any memorandum

**E** under his hand, appoint a trustee or trustees of the moneys payable under the policy and, in default of any such appointment of a trustee, such policy shall, immediately on its being effected, vest in the insured and his legal personal representatives in trust for the purposes aforesaid. No trustee having been appointed, the executors are trustees of the policy, "for the purposes aforesaid," that is, for the wife so long as the object of the trust remains unperformed. When

**F** the object ceases to remain unperformed, then the policy is to form part of the personal estate of the deceased. Suppose the wife had died before her husband, the defendants could not say to him that they would, in consequence, receive no more premiums, and refuse to go on with the policy because the trust for her could not be performed. In such a case I take it that the trust having become impossible to be performed, the matter must be treated as if the object of the trust had been

**G** performed.

Treating the case before us as a matter which is subject to the rule about public policy, the wife has rendered the trust in her favour incapable of performance. The trust must, therefore, be treated as if it had ceased to exist for, as the object of it cannot be performed, it cannot be said, using the words of the section, to remain unperformed. What is to happen in that case? The section says the

**H** money is to form part of the estate of the insured. Upon this construction of the section it is unnecessary to vouch the rule of public policy as between the executors and the defendants. The executors are entitled to recover the money from the defendants; and when they have got it, they will hold it as trustees for the estate of the deceased. If there are creditors it will go to them so far as may be necessary to satisfy their claims, and then, if there is anything left, and there are

**I** children, it will go to the children. Neither the wife nor anyone claiming through her have any right to the money, they are shut out by public policy; but the children claim through their father, not through their mother. There is nothing in such an arrangement contrary to public policy. It would be a great injustice if, in the name of public policy, the plaintiffs, and, therefore, the children of the deceased, were not allowed to succeed in this action. Anyone claiming through the wife is shut out by the rule of public policy, so that an assignee from her cannot recover the money; but as between the executors and the defendants the rule of public policy does not apply, and their rights and liabilities must be determined

according to the contract which has been made. The only event mentioned in the contract as a condition on which the money was to become payable has happened, so that there is no defence to the action so far as the executors of the deceased are concerned, and they must succeed. As the assignee claims through the wife he must fail. I, therefore, disagree with the judgment of the Divisional Court, and this appeal will be allowed. A

**FRY, L.J.**, read the following judgment:—Of the questions stated by the order of the master in this case one only has been argued before us, namely, whether the murder of James Maybrick by his wife Florence, if proved, would afford a defence to this action brought by the executors of James Maybrick. B

That question has been answered in the affirmative by the Divisional Court, and the judgment has been maintained before us by the same line of argument as was adopted by the court, which is shortly as follows: The executors of James Maybrick, it is said, are suing as trustees for Florence, and can have no better title than their cestui que trust. It is against public policy to allow a criminal to claim any benefit by virtue of his crime. She is, therefore, disentitled to claim the proceeds of the policy in question, and the executors, who are her trustees, are equally disentitled. This line of argument appears to me equally untenable whether there be or be not such a principle of public policy as that stated. If there be not, there is no objection to the action; if there be, it disqualifies Florence Maybrick from asserting that she is the cestui que trust of the executors, and negatives the proposition that the plaintiffs are suing for her benefit. They may be suing for their own benefit, or for the benefit of the estate of the deceased, or of some other person; but if the principle be valid, they cannot possibly be suing for her benefit. These observations are, to my mind, sufficient to dispose of the case; but, considering its importance and the fulness with which it has been argued, I shall descend somewhat more to detail. C

The principle of public policy invoked is, in my opinion, rightly asserted. It appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. It may be that there is no authority directly asserting the existence of this principle; but the decision of the House of Lords in *Amicable Society v. Bolland (Fauntleroy's Case)* (2) appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* (2) it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must so far be regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it. D

James Maybrick insured his life by the policy in question in the year 1888, and by the proposal which was made part of the policy, he expressed the policy to be effected for the benefit of his wife, and in the policy itself she is named as the payee of the policy moneys in the event, which happened, of her surviving her husband. Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay to Florence Maybrick the £2,000 assured; it would be broken by non-payment to her; but the cause of action resulting from such breach would vest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting E



**A** parties without her consent, and the breach of it would have given her no cause of action against anyone.

Section 11 of the Married Women's Property Act, 1882, deals with policies like the present, effected for the expressed benefit of a wife, and among other things contains these alternative provisions. It enables the insured to appoint a trustee or trustees of the moneys payable under the policy, and, in default of such appointment, it provides that the policy shall vest in the assured and his legal personal representatives. It is impossible to consider the insertion of the name of Florence Maybrick in the policy as the nomination of her as trustee for herself; there is no nomination of any other trustee; consequently, the statute applied, and, in spite of her nomination as payee, vested the policy in James Maybrick and his legal personal representatives, namely, the plaintiffs. The section in question goes further, and declares the trusts on which such a policy is to be held. According to its language, the effecting of this policy created a trust in favour of the object named, that is, Florence Maybrick; and the section enacted that the moneys payable under it should not, so long as any object of the trust remained unperformed, form part of the estate of the insured.

**D** The trust thus created by statute, and the language of the statute creating it, must, in my opinion, be both subject to the principle of public policy which I have stated, namely, the trust is one which cannot be enforced by a murderess of her husband—and the language of the statute must be read as if it contained an exception of such a case. Consequently, the trust which the statute was intended to create has either never arisen or it has, by the act of cestui que trust, become incapable of enforcement. If the executors of the insured were in such a case as the present to refuse to sue the office, it is inconceivable to me that the murderess could maintain a suit against them to enable her to use their names, or in fact that she could be allowed to sue in any way in a court of equity as cestui que trust of a fund which she had created by her crime.

**E** But if the executors are not trustees for Florence Maybrick, for whom are they trustees? This question seems to admit of an easy answer. Whenever there is property produced by the payments of A. which is held in trust for B., and that trust fails or is satisfied, a resulting trust arises for A. or his estate. This resulting trust is recognised by the section of the Act in question, because it takes the property out of the estate of the insured so long as any object of the trust remains unperformed—language which implies, if it does not assert, that when no object of the trust remains to be performed the policy moneys form part of the estate of the insured. If it be suggested that this view only removes the difficulty a step further off, and that the possible right of the wife under her husband's will or intestacy forms an objection to the action by the executors, the reply is obvious—that the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to achieve as the result of her crime.

**H** It follows from the view which I have expressed that I think it needless to inquire what the particular trusts may be on which the convict's property is held by the administrator appointed under the statute of 1870. He took only the property which Florence Maybrick had in the moneys in question; and, as she took nothing, in my judgment, by reason of her crime, he takes nothing likewise.

**I** It may be argued that, having regard to the fact that Mrs. Maybrick is the prime object of the insurance, and that she is named on the face of the policy as payee, the contract of insurance must be taken to imply an exception of the case of the death of the insured, when caused by the crime of the person so named; and it is suggested that *Fauntleroy's Case* (2), in the House of Lords, supports this contention. This argument does not appear to me to be tenable. The policy is effected under, and, therefore, affected by, a statutory enactment, the effect of which in the present case is to vest the policy in the executors of the insured as trustees, in the event of Mrs. Maybrick being entitled to claim, in trust for her, and, in every other event, in trust for the estate of James Maybrick, just in

the same way as if, before the statute, a policy had been taken out by James Maybrick, and he had, by a separate instrument, declared the like trusts of it. A

It is to my mind illogical to make the crime of one cestui que trust a bar to the claim of another, or of the trustees for that other cestui que trust; and if the supposed defence were to prevail, we should so hold. If Mrs. Maybrick had inflicted a mortal, but not immediately fatal, wound on her husband, and had then committed suicide leaving him surviving, and his executors had claimed on his death, it appears to me that the crime which caused his death would have furnished no defence. In a word, I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights. In *Fauntleroy's Case* (2) the plaintiffs were the assigns of the criminal, and were claiming through him. In the present case the plaintiffs are the assigns in law of the innocent husband, and are claiming through him. The authority, therefore, of that case goes to show that neither Florence Maybrick nor the administrator of her estate, who claims through her, can take any benefit. But that appears to me to throw no impediment in the way of a suit by those who claim with clean hands themselves, and as assigns of the innocent insured. In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights. B

In my opinion, therefore, public policy prevents Florence Maybrick from asserting any title as cestui que trust of this fund, and thereby brings into operation the resulting trust in favour of the estate of the insured, and so enables the executors to maintain an action as plaintiffs without any taint derived from the crime committed by Florence Maybrick. C

**LOPES, L.J.**—The plaintiffs are the legal personal representatives of James Maybrick, and the question for our decision is whether the crime of his wife, Florence Maybrick, prevents them from recovering the amount which became payable by the defendants under a policy on his life which set out the trusts to which the money was to be applied. The contract of insurance was made between the husband, on one side, and the defendants, on the other. The husband died by the criminal act of his wife. Upon his death the right to sue on the policy went to his executors. I have no doubt that there is a rule of public policy which would prevent the wife from recovering from the plaintiffs the money recovered by them under the policy, and so reaping a benefit from her crime. The simple answer in this case to the defence of public policy is that the executors are entitled to say that they are suing for the benefit of the estate of the husband, and, therefore, no question of public policy arises. This would have been the case, I think, even if the Married Women's Property Act, 1882, had not been passed. I agree with what the Master of the Rolls and FRY, L.J., have said—that s. 11 of that Act creates a resulting trust in favour of the husband or his legal personal representatives in case the trust in favour of the wife cannot be performed. The death of the husband having been caused in the present case by the criminal act of his wife, the trust in her favour must be regarded as having been struck out, and a resulting trust thereupon arises in favour of his estate. I, therefore, think that this appeal should be allowed. D

Appeal allowed. E

Solicitors: *Sharpe, Parker, Pritchard & Sharpe* for *Cleaver, Holden & Co.*, Liverpool; *Robinson & Stannard*.

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.] F

# McCOWAN v. BAINE AND JOHNSTON. THE NIOBE

[HOUSE OF LORDS (The Earl of Selborne, Lord Watson, Lord Bramwell and Lord Morris), June 15, July 27, 1891]

[Reported [1891] A.C. 401; 65 L.T. 502; 7 T.L.R. 713;  
7 Asp.M.L.C. 89]

*Insurance—Marine insurance—Collision clause—Towed vessel—Collision between tug and another ship—Liability of owner of towed vessel—Identity of tow with tug.*

By a policy of insurance, underwritten by the appellant, a ship owned by the respondents was insured "at and from the Clyde (in tow) to Cardiff and/or Penarth, while there, and thence to Singapore . . ." The policy contained a clause providing that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay, to the persons interested in such other ship or vessel any sum or sums of money . . ." the underwriters would repay such sum to the insured. While the ship was being towed from the Clyde to Cardiff her tug came into collision with and damaged another vessel, whose owners recovered damages from the respondents.

**Held:** the ship and her tug must be regarded as if they were one vessel, and, therefore, although the insured ship did not actually come into contact with the damaged ship, the collision was a collision within the policy and the underwriter was liable to repay to the respondents the amount of the damages paid by them.

**Notes.** Explained: *The Englishman and The Australia*, [1894] P. 239. Considered: *Re Margetts and Ocean Accident and Guarantee Corpn.*, [1901] 2 K.B. 792; *S.S. Devonshire v. Barge Leslie (Owners)*, [1912] A.C. 634. Distinguished: *Bennett Steamship Co. v. Hull Mutual Steamship Protecting Society*, [1914] 3 K.B. 57. Referred to: *The Devonian*, [1901] P. 221; *Fenwick v. Merchants' Marine Insurance Co.*, [1914] 3 K.B. 827.

As to the effect of a collision clause in a marine policy, see 22 HALSBURY'S LAWS (3rd Edn.) 85, 86; and for cases see 29 DIGEST (Repl.) 246-250.

Cases referred to:

(1) *The Arthur Gordon, The Independence* (1861), Lush. 270; 4 L.T. 563; 9 W.R. 582; 1 Mar.L.C. 88; 167 E.R. 121; sub nom. *Maddox v. Fisher, The Independence*, 14 Moo.P.C.C. 103, P.C.; 41 Digest 740, 5912.

(2) *Stevens v. Gourley, The Cleadon* (1860), 14 Moo.P.C.C. 92; Lush. 158; 5 L.T. 694; 15 E.R. 240, P.C.; 41 Digest 747, 5986.

Also referred to in argument:

*The Quickstep* (1890), 15 P.D. 196; 59 L.J.P. 65; 63 L.T. 713; 6 T.L.R. 476; 6 Asp.M.L.C. 603, D.C.; 41 Digest 792, 6516.

*Union Steamship Co. v. Aracan (Owners), The American and The Syria* (1874), L.R. 6 P.C. 127; 43 L.J.Adm. 30; 31 L.T. 42; 22 W.R. 927; 2 Asp.M.L.C. 350, P.C.; 41 Digest 791, 6513.

*The Sisters* (1876), 1 P.D. 117; 45 L.J.P. 39; 34 L.T. 338; 24 W.R. 412; 3 Asp.M.L.C. 122, C.A.; 41 Digest 769, 6233.

*The Wheatshaf v. The Intrepide* (1865), Holt, Adm. 210; 13 L.T. 612; 2 Mar.L.C. 292; 41 Digest 760, 6128.

*The Ticonderoga* (1857), Sw. 215; 166 E.R. 1103; 41 Digest 792, 6520.

**Appeal** from a decision of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk (LORD MACDONALD), LORD YOUNG, LORD RUTHERFORD CLARK and LORD LEE), affirming a judgment of the Lord Ordinary, LORD TRAYNER.



By a policy of marine insurance effected by the respondents, the owners of the sailing ship *Niobe*, with the appellant, an underwriter, the ship was covered A

“At and from the Clyde (in tow) to Cardiff and/or Penarth, while there, and thence to Singapore . . .”

and it was provided that the underwriters should be liable

“if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby assured.” B

While the *Niobe* was on her way to Cardiff in tow of the *Flying Serpent*, her tug came into collision with the *Valetta*, causing her damage. The *Valetta*, after colliding with the tug, also came into contact with the *Niobe*, but without receiving any damage. In a suit before the Admiralty Court of England it was decided by LORD HANNEN that the collision was due to the fault of the tug in not porting her helm in terms of the regulations, and that the *Niobe* was likewise to blame in respect of her failure to keep a look-out and to control the steerage of her tug. The respondents had in consequence paid £12,909 to the owners of the *Valetta*, and they now sued one of the underwriters of the policy for his proportion of that sum. The action was heard by LORD TRAYNER, who gave judgment for the respondents, a decision which was affirmed by the Second Division of the Court of Session. The underwriter appealed. C

*Finlay, Q.C.*, and *Walton* for the appellant.

The Attorney-General (*Sir Richard Webster, Q.C.*), *Gorell Barnes, Q.C.*, and *Leck* for the respondents. D

Their Lordships took time for consideration.

July 27, 1891. The following opinions were read. E

**THE EARL OF SELBORNE.**—I cannot help thinking that, in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude; and though I do not adopt the argument that a contract of indemnity against the consequences of collision can be extended to a case in which there has been no collision, but only damages caused by measures properly taken to avoid a collision, I think a construction which makes it cover all damage consequent upon an actual collision, for which the assured is liable, is more reasonable and more in accordance with the probable intention of the parties, if the words will bear it, than one which does not. In the present case the *Valetta* was sunk by an actual collision, for which the owners of the *Niobe* have been held liable. But the impact which caused the loss of the *Valetta* was not that of the hull of the *Niobe*, but that of the steam-tug *Flying Serpent*, which was towing the *Niobe* on a part of her insured voyage, described in the policy of insurance as “in tow from the Clyde to Cardiff or Penarth.” F

The words of this contract are: “If the ship hereby insured shall come into collision with any other ship or vessel . . .” If a ship cannot be said to “come into collision with any other ship” except by direct contact, causing damage between the two hulls, including under the term hull all parts of a ship’s structure, there was in this case no such contact, and the appellant ought to succeed. But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam-launch, even if those accessories were not (as in this case) insured, as being, in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which G

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A case the barge-owners would not be liable for a collision) if damage to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel.

After full consideration, it seems to me to be no more than a reasonable extension of the same principles to include within them such a case as the present. Where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said, by high authority, to be for many purposes properly regarded as one vessel. LORD KINGSDOWN's words in *The Independence* (1) (14 Moo.P.C.C. at p. 115) were that the tug "may for many purposes be considered as a part of the ship to which she is attached," and he went on to repeat the reason given in the earlier judgment reported in the same volume: *The Cleadon* (2), to which he was also a party, where it was said (14 Moo.P.C.C. at p. 97):

"The *Cleadon* being in tow of the tug, it is admitted she and the tug must be considered to be one ship, the motive power being in the tug and the governing power in the ship that was being towed."

I think the *Flying Serpent* and the *Niobe* may be so regarded for the purpose now in question. The principle on which the *Niobe* has been held liable for the collision seems to me to go far towards that conclusion. That the *Niobe* should be in tow from the Clyde to Cardiff or Penarth was, in the present case, part of the contract. I think the construction ought to be the same so far as relates to that voyage, as if the words in the margin had been "if the ship insured, while in tow between the Clyde and Cardiff or Penarth, shall come into collision with any other vessel," etc. If the contract had been so expressed, I should have thought it arbitrary and not reasonable to exclude a collision by the impact of the tug during that voyage upon another vessel, for the consequences of which the owners of the *Niobe* were liable. I am, for these reasons, of opinion that the interlocutors appealed from are right, and ought to be affirmed.

LORD WATSON stated the facts and continued: The legal liability of the *Niobe*, and the facts upon which it rests, as these were found by the President of the Admiralty Division, are matters of mutual admission in this case. Whether the collision between the *Flying Serpent* and the *Valetta* was a collision within the meaning of the marginal clause of the policy is the only subject-matter of controversy.

The clause is certainly not conceived in the terms in which one would have expected it to be if, as was argued, it was the intention of the parties to include in the indemnity all liabilities arising from collision which the *Niobe* could possibly incur. Under it the condition which must be fulfilled before any obligation can attach to the underwriters is "that the ship hereby insured shall come into collision with" another ship or vessel. These words in their literal sense import that there must be contact between the *Niobe* and such other ship or vessel, causing damage to the latter. There are many ways in which a ship under sail may, without being herself in collision, become liable to bear the whole damages resulting from a collision. Her unjustifiable manœuvre may occasion the colliding of two or more vessels, other than herself, without any blame on their part; and in that case the offending ship, and she alone, is responsible for the consequences of her fault. In such a case I should not be prepared to hold that the *Niobe* had, in the sense of the policy, "come into collision with" the vessels which she caused to collide, because there would be no ground in fact or law for the suggestion that the *Niobe* ought to be identified with any one of them.

So far as I can discover, none of the learned judges of the Court of Session indicated an opinion that the clause was so expressed as to cover every kind of liability for collision. They based their decision upon a special rule of law, which,

it is admitted, has no application except as between a ship and her tug. They held that the identity which that rule establishes between tow and tug is so complete that the *Niobe* herself must be considered to have come into collision with the *Valetta* within the meaning of the policy. A sailing vessel and the steam-tug which has her in tow have frequently been described by eminent judges as, for certain purposes, constituting one ship—an expression which has been borrowed by text-writers, and is familiar to persons conversant with maritime law. The expression is figurative, and must not be strained beyond the meaning which the learned judges who have employed it intended that it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical, in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and, the motive power being with the tug, must, in order to comply with the Regulations for Preventing Collisions at Sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has (as in this case) the control of the tug and the duty of directing the course of the tug in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered through the neglect of her officers and crew to perform that duty.

There was, therefore, a legal connection between the *Niobe* and the *Flying Serpent* which could not subsist between her and any other vessel which her fault might drive into collision with a stranger ship. The *Niobe* was in contemplation of the law one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision, and the fault which led to a collision between that legal composite and the *Valetta* was admittedly the fault not only of the *Flying Serpent* but of the *Niobe*. I admit the force of the appellant's argument that contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same as their legal meaning. In the latter case the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation. The point thus raised appears to me to be a very narrow one. But in this case the contracting parties are shipowners and underwriters, and the clause in question relates to possible legal liabilities of the ship insured, which are entirely dependent upon the rules of maritime law. In these circumstances I have, not without some hesitation, come to the conclusion that they must be presumed to have known the law, and to have contracted on the faith of it.

**LORD BRAMWELL** stated the facts and continued: I say, then, in very fact the *Niobe* did not come into collision with the *Valetta*, causing a liability in the appellants, and, according to the ordinary primary meaning of the words used, the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended, and that we should hold that there was a collision where there was none. I am at a loss to see why.

I think that an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the court to do it. In the first case it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers. Take this very case. Can anyone say that if the insured had required the insurers to agree to be liable for a collision by the tug (and be it remembered that it is mentioned that the *Niobe* was to be towed to



A Cardiff), I say if such a requirement had been made, can anyone say that the insurers would have agreed to it without an increase of premium—a liability for any towing till the voyage to Singapore was ended? Suppose a suit to reform the document by making the insurers liable for collisions by the tug, could it have succeeded?

B Let me examine the reasons given for adding to or altering the meaning of the words used. The Lord Ordinary says, if the collision clause is read in the strictest manner, he would be of opinion that the defender is not liable, but he thinks that it admits of being read in a broader and more comprehensive sense. The superlative "strictest" is a difficult word to deal with. Is it to be read in a way not strict; if so, how far short of it? His Lordship gives his reasons. He says:

C "The risk they wished and had an interest to cover was liability arising from collision for which, as owners of that particular ship, they might be liable . . . that the defender knew they wished to cover it, and it may fairly be presumed that the clause was intended to cover that particular risk."

D I respectfully ask: Where is the evidence that they wished to cover any risk of collision beyond what they have expressed, or that the defender knew that the pursuers so wished? I firmly believe that, if the truth were known, neither party had it in mind; and I repeat, I am by no means sure it would have been included for the same premium. The Lord Justice-Clerk says:

E "In certain circumstances the vessel is looked upon as being part of the tug, and the real question here is, whether that view applies to such a case as this. I think it would have been far better if the policy had been more clearly expressed."

F With submission, that should be not "more clearly" but "differently" expressed. Nothing can be clearer than it is. It is said that to hold as I do is a "narrow construction." I respectfully deny it. I do not "construe" the words; I simply read them, as I should "twice two are four." If too narrow is wrong, so is too wide, which, to my mind, the construction (for it is a construction) which I object to is. His Lordship came to the conclusion for the pursuer not without hesitation. LORD YOUNG says the collision was just the sort of collision, the possibility of which was contemplated by both sides. I should suppose, then, that he does not agree with the Lord Justice-Clerk that it would have been far better if the policy had been more clearly expressed. LORD RUTHERFURD CLARK doubts if the pursuer is

G right. LORD LEE agrees with the Lord Ordinary.

H It is said that the *Niobe* was, in the contemplation of the law, one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision. I respectfully deny it. I deny that it is an intendment of the law. LORD KINGSDOWN, a most distinguished lawyer, did once use the unfortunate metaphor (judges ought to be very careful about using such expressions) that "the tug may for many purposes be considered as a part of the ship to which she is attached." He says "for many purposes," not for all. He does not say that it is to be considered that the plain words of a contract are to be misinterpreted. Had he foreseen what use would be made of his words he would not have used them. These two shall be one. And it is said that the parties to this suit knew all about this, and contracted on the footing of it. This seems to me to be a case (too

I common) in which there is a tendency to depart from the natural primary meaning of words, and add to or take from them, to hold that constructively words mean something different from what they say. It introduces uncertainty. No case is desperate when plain words may be disregarded. I deprecate this in all cases. In this particular one I believe it will be attended with at least this injustice, that the parties did not contemplate the case that has occurred, and perhaps would have raised the premium if they had. That they did not contemplate it I infer from the words they used. Ingenious cases were put in which there might be damage by collision with the *Niobe* without her touching the vessel damaged, as where she

pushed an intermediate vessel against that damaged. I have no doubt that ingenuity might suggest many difficult cases. I content myself with dealing with the present, where the ship did not in any sense come into collision with any other ship and cause damage. I think the judgment should be reversed; but I suppose I must be in the wrong, because four judges of the Court of Session have held differently, and three of your Lordships, I know, will hold differently.

**LORD MORRIS.**—In my opinion the contract must be construed as an insurance against risk or liability for damage by collision to be incurred by the *Niobe* while in tow. What the owners were bargaining for was indemnity against loss or payment which the *Niobe* might incur by being towed. I consider the tug part of the apparatus for moving the ship *Niobe*, and that a collision by the tug while so towing the *Niobe* was a collision of the *Niobe* within the meaning of the marginal clause of the policy, and, consequently, that the judgment of the Court of Session should be affirmed.

*Appeal dismissed.*

Solicitors: *Waltons, Johnson & Bubb* for *J. & J. Ross*, Edinburgh; *Lowless & Co.* for *Webster, Will & Ritchie*, Edinburgh.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## LOW v. BOUVERIE

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), May 1, 2, June 11, 1891]

[Reported [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533;  
40 W.R. 50; 7 T.L.R. 582]

*Trustee—Duty of trustee—Preservation of trust fund—Payment of income and capital to cestuis que trust—Encumbrances on fund—Trustees' duty in answering inquiries from person proposing to lend money on interest of cestui que trust.*

The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestuis que trust on demand information with respect to the mode in which the trust fund has been dealt with and where it is. But it is no part of the duty of a trustee to tell his cestui que trust what encumbrances he has created, nor which of his encumbrancers has given notice of their respective charges. It is no part of the duty of a trustee to assist his cestui que trust in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune, and a person who proposes to buy or lend money on it has no greater rights than the cestui que trust himself. There is no trust or other relation between a trustee and a stranger about to deal with a cestui que trust, and although probably such a person, in making enquiries, may be regarded as authorised by the cestui que trust to make them, this view of the stranger's position will not give him a right to information which the cestui que trust himself is not entitled to demand. The trustee, therefore, is under no obligation to answer such an inquiry. He can refer the person making it to the cestui que trust himself. If, however, the trustee does answer the inquiry, what is the extent of his obligation? Is he bound to find out the facts; bound to make inquiries of his co-trustees, or of the solicitor to the trust?

**A** Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes on him any obligation to do more than give an honest answer to the inquiry—that is to say, to do more than answer to the best of his actual knowledge and belief. There is no equitable as distinguished from legal obligation to answer such inquiries, and if a trustee gives an honest answer he discharges the only obligation which he is under: per LINDLEY, L.J.

**B** *Slim v. Croucher* (1) (1860), 1 De G. F. & J. 518, was overruled by *Derry v. Peek* (2) (1889), 14 App. Cas. 337; and *Burrowes v. Lock* (3) (1805), 10 Ves. 470, can only be sustained on the ground of estoppel.

**C** *Trust—Fund—Encumbrance—Notice by encumbrancer to trustee—Priority over prior encumbrance not notified—Co-trustees not affected while ignorant of notice.*

An encumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior encumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees, so as to make them liable for what they may do in ignorance of the notice to their co-trustee: per LINDLEY, L.J.

**D** **Notes.** A trustee must now, subject to the payment of costs, produce written notices served on him in relation to an equitable interest in property to any person interested in the equitable: see s. 137 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427).

**E** Considered: *Ward v. Duncombe* (1893), 69 L.T. 121; *Whitechurch v. Cavanagh*, [1902] A.C. 117. Explained: *Oliver v. Bank of England*, [1902] 1 Ch. 610. Considered: *Porter v. Moore*, [1940] 2 Ch. 367; *Nocton v. Ashburton*, [1914–15] All E.R.Rep. 45. Explained: *Banbury v. Bank of Montreal*, [1917] 1 K.B. 409. Considered: *Canada and Dominion Sugar Co. v. Canadian National (West Indies) Steamships, Ltd.*, [1947] A.C. 46; *London Territorial and Auxiliary Forces Association v. Nichols*, *London Territorial and Auxiliary Forces Association v. Parker*, [1948] L.J.R. 1600; *Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 All E.R. 247. Referred to: *Elkington v. Hürter*, [1892] 2 Ch. 452; *Re Tillott*, *Lee v. Wilson*, [1892] 1 Ch. 86; *Re Wyatt*, *White v. Ellis*, [1892] 1 Ch. 188; *Le Lievre v. Gould*, [1893] 1 Ch. 491; *Balkis Consolidated Co. v. Tomkinson* (1893), 42 W.R. 204; *Williams v. Pinckney* (1897), 67 L.J.Ch. 34; *Whittington v. Seale-Hayne* (1900), 82 L.T. 49; *Exploring Land and Minerals Co. v. Kolckmann* (1905), 94 L.T. 234; *Pierson v. Altrincham U.D.C.* (1917), 86 L.J.K.B. 969; *Everett v. Griffiths*, [1920] 3 K.B. 163; *H. v. H.*, [1928] P. 206; *Curtis Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805; *Candler v. Crane*, [1951] 2 K.B. 164; *Hawksley v. May*, [1955] 3 All E.R. 353; *Woods v. Martins Bank, Ltd.*, [1958] 3 All E.R. 166; *Randolph v. Tuck*, [1961] 1 All E.R. 814.

**F** As to the duties of a trustee, see 38 HALSBURY'S LAWS (3rd Edn.) 966–978; and for cases see 43 DIGEST (Repl.) 847 et seq.

**G** Cases referred to:

- (1) *Slim v. Croucher* (1860), 1 De G.F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 103; 6 Jur.N.S. 437; 8 W.R. 347; 45 E.R. 462, L.C. & L.J.J.; 35 Digest 34, 262.
- (2) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, 185.
- (3) *Burrowes v. Lock* (1805), 10 Ves. 470; 65 L.T. 536, n.; 40 W.R. 51, n.; 32 E.R. 927; 43 Digest 860, 3062.
- (4) *Browne v. Savage* (1859), 4 Drew. 635; 5 Jur.N.S. 1020; 7 W.R. 571; 62 E.R. 244; 43 Digest 860, 3063.
- (5) *Barley v. Walford* (1846), 9 Q.B. 197; 15 L.J.Q.B. 369; 10 Jur. 917; 115 E.R. 1249; sub nom. *Bailey v. Walford*, 7 L.T.O.S. 252; 43 Digest 263, 1011.
- (6) *Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 869, 1103.



- (7) *Brownlie v. Campbell* (1860), 5 App. Cas. 925, H.L.; 35 Digest 9, 24. **A**
- (8) *Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest (Repl.) 366, 1090.
- (9) *Carr v. London and North Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest (Repl.) 367, 1091.
- (10) *Phipps v. Lovegrove, Prosser v. Phipps* (1873), L.R. 16 Eq. 80; 42 L.J.Ch. 892; 28 L.T. 584; 21 W.R. 590; 43 Digest 849, 2970. **B**
- (11) *Re Bahia and San Francisco Rail. Co.* (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 404, 2590.
- (12) *Draper v. Borlace* (1699), 2 Vern. 370; 23 E.R. 833; 35 Digest 473, 2078.
- (13) *Evans v. Bicknell* (1801), 6 Ves. 174; 1 Coop. temp. Cott. 480; 31 E.R. 998, L.C.; 21 Digest (Repl.) 391, 1208. **C**
- (14) *Hobs v. Norton* (1682), 2 Cas. in Ch. 128; 22 E.R. 879; sub nom. *Hobbs v. Norton*, 1 Vern. 136; 21 Digest (Repl.) 399, 1258.
- (15) *Hunsden v. Cheyney* (1690), 2 Vern. 150; 1 Eq. Cas. Abr. 355; 23 E.R. 703; 40 Digest (Repl.) 513, 239.
- (16) *Piggott v. Stratton* (1859), 1 De G.F. & J. 33; 29 L.J.Ch. 1; 1 L.T. 111; 24 J.P. 69; 6 Jur.N.S. 129; 8 W.R. 13; 45 E.R. 271, L.C. & L.JJ.; 21 Digest (Repl.) 392, 1217. **D**
- (17) *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; 48 L.J.Ch. 179; 39 L.T. 308; 26 W.R. 819, H.L.; 9 Digest (Repl.) 299, 1883.
- (18) *Hart v. Frontino and Bolivia South American Gold Mining Co., Ltd.* (1870), L.R. 5 Exch. 111; 39 L.J.Ex. 93; 22 L.T. 30; 9 Digest (Repl.) 297, 1878. **E**
- (19) *Heath v. Crealock* (1874), 10 Ch. App. 22; 44 L.J.Ch. 157; 31 L.T. 650; 23 W.R. 95, L.C. & L.JJ.; 21 Digest (Repl.) 333, 863.
- (20) *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch.D. 15; 39 L.T. 600; 27 W.R. 210; 21 Digest (Repl.) 324, 796.

Also referred to in argument: **F**

*Re Ward* (1862), 31 Beav. 1; 54 E.R. 1037; 22 Digest (Repl.) 259, 2592.

*Peck v. Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, 119.

*Arkwright v. Newbold* (1881), 17 Ch.D. 301, 313; 50 L.J.Ch. 372; 44 L.T. 393; 29 W.R. 455, C.A.; 35 Digest 20, 114.

*York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685; 51 L.J.Q.B. 257; 46 L.T. 296; 30 W.R. 624, C.A.; 9 Digest (Repl.) 453, 2973. **G**

*Stranks v. St. John* (1867), L.R. 2 C.P. 376; 36 L.J.C.P. 118; 16 L.T. 283; 15 W.R. 678; 30 Digest (Repl.) 418, 611.

**Appeal** by the defendant from a decision of NORTH, J., in an action for a declaration. **H**

In January, 1888, Vice-Admiral Bouverie applied to the plaintiff, Robert Low, to lend him £600 on the security of his life interest in a sum of £5,523 6s. 3d. Metropolitan 3½ per cent. stock under the trusts of his marriage settlement, dated Sept. 1, 1845, and of certain policies of assurance on his life, and referred him to the defendant, H. H. P. Bouverie, who was one of the trustees of the settlement. On Feb. 22, 1888, the plaintiff's solicitors wrote as follows to the defendant: **I**

"We are doing business with Vice-Admiral Bouverie, and he says you will give us information as to his means and position. He says he is entitled to a life interest in some funds held in trust under a settlement dated Sept. 1, 1845, of which you are a trustee. Will you kindly tell us what those funds are, and whether Vice-Admiral Bouverie is still entitled to the full benefit of his life interest therein. We understand he has not in any way mortgaged or parted with such life interest. Is this so?"

A In answer to that letter the defendant wrote on Feb. 23 as follows :

"In reply to your letter of the 22nd inst., I beg to inform you that Vice-Admiral Bouverie has a life interest in £5,523 6s. 3d. Metropolitan 3½ per cent. stock, but this said life interest is charged with the payment of the premiums of two life policies, one of which amounts to £37 17s., and the other is extinct, also it is charged with payment of interest for money already advanced to him to the extent of £34 per annum."

On Feb. 25 the defendant wrote again :

"In furtherance of my letter to you of a day or two since, I beg to state that I hold a policy of insurance on Admiral Bouverie's life in Mutual Safety Assurance Society for £300, as security for the money advanced to him, for which the £34 mentioned to you is the annual charge of interest."

On the same day the plaintiff's solicitors wrote to the defendant :

"Will you kindly inform us whether you hold any mortgage, or know of any encumbrance, upon Vice-Admiral Bouverie's life interest in the funds mentioned in your letter of the 23rd inst., or on his life interest under his marriage settlement. By so doing you will much oblige."

On Feb. 27, the defendant replied as follows :

"I don't see how I can explain myself more clearly than I did the other day in my letter to you. I hold no mortgage from Admiral Bouverie for the charge of interest on money advanced to him, but this charge of interest is in the ordinary course of business, but the two policies of insurance whose premiums now amount to £35 are mortgaged to his trustees."

Upon receipt of that letter, and without any further inquiry, the plaintiff advanced Vice-Admiral Bouverie the sum of £600 on the proposed security, and a deed of mortgage dated Mar. 1, 1888, was executed, of which notice was duly given to the defendant. Towards the end of 1888 Vice-Admiral Bouverie, being in pecuniary difficulties, left this country, and had not since returned. In April, 1889, the interest on the mortgage being in arrear, the plaintiff requested the defendant to pay him in future the balance of the income of the settled funds payable to Vice-Admiral Bouverie after satisfying the charges mentioned in the defendant's letters. It then appeared that Vice-Admiral Bouverie's life interest was charged with six prior mortgages, and that they were recited in the deed appointing the defendant a trustee of the settlement. In consequence of the prior encumbrances the plaintiff's security was worthless, and in order to keep up the policies mortgaged to him he had been obliged to pay the premiums. He, therefore, commenced this action claiming a declaration that the defendant was liable to pay him the £600 secured by the mortgage of Mar. 1, 1888, and also all the premiums paid by him together with interest thereon. The action was tried on admissions signed by both parties. The existence of the six prior mortgages was admitted, and that the defendant had notice of them, but that at the time he wrote the above-mentioned letters he had forgotten the existence of them. On Jan. 29, 1891, the case came before NORTH, J., who decided in favour of the plaintiff. The defendant appealed.

*Rigby, Q.C., Cozens-Hardy, Q.C., and Morshead* for the defendant.

*Everitt, Q.C., and Church* for the plaintiffs.

*Cur. adv. vult.*

June 11, 1891. The following judgments were read.

LINDLEY, L.J., after stating the facts: This appeal raises several extremely important questions. First it is necessary to consider what are the duties of trustees towards persons about to deal with their cestuis que trust, who, before dealing with them, make inquiries of their trustees as to any assignments or

encumbrances known to them. In *Browne v. Savage* (4) KINDERSLEY, V.-C., said A  
(4 Drew. at p. 639) that trustees

"must for their own security give correct information when inquiry is made of them whether they have had notice of any prior assignments affecting their trust property."

MR. LEWIN, in his well-known work (LEWIN ON TRUSTS, 8th Edn., p. 704), refers B  
to this case as an authority for the proposition that trustees are bound to answer such inquiries. But when this opinion is examined it can scarcely be supported, and if such a doctrine were logically carried out it would impose very serious duties upon trustees. The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestui que trust on demand information with respect to the mode in C  
which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his cestui que trust what encumbrances he has created, nor which of his encumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his cestui que trust in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the cestui que trust himself. There is no trust or other relation D  
between a trustee and a stranger about to deal with a cestui que trust, and although probably such a person, in making inquiries, may be regarded as authorised by the cestui que trust to make them, this view of the stranger's position will not give him a right to information which the cestui que trust himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry. He can refer the person making it to the cestui que trust himself. E

I will next take the case of a trustee who answers the inquiry. What in this case is the extent of his obligation? Is he bound to find out the facts; bound to make inquiries of his co-trustees, or of the solicitor to the trust? Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes F  
upon him any obligation to do more than give an honest answer to the inquiry—that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake a greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he said; but unless he does one or the other I do not know on what principle consistent with *Derry v. Peek* (2) he can, if he answers G  
honestly, expose himself to liability. I say consistently with *Derry v. Peek* (2) because until that case was decided it was generally supposed to be settled in equity that liability was incurred by a person who carelessly, although honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation: *Burrowes v. Lock* (3); *Slim v. Croucher* (1). This general proposition is, however, quite inconsistent with *Derry v. Peek* (2). H

I do not, however, understand *Derry v. Peek* (2) to apply where there is a legal obligation on the part of the defendant towards the plaintiff to give him correct information. If such an obligation exists, an action for damages will, I apprehend, lie for its non-performance, even in the absence of fraud: per LORD DENMAN in *Barley v. Walford* (5), 9 Q.B. at p. 208. It is for this reason that I have examined the obligation of trustees to answer inquiries made by persons about to deal with their cestui que trust. There is no equitable as distinguished from legal obligation I  
to answer such inquiries, and if a trustee gives an honest answer he discharges the only obligation which he is under. Again, *Derry v. Peek* (2) does not in any way affect the law relating to warranties, unless it be by negating the notion that promoters who issue a prospectus impliedly warrant the truth of the statements contained in it. Nor does *Derry v. Peek* (2) in any way affect the law relating to estoppel where such law is applicable. But estoppel is not a cause of action; it is



A a rule of evidence which precludes a person from denying the truth of some statement previously made by himself.

LORD HERSCHELL, in his opinion in *Derry v. Peek* (2), did not profess to overrule *Burrowes v. Lock* (3) and *Slim v. Croucher* (1), and it was strenuously contended that those cases were still law, and that they governed the present case. It becomes necessary, therefore, to examine those cases with care. *Burrowes v. Lock* (3), as appears from the registrar's book, was a suit by the assignee of one of several residuary legatees for his share of the residue of a testator's estate. The amount of the residue was not in controversy, and a general administration decree was not sought. The defendants to the suit were plaintiff's assignor and the trustee of his share of the residue. The trustee had (as appears from the report in VESSEY) informed the plaintiff that this share was unencumbered, whereas, in fact, it was not. The decree was in effect that the trustee should pay the full amount of the share to the plaintiff without deducting the encumbrance. The trustee, even if he acted honestly, which is perhaps questionable, was clearly estopped from denying that the share was unencumbered. This decision was in 1805, more than thirty years before *Pickard v. Sears* (6), and at a time when the doctrine of estoppel was less accurately defined than it has since become. Regarded as a decision on the ground of estoppel, *Burrowes v. Lock* (3) appears to me not only to have been quite right, but to remain wholly untouched by *Derry v. Peek* (2). LORD BLACKBURN seems to have thought that the representation in *Burrowes v. Lock* (3) was scarcely distinguishable from a warranty: *Brownlie v. Campbell* (7), 5 App. Cas. at p. 953; and if this be the proper view to take of it *Burrowes v. Lock* (3) can stand on that ground, although I confess my own inability to sustain it on the ground of warranty.

*Slim v. Croucher* (1) in which *Burrowes v. Lock* (3) was recognised and extended, cannot, in my opinion, be supported on the ground of estoppel. It was a suit in equity to recover money advanced on a lease granted by the defendant to the borrower, which the defendant had told the plaintiff would be granted. The lease proved to be invalid. Unless the defendant's statement amounted to a warranty that the lease when granted would be valid, I do not myself see how to avoid the conclusion that *Slim v. Croucher* (3) is inconsistent with, and, therefore, overruled by, *Derry v. Peek* (2). LORD HERSCHELL, in his opinion, did not himself examine these cases, but intimated that the two might stand together upon the grounds explained by LORD SELBORNE in *Brownlie v. Campbell* (7) (5 App. Cas. at p. 935.) I am not, however, myself able to reconcile these grounds with the decision in *Derry v. Peek* (2). *Slim v. Croucher* (1) evidently proceeded upon the notion, sanctioned by the high authority of LORD CAMPBELL, that in that case an action for damages might have been maintained at law upon the defendant's representation, and that in such a case the Court of Chancery had a concurrent jurisdiction with the courts of common law. There would be no such jurisdiction in the case of a warranty. *Slim v. Croucher* (1) was not decided, nor did LORD SELBORNE approve of it, on any such ground (see 5 App. Cas. at p. 936). The only conclusion I can arrive at is that, while *Burrowes v. Locke* (3) can be supported and taken as a guide on the ground of estoppel or possibly fraud, *Slim v. Croucher* (1) cannot any longer be regarded as having been rightly decided, fraud having been negatived. As pointed out by LORD BLACKBURN in *Brownlie v. Campbell* (7) (5 App. Cas. at p. 953), the line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is, the three words denote fundamentally different legal conceptions which must not be confounded.

Reverting now to the grounds of liability on which this action may be supported, it is obvious that as regards warranty the plaintiff and the defendant were not contracting parties. There was no intention to contract, nor was there any consideration which is essential for the purpose of treating what the defendant said as a promise or a warranty. As regards estoppel, if the defendant had said that

there were no encumbrances on Admiral Bouverie's life interest except those mentioned by the defendant in his letters, the case would be clearly one of estoppel; it would be undistinguishable from *Burrowes v. Lock* (3); and the plaintiff would be entitled to relief, not to damages for a misrepresentation, but to an order on the defendant as trustee for the plaintiff to pay to him the Admiral's life interest in the fund in question, subject only to the encumbrances disclosed by the defendant. This is not the relief sought by the plaintiff, nor is it the relief given to him by the court below, but it is relief to which he would be entitled on the ground of estoppel. But the difficulty of affording the plaintiff relief on this ground arises from the ambiguity of the defendant's letters. They are quite consistent with the view that the encumbrances mentioned by the defendant were all he knew of or remembered. A statement, however, to that effect would not estop him from showing that there were others which he did not know of or did not remember.

But then it is said that he ought to have known of them and remembered them, as notice of them had been given to him; and it is admitted that, if he had looked into the deeds and documents relating to the trust, he would have found that there were other encumbrances besides those which he did in fact know of and did accordingly mention. Knowledge and means of knowledge are very different things; and if a person truly says he only knows or remembers so and so, is it right to treat him as saying that he knows more, even if it is his duty to inform himself accurately before he speaks? I do not think that so to hold would be consistent with *Derry v. Peek* (2). To treat him in the case supposed as saying more than he did would be to resuscitate the doctrine condemned in *Derry v. Peek* (2), and to hold him liable in damages for a negligent misrepresentation.

Then it is said that the defendant's language was such as to be calculated to mislead, and as in fact to mislead, the plaintiff's solicitors, who applied to the defendant for information, and reliance is placed on the judgment of PARKE, B., in *Freeman v. Cooke* (8), and of BRETT, J., in *Carr v. London and North Western Rail. Co.* (9). But the answer to this argument is that the plaintiff too hastily inferred from the defendant's letters that there were no other encumbrances besides those which he mentioned. He never said this in terms; I cannot think he meant so to be understood; and although the plaintiff's solicitors may have so understood him, I do not think they had more reason to be satisfied with his last letter than with his first, which they saw was too loosely expressed to justify them in acting upon it. It must be remembered that in this case the defendant was not the only trustee, and it does not appear that the plaintiff's advisers applied to the other trustee.

It is often said that notice to one trustee is notice to all: see *Browne v. Savage* (4); but this is one of those misleading generalities against which it is necessary to be on one's guard. An encumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior encumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustee. There is no law which precludes them from saying they do not know what he knows; and notice given to one who dies or retires without communicating it to his co-trustees cannot, I apprehend, render them liable for not giving effect to a notice of which they knew absolutely nothing: *Phipps v. Lovegrove* (10). The doctrine of implied notice cannot create an estoppel in such a case any more than it can create a personal liability.

Fraud, breach of duty, warranty, estoppel, being, therefore, negatived in the present case, no ground remains on which this action can be supported. The appeal, therefore, must be allowed with costs here and below.

**BOWEN, L.J.**—I am of the same opinion, and I only add one or two words because substantially I agree with all LINDLEY, L.J., has said.

As to *Derry v. Peek* (2), I think, as we have already had reason more than once to explain, it decides two things, and two things only. First, the point of common

A law required no elaboration, namely, the point that an action for deceit or fraud, properly so called, would only lie at law for a fraudulent misrepresentation—a fraudulent allegation that a fact existed which did not exist, in the truth of which representation the person making it had no genuine or honest belief. That was the test rule at common law. But *Derry v. Peck* (2) decides, secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exists a duty to be careful—not to give information, except after careful inquiry. In *Derry v. Peck* (2) the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that, therefore, the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty such as the law recognises to be careful.

But *Derry v. Peck* (2) leaves, as LINDLEY, L.J., has said, altogether untouched, first of all, the case of warranty which we need not consider; secondly, cases of estoppel. But we must be guarded in the way in which we understand the remedy, where there is an estoppel. Estoppel is only a rule of evidence, you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief, on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of estoppel filling up the gap in the evidence, which, when so filled up, would produce this right to relief, is found in *Re Bahia and San Francisco Rail. Co.* (11). *Burrowes v. Lock* (3) was a case of estoppel. It was a case where there was a right to relief on the hypothesis that the defendant was precluded from denying the truth of a particular fact. *Slim v. Croucher* (1) was supposed, by the court which decided it, to be on all-fours with *Burrowes v. Lock* (3), and so it would have been, I think, if an action for specific performance could have been brought in *Slim v. Croucher* (1). I confess that I agree with LINDLEY, L.J., in failing to discover how an action for specific performance could have laid in that case. If it could have laid, then I think the decision in *Slim v. Croucher* (1) could have been justified, because it seems to me that a person who alleges that he has undertaken to grant a lease really alleges that he has undertaken to grant a valid lease.

Therefore, we come to the conclusion in this case that, in order to entitle the plaintiff to relief, we must find here such an estoppel as would support a claim for relief, based upon the hypothesis that the defendant is precluded from denying the truth of the fact which he is supposed to have asserted. An estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will reasonably be understood in a particular sense by the person to whom it is addressed. After a careful consideration of these letters, I have come to the conclusion that the defendant did not make any clear statement of the character which the plaintiff alleges. I think that his language would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge, and, therefore, that no relief here can be granted. The appeal, therefore, in my opinion must succeed.

KAY, L.J.—In the discussion in this case the question was raised whether courts of equity have been in the habit of exercising a more extensive jurisdiction than courts of law in cases of innocent misrepresentation.

The plaintiff being about to deal with an equitable tenant for life under a settlement by lending him money upon the security of his life interest, caused inquiries to be made of the defendant, who is one of the trustees of that settlement, whether



the life estate was encumbered. If the defendant had given a positive answer that it was not encumbered, and the intending lender, relying upon that assurance, had proceeded to lend money upon a mortgage of the life interest and had afterwards taken proceedings against the trustee to realise his security, there seems to be no doubt that the trustee could not defend himself by saying that the life estate had been previously assigned, but that when he made the statement he had forgotten that fact. Also where there is conscious deceit there is no doubt that equity would give relief. A

In 1699, in *Draper v. Borlace* (12), one who had encouraged another to lend money on mortgage, concealing a prior charge of his own, was postponed. In 1801, in *Evans v. Bicknell* (13), LORD ELDON said (6 Ves. at p. 183): B

"It is a very old head of equity that, if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false." C

Knowledge of the falsehood, of course, makes the representation fraudulent, and in cases of fraud courts of equity have always exercised a wide jurisdiction. The facts in *Evans v. Bicknell* (13) were that one Stansell, having a life interest in certain real estate in remainder after the death of his wife with a possible reversion in fee in default of children, obtained the title deeds from Bicknell, one of the trustees, and, concealing the settlement, mortgaged the estate in fee to the plaintiff, who filed the bill against the trustee, alleging that he had delivered the deeds to Stansell for the purpose of enabling him to make the mortgage. LORD ELDON said (*ibid.* at p. 182): D

"The question then is, supposing the husband's interest insufficient to satisfy the mortgage, whether there is a personal demand against Bicknell upon the circumstances of his conduct; and whether, if there is, it can be enforced in a court of equity." E

Relief was refused because the evidence of fraud was not sufficient.

In 1885, in *Burrowes v. Lock* (3), a trustee was held liable to the plaintiff who had bought the interest of a cestui que trust, relying upon the statement of the trustee that the cestui que trust was entitled to the fund, the trustee having forgotten that he had received notice of a prior encumbrance. The language of SIR WILLIAM GRANT seems to make it doubtful whether he entirely believed that the trustee had forgotten—if he had not, of course, his statement would be fraudulent. But it is quite plain that fraud is not necessary in all cases as a ground for this relief. F

In 1682, in *Hobbs v. Norton* (14), relief was given against the owner of land who answered an inquiry as to an annuity, supposed to be charged upon the land, that he believed it was so charged, and encouraged the applicant to proceed in his purchase of the annuity. The landowner was compelled to pay the annuity, though he had since discovered that he was entitled to the land free from any such charge. G

In 1690, in *Hunsden v. Cheyney* (15), a mother, who was entitled to a term of years in land which was limited to her in tail, stood by while her son negotiated a marriage upon the footing that he was entitled to the term upon her death, and engaged to settle such reversion on the issue of the marriage. On the suit of a child of that marriage she was compelled to make the settlement good, though it was insisted that she was not guilty of any fraud or ill-practice, but was ignorant that as tenant in tail she could dispose of the term. In each of these cases the plaintiff relied either upon the fraud of the defendant or upon his being estopped from defending himself by denying the truth of his own statement. H

In *Slim v. Croucher* (1) a person, being asked to lend upon the security of a lease which the borrower represented that he was entitled to have granted to him, applied to the lessor and received from him an assurance that he was agreeable to grant a peppercorn lease of the property in question to the borrower. In fact he had already granted the lease and the borrower had mortgaged it, but the lessor had forgotten the previous grant. The money having been advanced on the faith I

A of this statement, the Court of Appeal (consisting of LORD CAMPBELL, L.C., and KNIGHT BRUCE and TURNER, L.J.J.) directed the lessor to repay the money advanced with interest and costs of suit, recognising in distinct terms that there was no moral fraud on the part of the lessor. That case carries the doctrine as far as any that can be cited, because at that time courts of equity were not accustomed to give relief by way of damages in cases which did not involve actual fraud.

B LORD CAMPBELL said, however, that it belonged to a class of cases over which courts of law and courts of equity had a common jurisdiction, and the relief was granted on the authority of the dicta of LORD ELDON in *Evans v. Bicknell* (13), and upon the ground that the plaintiff was to be placed as far as possible in the position he was in before the representation was made. According to the recent decision in the House of Lords in *Derry v. Peek* (2), an action of deceit could not have

C been maintained under such circumstances, because there was not actual fraud. The doctrine of estoppel seems scarcely applicable.

The representation relied on in *Slim v. Croucher* (1) was more like a contract or promise than the statement of an existing fact. The lessor said he was agreeable to grant the lease, but, as the money was not advanced at the lessor's request, there seems to be no consideration to support a contract. However, the language

D used by the lessor involved a representation that he was in a position to grant the lease, and this may have been the misrepresentation relied on. If the mortgagee could sue the landlord to compel him to grant the lease, or in the alternative for damages, and the landlord were estopped from denying his ability to make the grant, he might be treated as contumaciously refusing to do so, and in this way, perhaps, the decision might be justified. But this would be an action

E for specific performance of a contract, and I do not see how it could be maintained. TURNER, L.J., says distinctly that enforcing a personal demand against the defendant under such circumstances is an old jurisdiction of the Court of Equity, and refers to LORD ELDON's language in *Evans v. Bicknell* (13), which, however, as I have pointed out, was a case of fraud. LORD CAMPBELL evidently felt the difficulty, for in his judgment he seems to distinguish the case from an action for damages,

F because there could be no question about the amount to be recovered.

In *Piggott v. Stratton* (16) a vendor induced a man to buy land for building by a statement that he was lessee of the adjoining land, and could not, owing to the terms of his lease, build upon it so as to obstruct the sea view from the land he was selling. After the plaintiff had built the vendor surrendered his lease and took a new one not containing any restriction against obstructing the view, and

G then commenced to build so as to obstruct the view from the plaintiff's houses. It was held by the same court that decided *Slim v. Croucher* (1) that the vendor must be restrained from so doing, LORD CAMPBELL, L.C., sustaining the injunction expressly on the ground of estoppel. He said (1 De G.F. & J. at p. 49):

"I apprehend that the injunction is to be supported on the well-established doctrine that, if A. deliberately makes an assertion to B. intending it to be acted upon by B. and it is acted upon by B., A. is estopped from saying that it was not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B. from having acted upon it, and B. is entitled, in respect of anything done in the belief that it was true, to object to any denial of its truth by A. This doctrine is to be found in *Pickard v. Sears* (6) and a series of subsequent decisions."

I LORD CAMPBELL's language in both these cases, but more especially in the former, might be read as intimating an opinion that an action at law would lie for an innocent misrepresentation of fact upon which another person acted. But *Piggott v. Stratton* (16) was an obvious case of estoppel.

It has been recognised since *Freeman v. Cooke* (8) that a statement made by a man with the intention that it should be acted upon, and which is acted upon accordingly, is binding upon him, so that he is precluded from contesting its truth, although it was not fraudulently made, and this has been followed in

numerous instances. The doctrine was stated by LORD BLACKBURN in the House of Lords, in the well-known case of *Burkinshaw v. Nicolls* (17) in these words (3 App. Cas. at p. 1026):

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Certificates in that case had been issued by a joint-stock company for shares which the certificates stated had been fully paid up, and the company were held to be estopped from denying that they were paid up as against a purchaser of those shares for value without notice. The same doctrine was applied in *Re Bahia and San Francisco Rail. Co.* (11) and in *Hart v. Frontino and Bolivia South American Gold Mining Co.* (18), where no kind of fraud was imputed to the companies.

The result of the authorities seems to be as follows: (i) There has been from ancient times a jurisdiction in courts of equity in certain cases to enforce a personal demand against one who made an untrue representation, upon which he knew that the person to whom it was made intended to act, if such person did act on the faith of it and suffered loss by so acting. (ii) This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law. (iii) Relief will also be given at law and in equity, even though the representation was innocently made, without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation. (iv) Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby. (v) Estoppel is effective where an action must succeed or fail if the plaintiff or defendant is prevented from disputing a particular fact alleged. For example, if an assign of A. sues A.'s trustees to recover the fund assigned, and the trustee is prevented from denying its existence in his hands, or at law, if the assign of a debt should sue the alleged debtor, and he was prevented from denying that the debt was due; or, in the converse case, an estoppel may be a defence, as if a joint-stock company were to sue a shareholder for calls, and they were estopped from denying that the shares were paid up, their action would fail. It is obvious that this rule does not apply to an action for deceit. In such an action the plaintiff relies not on the truth of the statement, but upon its falsehood, and he is bound to prove not only that the representation was untrue, but also that it was made fraudulently. *Derry v. Peek* (2) very well illustrates the difference. It was an action by a person who had been induced to take shares in a joint-stock company by an untrue statement in a prospectus. The action was not against the company, but against the directors who had issued the prospectus. The representation was not fraudulently made. Preventing the defendants from denying the truth of their representation would not enable the plaintiff to succeed in such an action, so that the plaintiff could not rely on estoppel. That would only be if the defence had been that the statement was inaccurate, and the defendants were estopped from denying the accuracy of their own statement. The plaintiff's case was not that the statement must be treated as accurate; on that supposition he could not have had any relief against the defendants. The plaintiff sued the defendants upon the ground that the statement was false, and false to their knowledge, that is fraudulent; and the defence that prevailed was, that if it was inaccurate, it was not fraudulent. (vi) I am not satisfied that relief in the nature of a personal demand against the defendant has been given in equity in cases which did not involve fraud, or to which the doctrine of estoppel would not apply. *Slim v. Croucher* (1) is the only instance I know of, and, as LORD CAMPBELL said, there might be relief at law



A in that case; he probably considered, either that it was a case of estoppel, or that an action of deceit would lie, which latter view is not consistent with *Derry v. Peek* (2).

In the present case the doctrine of estoppel would enable the plaintiff to succeed if the facts warrant the application of it. But, in order to create an estoppel, the statement by which the defendant is held bound must be clear and unambiguous.

B This is an ancient rule as to estoppel by statements in a deed, as appears from *ROLLE'S ABRIDGMENT*, "Estoppel," (P.), pl. 1 and 7, and was acted on by *LOHN CAIRNS* in *Heath v. Crealock* (19). In *General Finance Mortgage and Discount Co. v. Liberator Permanent Building Society* (20) *SIR GEORGE JESSEL* followed the last case, and intimated that in his opinion the doctrine ought not to be extended, there being no reasons for preferring one innocent purchaser to another. That  
C certainty of statement is also required to maintain an estoppel upon a statement not by deed, appears from *Freeman v. Cooke* (8), where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken altogether. Whether this suit be treated as in equity or at law, the essence of the plaintiff's case must be that he was misled by the statement. The court must be satisfied of this. If there was fraud and the  
D statement was intended to mislead, its ambiguity would not be a defence. But where no fraud is alleged it is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it.

One peculiarity of the present case is that there is no evidence. The cause is tried upon admissions by both sides. Consequently, we have no statement by the  
E plaintiff or by his professional advisers, who were the real actors in the negotiations, as to what meaning they attributed to the letters on which they now rely as a misrepresentation; nor is there any statement or admission as to the extent of the reliance which they placed upon the alleged misrepresentation. The court has to determine what the representation amounted to, and how far it influenced the plaintiff's conduct. The plaintiff did not personally interfere in the negotia-  
F tions. His solicitors having been applied to by Vice-Admiral Bouverie, the equitable tenant for life, for a loan upon the security of his life interest, and having, as appears from the first letter, been assured by him that he had not mortgaged or in any way parted with such life interest, wrote the letters which have been read. It was pointed out by *BOWEN, L.J.*, in the argument that the last letter but one demonstrated that the writers, the plaintiff's solicitors, considered  
G they had not obtained at that time a satisfactory answer to the question stated in it. The reply was on Feb. 27. Without further inquiry the plaintiff lent money to Vice-Admiral Bouverie upon the security of a mortgage of his life interest. The plaintiff admits that the defendant did not, at the time of his correspondence, recollect that he had received, as he now admits was the fact, notice of, or that he was otherwise aware of the existence of, previous mortgages on the life estate.

H It appears that nothing can be recovered from the tenant for life, who is an undischarged bankrupt, and is out of the jurisdiction.

What is the true inference from these facts? Did this correspondence amount to a statement by the defendant that there were no other encumbrances upon the life estate than those mentioned in his letters? Or was the true meaning that those were all that he knew of or remembered at the time? It is said that we  
I should adopt the former view, because otherwise it is not probable that the money would have been advanced; but I am not convinced of that. The plaintiff's solicitors had the assurance of Vice-Admiral Bouverie that he had not encumbered, and they might have well been satisfied with the statement of the trustee in addition that he did not know of any encumbrance. Such a statement made in good faith, if accurate, would not render the defendant liable. I am strongly disinclined, in a case which is free from suspicion of fraud, to hold a person in the position of this defendant liable upon a statement which is not clear and unambiguous. I cannot believe that solicitors receiving such letters as those

written by this defendant could possibly read them as a positive assurance that there were no other encumbrances. I think that the only fair meaning which they could attribute to the statements of the defendant was, that the charges he mentioned were all that he was aware of at the time he was writing. For this reason I think that the appeal should be allowed and the action dismissed with costs.

Appeal allowed.

Solicitors: *Pearce-Jones & Co.*; *Tylee & Co.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

## THE DICTATOR

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Jeune, J.), May 10, 1892]

[Reported [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563;  
7 Asp.M.L.C. 251]

*Shipping—Salvage—Award—Enforcement—Action in rem—Appearance by defendants—Sum awarded greater than sum claimed and amount for which bail given and costs.*

Where, in a salvage action in rem in the Admiralty Court, the defendants, the owners of the ship and cargo, appear as such, and the court amends the writ and awards a sum larger than that claimed, execution can be issued for the sum awarded although it is greater than that originally claimed and greater than the amount for which bail has been given and costs.

In a salvage action in rem claiming £5,000, the defendants' solicitors gave a written undertaking to appear and to put in bail in an amount not exceeding £5,000. The court awarded £7,500, and subsequently ordered the endorsement on the writ to be amended by altering the claim from £5,000 to £8,500. The plaintiffs were allowed to issue execution against the defendants personally for the amount of the award, and were not restricted to the amount originally claimed and named in the undertaking to put in bail.

**Notes.** Considered: *The Ripon City*, [1895-9] All E.R.Rep. 487. Approved: *The Gemma*, [1895-9] All E.R.Rep. 596. Considered: *The Dupleix*, [1912] P. 8; *The Beldis*, [1935] All E.R.Rep. 760. Referred to: *The Port Victor*, [1901] P. 243; *The Veritas*, [1900-3] All E.R.Rep. 501; *The Burns*, [1907] P. 137; *The Broadmayne*, [1916] P. 64; *The Llandoverly Castle*, [1920] P. 119; *The Joanna Vatis* (No. 2), [1922] P. 213; *The Jupiter*, [1924] All E.R.Rep. 405; *The Point Breeze*, [1928] P. 135; *The Roberta*, [1938] P. 1; *France Fenwick Tyne and Wear Co., Ltd. v. H.M. Procurator-General*, [1942] 2 All E.R. 453; *Admiralty Comrs. v. Josefina Thorden, Owners, The Josefina Thorden*, [1945] 1 All E.R. 344.

As to the Admiralty jurisdiction in rem and in personam, see 1 HALSBURY'S LAWS (3rd Edn.) 47 et seq., and *ibid.*, vol. 35, pp. 718-720. For cases see 1 DIGEST (Repl.) 120-123, and (as to salvage actions generally) 41 DIGEST 865 et seq.

Cases referred to:

- (1) *Five Steel Barges* (1890), 15 P.D. 142; 63 L.T. 499; 6 Asp.M.L.C. 580; sub nom.—*Steel Barges*, 59 L.J.P. 77; 39 W.R. 127; 1 Digest (Repl.) 131, 167.
- (2) *The Jonge Bastiaan* (1804), 5 Ch. Rob. 322; 165 E.R. 791; 41 Digest 831, 6908.

- A** (3) *Johnson v. Shippen* (1704), 2 Ld. Raym. 982; Holt, K.B. 48; 11 Mod. Rep. 30; 1 Salk. 35; 92 E.R. 154; sub nom. *Jonson v. Shepney*, 6 Mod. Rep. 79; 41 Digest 270, 1165.
- (4) *Castrique v. Imrie* (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 19 W.R. 1; 3 Mar.L.C. 454, H.L.; 11 Digest (Repl.) 525, 1375.
- (5) *The Ruby Queen* (1861), Lush. 266; 1 Digest (Repl.) 166, 534.
- B** (6) *The Clara* (1855), Sw. 1; 26 L.T.O.S. 165; 2 Jur.N.S. 46; 4 W.R. 180; 1 Digest (Repl.) 203, 900.
- (7) *The Heinrich (Henrich) Bjorn* (1885), 10 P.D. 44; 54 L.J.P. 33; 52 L.T. 560; 33 W.R. 719; 1 T.L.R. 266; 5 Asp.M.L.C. 391, C.A.; affirmed (1886), 11 App. Cas. 270; 55 L.J.P. 80; 55 L.T. 66; 6 Asp.M.L.C. 1, H.L.; 1 Digest (Repl.) 120, 67.
- C** (8) *The Victor* (1860), Lush. 72; 28 L.J.P.M. & A. 110; 2 L.T. 331; 1 Digest (Repl.) 166, 537.
- (9) *The Dundee* (1823), 1 Hag. Adm. 109; 1 Digest (Repl.) 193, 783.
- (10) *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; 52 L.J.P. 1; 47 L.T. 198; 31 W.R. 249; 4 Asp.M.L.C. 567, H.L.; 41 Digest 924, 8135.
- D** (11) *Brown v. Wilkinson* (1846), 15 M. & W. 391; 16 L.J.Exch. 34.
- (12) *The Volant* (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 5 L.T. 185, 525; 6 Jur. 540; 1 Digest (Repl.) 163, 507.
- (13) *De Lovio v. Boit*, 2 Gallison, 397.
- (14) *The Triune* (1834), 3 Hag. Adm. 114; 1 Digest (Repl.) 265, 1661.
- (15) *The Aline* (1839), 1 Wm. Rob. 111; 1 Digest (Repl.) 143, 304.
- E** (16) *The Hope* (1840), 1 Wm. Rob. 154; 1 Digest (Repl.) 265, 1659.
- (17) *The Temiscouata* (1855), 2 Ecc. & Ad. 208; 1 Jur.N.S. 479; 1 Digest (Repl.) 242, 1373.
- (18) *The Kalamazoo* (1851), 18 L.T.O.S. 66; 15 Jur. 885; 1 Digest (Repl.) 196, 817.
- (19) *The Zephyr* (1864), 11 L.T. 351; 2 Mar.L.C. 146; 1 Digest (Repl.) 265, 1662.
- F** (20) *The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
- (21) *The Johann Friederich* (1839), 1 Wm. Rob. 35; 1 Digest (Repl.) 132, 173.
- (22) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 1 Digest (Repl.) 121, 70.
- G** (23) *The John Dunn* (1840), 1 Wm. Rob. 159; 1 Digest (Repl.) 243, 1387.
- (24) *The Freedom* (1871), L.R. 3 A. & E. 495; 41 L.J.Adm. 1; 25 L.T. 392; 1 Asp.M.L.C. 136; 1 Digest (Repl.) 195, 813.
- (25) *The Wild Ranger* (1863), Brown. & Lush. 84; 2 New Rep. 402; 1 Digest (Repl.) 196, 818.
- H** (26) *The Hero* (1865), Brown. & Lush. 447; 13 W.R. 927; 1 Digest (Repl.) 195, 812.
- (27) *The Freir, The Albert* (1875), 44 L.J.Adm. 49; 32 L.T. 572; 2 Asp.M.L.C. 589; 1 Digest (Repl.) 274, 1753.
- (28) *The Miriam* (1874), 43 L.J.Adm. 35; 30 L.T. 537; 2 Asp.M.L.C. 259; 1 Digest (Repl.) 274, 1752.
- I** (29) *The Flora* (1866), L.R. 1 A. & E. 45; 35 L.J.Adm. 15; 14 L.T. 192; 2 Mar.L.C. 325; 1 Digest (Repl.) 166, 540.
- (30) *The Staffordshire* (1872), 8 Moo.P.C.C.N.S. 443; L.R. 4 P.C. 194; 41 L.J.Adm. 49; 27 L.T. 46; 20 W.R. 557; 1 Asp.M.L.C. 365; 17 E.R. 378; 1 Digest (Repl.) 202, 897.
- (31) *The Christiansborg* (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 1 T.L.R. 634; 5 Asp.M.L.C. 491, C.A.; 41 Digest 955, 8498.
- (32) *Re Silver Bullion* (1854), 2 Ecc. & Ad. 70; 164 E.R. 312; sub nom. *The Sir Robert Peel*, 4 L.T. 742; 41 Digest 846, 7089.



- (33) *The Johannes* (1870), L.R. 3 A. & E. 127; 39 L.J.Adm. 41; 23 L.T. 26; A 3 Mar.L.C. 462; 1 Digest (Repl.) 190, 761.
- (34) *The Orient* (1871), L.R. 3 P.C. 696; 8 Moo.P.C.C.N.S. 74; 40 L.J.Adm. 29; 24 L.T. 918; 20 W.R. 6; 1 Asp.M.L.C. 108; 17 E.R. 241, P.C.; 1 Digest (Repl.) 216, 1046.

**Summons** by plaintiffs in a salvage action for particulars of the names and addresses of the defendants. B

*Gorell Barnes, Q.C.*, for the plaintiffs.

*Sir Walter Phillimore* for the defendants.

*Cur. adv. vult.*

May 10, 1892. **JEUNE, J.**, read the following judgment.—In this case, which is an action in rem of salvage, the claim on the writ was for £5,000. The owners of the ship and cargo appeared as such, and by consent the ship was released on bail for £5,000 being given. At the hearing on Nov. 26, 1891, before the President, the salvage was fixed at £7,500. On Dec. 16, the writ was amended by order of the President by increasing the amount claimed to £8,500. On Mar. 10, 1892, the Court of Appeal affirmed the decision of this court as to the amount of the salvage award. The motion came before me on an application that particulars may be given of the names and addresses of the owners of the *Dictator*, the salved ship, and her cargo, with the value of the cargo belonging to such cargo-owner opposite to his name. But it was agreed that the real object of the resistance to the application is to try the question whether execution can be issued against the owners of the ship and cargo for more than £5,000 and costs. C D E

If this had been an action in personam, as it might have been (*Five Steel Barges* (1)), no doubt execution could be levied for the full amount of the award, it being within the value of the property salved. But it is an action in rem, and the contention is, that in such action, even when the owners of the res appear, there cannot be execution for any greater amount than that originally claimed, or at least, than the amount for which bail has been given and costs. The question, therefore, is, what—when the owners of the res have appeared in a salvage action in rem—is the limitation (other than the value of the property salved) on the powers of the court to award salvage, or the power of the plaintiff to enforce its payment if awarded. It is necessary to consider first whether in an action in rem, where a personal action would lie against the owners, judgment can be enforced for more than the value of the res, because, if it can, no doubt it can be enforced for more than the amount of the bail. In a salvage action in rem the question so stated has probably seldom arisen, although *The Jonge Bastiaan* (2) is an instance of it, because the property salved is generally identical with the res, and the salvage award never goes beyond the value of the property salved. But in actions of damage the question may readily arise, now that the limit of liability may exceed the value of the ship by which the damage was caused and probably arose before the limit of the value of the ship was imposed by statute, as to the limit of the amount to be recovered. It is one upon which the highest authorities are in conflict, and I think it can be solved only by considering the practice, and especially the early practice of the Admiralty Court and the different views which at different times have been taken of the effect of an action in rem. F G H I

There can, I think, be no doubt that the courts of common law always clearly drew the distinction between the case of the Court of Admiralty having jurisdiction by reason of hypothecation or lien, or other reason, over a res, and it seeking to exercise jurisdiction against individuals personally, with regard to whom no such jurisdiction in the view of the common law courts existed, and while they allowed the action to proceed in regard to the former matter, prohibited it as to the latter (*Johnson v. Shippen* (3) approved by BLACKBURN, J., in

A *Castrique v. Imrie* (4)), and probably the Court of Admiralty, in cases such as *The Ruby Queen* (5) recognised that the court might have jurisdiction quoad the res, though not quoad its owners. But the Court of Admiralty, it would appear, did not in early times treat the action in rem as a specific and distinct form of action. If we turn to the *PRAXIS CURIÆ ADMIRALITATIS* OF CLERKE whom LORD HARDWICKE described (1 Atk. at p. 296) as "an author of undoubted credit," and select an edition published in the middle of the last century (I take that of SIMPSON, published in 1743), we find a complete sketch of the procedure and causes in the Court of Admiralty in force at that time, and probably for a long period before. In all actions in that court the respondent, if he appeared (tit. 12), had to find bail for the amount in which the action was instituted, or go to prison, and then the action proceeded against him in personam, and if judgment went against him he was monished to pay the amount ordered (tit. 63), or if he failed to do so his bail (tits. 64, 65), the consequence of default being attachment (tits. 67, 68). If he did not appear (tit. 28) his appearance could be enforced by seizure of any ship or any goods belonging or supposed to belong to him within the Admiralty jurisdiction, the real owner being able to intervene and claim them. If after such seizure he appeared and gave bail (tit. 37) the ship or goods were delivered over to him, and the case proceeded ut in actione instituta contra personam debitoris.

It would seem clear that the arrest in such cases was not limited to any particular property of the defendant on the seas; that the object of the arrest was to secure appearance and bail or provide a fund for securing compliance with the judgment, and that, whatever was the value of the property or the amount of the bail, the defendant would be liable to pay and liable to be attached if he did not pay the full amount of the sum decreed against him. No doubt the main object of arrest, whether of person or property, was to secure that bail should be given to satisfy the judgment. In RIDLEY'S *VIEW OF THE CIVIL AND ECCLESIASTICAL LAW*, published in 1639, the author writes (3rd Edn.), p. 94 :

"The proceeding in all these civil matters is by libel concluding to the action, the party agent giving caution to prosecute the suite and to pay what shall be adjudged against him if he faile in the suite; the defendant on the contrary part securing his adversarie by sufficient suretie or other caution as shall seeme meet for the present to the judge that he will appeare in judgment and will pay that which shall be adjudged against him, and that he will satisfie and allow all that his proctor shall doe in his name: for to all these ends satisfaction (or security) in judgment is, which is nothing else but a course to secure the adversary of that which is in debate before the judge, that on what side soever the cause shall have an end, the clients may be seen to get that which by law shall be adjudged unto them."

A similar view of the action in the Admiralty courts is to be gathered from H GODOLPHIN, writing towards the end of the seventeenth century. In enumerating the modes of procedure he speaks (GODOLPHIN'S *ADMIRALTY JURISDICTION* (1685), p. 41) of arrest of property only as a means to compel appearance. Similarly the table of fees at the end of SPELMAN'S treatise (*DISCOURSE OF THE ADMIRAL JURISDICTION AND THE OFFICERS THEREOF*) left by him at his death in 1641 contains the item "Pro relaxatione navis aut bonorum ab arresto," which I think refers I not merely to ship and cargo, but to any property of the defendant. And that the action in rem was not then regarded by Admiralty practitioners as a peculiarity existing in Admiralty procedure seems to me clear from the fact that PRYNNE in 1669, in his answers to LORD COKE'S *ARTICULI ADMIRALITATIS*, while enumerating the advantages which that procedure possessed over the common law, makes no mention of any such special form of action. It would appear, therefore, that under the earlier practice the distinction between actions in personam and actions in rem depended on whether the person or the property of the defendant was arrested in the first instance, but if the defendant appeared

the procedure and effect of an action in rem became those of an action in personam. **A**  
But several changes in law or practice took place.

When actions beginning by arrest of the person became obsolete in the last century, as DR. LUSHINGTON, in *The Clara* (6) (Sw. at p. 3), says they did, the last being in 1780, and the arrest of the property other than the res to compel appearance, which must always have been unusual, became obsolete also, the result was that the only action beginning by arrest at all was one beginning by **B**  
arrest of the res, though in theory arrest of the person would still seem permissible (per FRY, L.J., in *The Heinrich Björn* (7), 10 P.D. at pp. 53, 54). On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to arrest for the creditor that legal nexus over the proprietary interest of his debtor as from the date of the attachment of which LORD WATSON speaks in *The* **C**  
*Heinrich Björn* (7) grew up. The result was, that arrest became the distinctive feature of the action in rem, such arrest having primarily for its object the satisfaction of the creditor out of the property seized.

But there seems no reason to suppose that the action beginning by arrest of the res altered the course or character it had hitherto assumed as to the appearance of the debtor in it; and, if that be so, it would seem clear that the full amount of **D**  
a judgment—if a defendant who might himself have been arrested appeared—could be enforced by the only means available in the Admiralty Court, monition and attachment (*The Victor* (8)), whatever the value of the property arrested. Nor when we come to a later period can it, I think, be doubted that the view of a defendant's liability, which I have endeavoured to express, was the view of LORD STOWELL. In *The Dundee* (9), decided in 1823, LORD STOWELL said **E**  
(1 Hag. Adm. at pp. 120, 121, 124):

"The quantum or reparation due in such cases [cases of damage] has been differently measured in the maritime laws of different commercial countries, and of the same commercial country, among others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the common principle **F**  
applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed.... It is an admitted fact that this mode of initiating a suit by arrest of ship, tackle, apparel and furniture, is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statutes restrict it. But the initiatory terms, tackle, apparel and furniture, founded the suit sufficiently to embrace all the objects which the statutes left subject to its operation. These restrained **H**  
them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends."

There can, I think, be no doubt from these words what was the view of **I**  
LORD STOWELL. In *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Navigation Co.* (10), LORD BLACKBURN, after quoting them, says (7 App. Cas. at pp. 813, 814):

"LORD STOWELL treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by seizure of the ship, the recompense in damages decreed by that court could be enforced against the owners out of all their property of every kind, so that the result was that by the general law the owners might be made to pay to their uttermost



A farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship, when seized, was. PARKE, B., in *Brown v. Wilkinson* (11) (15 M. & W. at p. 398), says: 'From the practice of the Court of Admiralty no light could be derived on this question, for that court proceeds in rem, and can only obtain jurisdiction by seizure and the value, when seized, is the measure of liability.' It is not, I think, necessary to decide between those very high authorities. If it were, I should wish to make further search among the cases on prohibition. But *prima facie*, one would say, LORD STOWELL was more familiar with the subject, and, therefore, more likely to be accurate."

C It is unfortunately now necessary to decide between these high authorities to which LORD BLACKBURN refers. I am not quite sure that prohibition affords a complete test, because, given the liability of the owner to make full compensation to be enforced by the Court of Admiralty, the rest seems to be a question not of jurisdiction but of procedure; but, if prohibition be the test in this case it certainly supports LORD STOWELL's view. Although, as I have said, prohibition was granted as to the owners when the Court of Admiralty proceeded against them having jurisdiction to proceed only against the res, I cannot discover any prohibitions to the Admiralty Court either for proceeding against res and owners where there was a jurisdiction against the owner personally, or for issuing attachment against owners to enforce payment of an amount exceeding the value of the res, and certainly no trace of any such appears in the *ARTICULI ADMIRALITATIS* or in the *REPLIES TO LORD COKE'S OPINIONS* where one would have expected to find it. I would further remark that, though *The Dundee* (9) was referred to in *Brown v. Wilkinson* (11), attention does not appear to have been drawn in argument to the Admiralty practice. The dicta of PARKE, B., are mistaken in asserting that the Court of Admiralty can obtain jurisdiction only by seizure, and appear altogether to ignore the Admiralty jurisdiction in personam. There can be no doubt that DR. LUSHINGTON's opinion expressed in *The Volant* (12) (1 Wm. Rob. at p. 388) that

F "the jurisdiction of this court does not depend on the existence of the ship, but on the origin of the question to be decided and the locality,"

G correctly represents the law: see per STORY, J., in *De Lovio v. Boit* (13) (2 Gallison, at pp. 461, 464). The view of SIR JOHN NICOLL was, I think, in harmony with that of LORD STOWELL. In *The Triune* (14), which was an action for damage by collision against the master who was also part owner, the value of the ship arrested falling short of the damage which was assessed at £400, SIR JOHN NICOLL, treating the defendant as master and so not protected by s. 1 of the [repealed] statute 53 Geo. 3, c. 159, [relating to the responsibilities of shipowners], monished him to pay that sum of £400 and, failing to do so he was imprisoned.

H The argument before me turned chiefly on the decisions of DR. LUSHINGTON. It must, I think, be admitted that they are not consistent, and it is this inconsistency that has necessitated a more general view of the subject than would otherwise have been necessary, but, in view of the authorities I have referred to, I am, I think, justified in giving the preponderance to those expressions of his opinion which support them, and I think it will also be found that the earliest and latest views of DR. LUSHINGTON seem in harmony with those of LORD STOWELL and SIR JOHN NICOLL. In *The Aline* (15), decided in 1839, DR. LUSHINGTON said (1 Wm. Rob. at pp. 116, 117):

"Independent of any municipal regulation, it is, I apprehend one of the great principles of justice that in cases of this description, where the wrong is done by the servants of the owner, the owner ought to make good the whole loss occasioned by their default. In the courts of common law, where the proceedings are in personam, the operation of this principle would be carried out in its fullest extent, unless restrained by Act of Parliament. In

these courts, however, when the proceedings are in rem, a mode of remedy not originally given as the measure of the damage, but as the best security for indemnity that could be obtained as the owner might be beyond the reach of the law, the application of this principle has been modified by municipal regulation, and a restriction is imposed [not, DR. LUSHINGTON says, by the nature of the action, but by] limiting the liability of the owner of the ship doing the damage to the value of the vessel itself, and of the freight where the freight can be attached. Under this modification, therefore, the rights of a person in possession of a decree of this court in a cause of damage are co-extensive with the rights of the owner in the vessel against which the decree has been awarded."

This is almost an echo of the words of LORD STOWELL. I do not think that *The Hope* (16), decided in 1840, asserts any contrary principle. It decided that the owners of a ship having been sued as owners and so entitled to avail themselves of the protection of the statute (53 Geo. 3, c. 159, s. 1), judgment could not be obtained against the master who was also a part owner beyond the value of the res; and so far it perhaps differed from *The Triune* (14), which was not cited in argument. But, although DR. LUSHINGTON said that he was not aware of any case in which the court in a proceeding of that kind had ever had engrafted upon it a further proceeding against the owners upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of damages pronounced for, this falls short of saying that apart from the statute the owners were not liable in an action in rem for damages beyond the value of the res.

In *The Volant* (12), decided in 1842, it cannot be doubted that DR. LUSHINGTON departed from the view of LORD STOWELL, basing his opinion on this very inference from the style of the court which LORD STOWELL had deprecated. He said (1 Wm. Rob. at pp. 388, 389) :

"In a case in which the owner has appeared the question is to what extent he has appeared to the process against the ship. It is material to see how the process is worded. It decrees the ship to be seized, and it cites all persons having, or pretending to have, any right, title, or interest therein to appear in this court on certain days and hours, there to answer in a cause civil and maritime. The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel and not further. Now, if it were possible on such warrant to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no reason why bail should not be commensurate with the damage where the amount is not restricted by statute; but, if bail could not be demanded beyond the value of the ship, I do not see how the owners in that proceeding can be made further responsible; the warrant of arrest is confined to the ship, it goes no further. It appears to me therefore that there is no personal liability beyond the value of the ship, for this obvious reason, that the original process would not justify any such proceeding; the appearance given by the individual himself would not justify such proceeding; he has appeared only to protect his interest in the ship."

It is true that it was not necessary for the decision of this case to say more than DR. LUSHINGTON said later in his judgment, that to render a master who was part owner guilty of neglect, responsible beyond the value of ship and freight he must be sued as master in the first instance. It is true also that in a later case, *The Temiscouata* (17), (2 Ecc. & Ad. at p. 210), DR. LUSHINGTON places his decision on the restriction of liability effected by the Acts of Parliament, and not by the nature of an action in rem; and he seems to explain his decision in *The Volant* (12) very much as he had expressed himself in *The Aline* (15); but I do not think that on those grounds we can refuse to acknowledge

A the weight of Dr. LUSHINGTON's opinion expressed in the words I have quoted.

A similar expression of opinion is to be found in *The Kalamazoo* (18). Again, the actual decision is not in point, because all that was decided was that a ship having been released on bail could not be re-arrested in a further action where the compensation found due exceeded the bail. But Dr. LUSHINGTON took occasion to say (15 Jur. at p. 886):

B "It is said that the party ought to receive the whole amount of the damage done to the full extent of the value of the ship in fault. To this there are two answers. First, it was their own fault if they did not arrest her to the full value of the ship; and secondly, there is no authority to show that, having obtained bail for the ship, you can afterwards proceed against the owners to make up the amount of the loss. I cannot think I can engraft a personal action upon an action in rem."

C But in *The Zephyr* (19), decided in 1864, Dr. LUSHINGTON gave a decision, the reason for which appears to me not in accordance with his view as expressed in *The Volant* (12) and the *Kalamazoo* (18), and which, if correct, is conclusive in favour of the present application. The action for damage in that case was entered for £700 and the *Zephyr* was arrested. The liability of the owners under s. 54 of the Merchant Shipping Act Amendment Act, 1862 [repealed], was £712, and exceeded the value, £400, of the ship for which bail was given. The application made was to amend the præcipe by inserting the names of the owners and for a citation in personam against them. Dr. LUSHINGTON refused the application on the express ground that it was unnecessary. He said (11 E L.T. at p. 351):

F "I have only known of one instance in which a personal action has been engrafted on a suit in rem. There is some difficulty in altering the præcipe as prayed, and such a course appears to the court unnecessary, inasmuch as s. 15 of the Admiralty Court Act, 1861 [section repealed], gives the court power to effect the object with which the motion has been made. That section puts decrees of the Court of Admiralty upon the same footing as judgments in the Superior Courts of common law, and gives a remedy as well against the ship and goods arrested as against the person of the judgment creditor. If, therefore, the occasion should arise, a monition might issue to compel the owners of the *Zephyr* to pay the amount of damages not covered by the bail bond."

G I confess I am unable to attribute to s. 15 of the Act of 1861, the effect which Dr. LUSHINGTON is reported to give to it. It seems to me only to arm the Court of Admiralty, which then could only enforce its orders for payment by attachment, with the same powers of execution as were possessed by the Superior Courts; and if the objection to proceeding against the owners in that action H for any sum over £400 really depended on its being impossible to graft an action in personam on an action in rem (the phrase employed by Dr. LUSHINGTON in *The Hope* (16) and *The Kalamazoo* (18), and in argument in *The Victor* (8) it appears to me that that objection would equally apply whether the proceeding was by way of fi. fa. or by way of monition and attachment. I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond I the value of the res against owners who have appeared, and against whom a personal liability enforceable by Admiralty process exists, is the grafting of one form of action on another. The change, if it be a change, in the action is effected at an earlier stage, viz., when the defendant, by appearing personally, introduces his personal liability. It appears to me that the meaning of Lord STOWELL's opinion, as above quoted, is that the judgment can be so enforced in the action in which the ship is arrested, and that in *The Zephyr* (19) Dr. LUSHINGTON really intended to follow that opinion, and to adhere to his own opinion in *The Aline* (15).



I do not think that the opinion of the Privy Council in *The Bold Buccleuch* (20) militates against this view. In that case the Privy Council, disapproving the decision of DR. LUSHINGTON in *The Volant* (12) and *The Johann Friederich* (21), that the arrest of the res operated only to compel appearance in a manner analogous to the procedure in foreign attachment, and to furnish security for prompt and immediate payment, and also the decision in *The Aline* (15) that a lien attached only upon action brought, held that a maritime lien attached from the time of damage done, that a maritime lien was the foundation of proceeding in rem, and that an action in rem was a process to make perfect a right inchoate from the moment the lien attached. In *The Parlement Belge* (22) it was said that *The Bold Buccleuch* (20) decided that "the action in rem is a different action from the action in personam, and has different results." But I do not think that it follows on that that the Privy Council or the Court of Appeal intended to lay down that an action in rem could affect only the res. It may well be that, if the owners do not appear, the action only enforces the lien on the res; but that when they do the action in rem not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it.

It appears to me consonant with common sense that, if the owners have had no personal notice, and are not, save in the sense indicated in *The Parlement Belge* (22), before the court, the effect of its judgment should be limited to the res in its hands; but that, if the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the court by a personal notice. It was argued by counsel for the defendants that the fact that a mortgagee is entitled to appear shows that appearance is limited to the interest in the res, but a mortgagee has no interest in or connection with the action beyond his interest in the res, nor can he by any process be fixed with any further liability. It was admitted in argument that an owner, by appearing, renders himself liable to costs over and above the value of the res. It is clear, however, that the authorities which decide that this liability for costs undoubtedly exists distinguish between that and liability for damages: *The John Dunn* (23); *The Volant* (12); *The Temiscouata* (17); *The Freedom* (24). I do not forget that modern text-writers (WILLIAMS AND BRUCE'S ADMIRALTY PRACTICE (2nd Edn.), pp. 81, 82, 302) have adopted the view that the remedy afforded by proceedings in rem cannot extend beyond the property proceeded against. But it appears to me that the point was not specially considered, and that the opinion expressed proceeded chiefly, if not entirely, on the decisions in *The Hope* (16), *The Volant* (12), and *The Kalamazoo* (18).

Even if, however, it be held that the remedy in actions in rem is limited by the value of the res, it is necessary for the defendants in the present case, in which the value of the res far exceeds the salvage award, to maintain either that when bail has been given the limit is the amount of the bail, or that limit is fixed by the original claim in the action. With regard to the first of these propositions, it may well be that for certain purposes the bail represents the released res. This would appear to be so with regard to conferring freedom from re-arrest, according to the opinion expressed by DR. LUSHINGTON in *The Wild Ranger* (25) and *The Kalamazoo* (18), though even this must be understood, as DR. LUSHINGTON explained in *The Hero* (26), to apply only to applications made for re-arrest after final judgment, which the cases of *The Freir*, *The Albert* (27), and *The Miriam* (28) show to mean final judgment after an appeal, and not even then to be an invariable rule, as the judgment of the same learned judge in *The Flora* (29) shows, or to extend to re-arrest for the purpose of obtaining costs, as the judgment of SIR ROBERT PHILLIMORE in *The Freedom* (24) suggests. Again, it would seem that, if the res is of less value than the bail, the bail is so far identified with the res that the bondsmen are liable only up to the value

**A** of the res: *The Staffordshire* (30). Again, as held by FRY, J., in *The Christiansborg* (31):

"bail is equivalent of the res, and that whilst the bail has been given for the thing, it is, if not impossible, highly improper that another action should be allowed to go on against the res in another place."

**B** In these senses and for these purposes bail stands in the place of the res. But it is quite another thing to say that the liability of the owners is confined to the same amount as the liability of the bail, and that the ship or any other goods of the defendant cannot be taken in execution under the provisions which continue the powers given to the Admiralty Court by the Act of 1861, as SIR ROBERT PHILLIMORE, in *The Freedom* (24) thought was possible as regards costs.

**C** The very form of the bail bond in the present day as given in WILLIAMS AND BRUCE'S ADMIRALTY PRACTICE (2nd Edn.), p. 636, and the early practice I have referred to in CLERKE'S PRAXIS seem to show that the bail is liable in a specified amount for the payment by the defendants of the whole amount of the judgment. Then, further, *The Jonge Bastiaan* (2) seems to me to be in point, and indeed to be on all-fours with the present case. There a salvage action in rem having

**D** been entered for £800 and bail given, which I presume was for the same amount, LORD STOWELL held that the court was by no means limited by any particular demand of the parties, and he awarded two-thirds of the value of the property salvaged, which was stated to be £3,400. LORD STOWELL clearly in this case did not consider a fresh action necessary, though in another case, probably under different circumstances, DR. LUSHINGTON is reported as saying that he had done so: see per DR. LUSHINGTON, *Re Silver Bullion* (32), 2 Ecc. & Ad. at p. 75. *The Zephyr* (19) is of course a further authority to the same effect.

There remains only the question whether the amount of the original claim limits the amount of the enforceable judgment I have no doubt that it does not. I think that, under the former practice, although DR. LUSHINGTON in *The Zephyr* (19) appears to have doubted it, the claim in the præcipe could be exceeded without

**F** actual formal amendment. *The Jonge Bastiaan* (2) is a clear authority on this point. I regard *The Hero* (26) and *The Johannes* (33) as decisions to the same effect. But, whether or not a præcipe could be so dealt with, the original claim now appears on the writ, and there is no doubt that a writ can be, and in this case has been, amended before final judgment. I should have regretted if I had been unable to accede to the present motion, because, as it is clear that, if a

**G** plaintiff's claim is not satisfied by one kind of action, he can resort to another (cf. *The Clara* (6) and *The Orient* (34)), the only result of refusal would be to drive the plaintiffs to bring another action. But for the reasons I have given I think the present application may be granted in order to enable the plaintiffs to issue execution in the present action for the full amount of the decree which they have obtained.

**H** Solicitors: *Lowless & Co.*; *Simpson, North & Johnson*, Liverpool.

[Reported by BUTLER ASPINALL, ESQ., Barrister-at-Law.]

## Re MIRAMS

[QUEEN'S BENCH DIVISION (Cave, J.), February 5, 20, 1891]

[Reported [1891] 1 Q.B. 594; 60 L.J.Q.B. 397; 64 L.T. 117;  
39 W.R. 464; 7 T.L.R. 309; 8 Morr. 59]*Contract—Illegality—Public policy—Assignment of salary by public officer—  
Chaplain to workhouse—Salary payable out of local funds.*

A chaplain to a workhouse, whose salary was payable out of the rates, executed an assignment of his salary.

**Held:** the principle preventing an assignment by a public officer of his salary did not apply since (i) a clergyman was not for this purpose a public officer, and (ii) the principle only applied where the salary was payable out of national, not local, funds, and, therefore, the assignment was not bad as being contrary to public policy.**Per Curiam:** Certain kinds of contract have been held void at common law on the grounds of public policy, a branch of the law, however, which certainly should not be extended, as the judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.**Notes:** The Bankruptcy Act, 1883, ss. 44, 53(2), have been repealed and replaced by the Bankruptcy Act, 1914, ss. 38, 51.Considered: *Mogul Steamship Co. v. McGregor, Gow & Co.*, ante p. 263. Referred to: *Hyams v. Stuart King* (1908), 77 L.J.K.B. 794; *Horwood v. Millar's Timber and Trading Co., Ltd.*, [1916] 2 K.B. 44; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *Beeston and Stapleford U.D.C. v. Smith*, [1949] 1 All E.R. 394.

As to salaries not assignable, see 4 HALSBURY'S LAWS (3rd Edn.) 517; 8 HALSBURY'S LAWS (3rd Edn.) 132. For cases see 12 DIGEST (Repl.) 271. For the Bankruptcy Act, 1914, ss. 38, 51, see 2 HALSBURY'S STATUTES (2nd Edn.) 373, 387.

Cases referred to:

- (1) *Grenfell v. Dean and Canons of Windsor* (1840), 2 Beav. 544; 48 E.R. 1292; 19 Digest (Repl.) 268, 348.
- (2) *Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest (Repl.) 781, 6642.
- (3) *Palmer v. Bate* (1821), 2 Brod. & Bing. 673; 6 Moore, C.P. 28; 129 E.R. 1125; 8 Digest (Repl.) 567, 195.
- (4) *Cooper v. Reilly* (1829), 2 Sim. 560; 57 E.R. 897; 21 Digest (Repl.) 776, 2608.
- (5) *Metcalfe v. Archbishop of York* (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65; 40 E.R. 485; 19 Digest (Repl.) 437, 2540.

Also referred to in argument:

*Feistel v. King's College, Cambridge* (1847), 10 Beav. 491; 16 L.J.Ch. 339; 50 E.R. 671; 11 Jur. 506; 8 Digest (Repl.) 568, 205.*Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 12 Digest (Repl.) 272, 2093.*Re Sudbury Union (Chaplain)* (1863), 1 New Rep. 235; sub nom. *Ex parte Molineux*, 7 L.T. 599; sub nom. *Ex parte Molyneux*, 27 J.P. 56; 11 W.R. 233; 19 Digest (Repl.) 588, 4238.**Case Stated** by the judge of the Birmingham County Court.

Thomas Mirams was chaplain at the Birmingham workhouse and at the Birmingham workhouse infirmary. His joint stipend or salary was £250 per annum. The joint appointment was solely in the hands of the Birmingham guardians, but he could only be dismissed by the Local Government Board. His stipend or salary was paid out of the rates. On Dec. 24, 1889, he executed an assignment of his salary in favour of W. G. Coulton for securing the repayment of a loan of £49 with interest. On Oct. 31. 1890, Thomas Mirams was adjudicated bankrupt.



- A** The questions for the opinion of the High Court were: (i) Whether the assignment to Mr. Coulton is void or voidable in so far as relates to the assignment of or charge upon the aforesaid stipend. (ii) Whether the said salary or stipend was void or voidable as being contrary to public policy: (a) Because the bankrupt was a public officer holding a public appointment, and paid out of the public funds; (b) because he was a clerk in holy orders and his salary was payable to him
- B** in respect of the cure of souls and the conduct of the services of the Church.

*Muir Mackenzie* for the official receiver.

*T. W. Chitty* for creditors.

*Cur. adv. vult.*

- C** Feb. 20, 1891. **CAYE, J.**, read the following judgment.—The question in this case is whether a charge given by the bankrupt on his salary as chaplain of the Birmingham workhouse and workhouse infirmary is void on the ground of public policy. As we all know, certain kinds of contracts have been held void at common law on this ground—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy. I have been referred to *Grenfell v. Dean and Canons of Windsor* (1) and *Ex parte Huggins* (2) as containing the clearest expositions of the law on this subject. In the former case it was pointed out that, in order to avoid the assignment of the pay or salary of an officer on this ground, the office must be a public one in some way connected with the public service, and that the public is interested not only in the performance from time to time of the duties of the office, but also in the fit state of preparation of the party having to perform them. On the former ground the pay or salary of persons in the service of the Crown, and on the latter ground the half-pay of officers in the military or naval service cannot be assigned. Similarly in *Ex parte Huggins* (2), it was laid down that pay given to induce persons to keep themselves ready for the service of the Crown, and pay for actual services rendered to the
- F** Crown, cannot be assigned. On these grounds it has been held that the salary of a clerk of the peace, a freehold office connected with the administration of justice, cannot be assigned: *Palmer v. Bate* (3); nor can the salary of an assistant parliamentary counsel to the Treasury: *Cooper v. Reilly* (4).

- It was in consequence of some of the expressions made use of by LORD LANGDALE, M.R., in *Grenfell v. Dean and Canons of Windsor* (1) that this Case was stated
- G** for my opinion, the learned judge of the county court entertaining some doubt whether a clergyman having the cure of souls was not a public officer within the meaning of the principle in question. Upon consideration I think that those doubts, although natural, are not warranted by any decided case. It has never been held that a clergyman having the cure of souls is a public officer, and, as I have said above, the doctrine in question ought not to be extended. At common
- H** law a beneficed clergyman could charge his benefice, and although this was made unlawful by the 13 Eliz., c. 20, yet when that Act was repealed in 1803 by the 43 Geo. 3, c. 84, a charge given between 1803 and 1817, when the 43 Geo. 3, c. 84, was repealed, and the 13 Eliz., c. 20, was revived by the 57 Geo. 3, c. 99, was held valid: *Metcalf v. Archbishop of York* (5).

- I** In this case it is true that a salary is paid out of a poor rate, and that the chaplain, although appointed by the guardians, can only be dismissed by the Local Government Board; but I am of opinion that this is no solid ground of distinction. To make the office a public office the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense. I must, therefore, answer the questions put to me by saying that, in my judgment, the charge is not invalid on the ground suggested.

With regard to the second point, there is, I think, no question that, during the continuance of the bankruptcy and of the office, the salary subject to the charge vests in the trustee as property of the bankrupt within s. 44, subject to the power of the court to make an order under s. 53(2), appropriating the salary in the manner therein pointed out.

*Order accordingly.*

Solicitors: *Solicitor to the Board of Trade; Hulbert & Crowe, for Coulton, Birmingham.*

[Reported by WALTER B. YATES, ESQ., Barrister-at-Law.]

## HARRISON v. SOUTHWARK AND VAUXHALL WATER CO.

[CHANCERY DIVISION (Vaughan Williams, J.), May 5, 6, 7, 11, 1891]

[Reported [1891] 2 Ch. 409; 60 L.J.Ch. 630; 64 L.T. 864]

*Nuisance—Noise—Interference with comfort—Water works—Noise and vibration caused by working of pumps—Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), s. 12.*

The defendants, a water company, in pursuance of their statutory powers, sank a shaft on land adjoining the plaintiff's house, in doing which it became necessary to have recourse to pumping in order to keep the shaft clear of water. For this purpose the defendants used lift pumps, the noise and vibration of which seriously interfered with the plaintiff's comfort. The plaintiff having commenced an action against the defendants for nuisance, the defendants substituted centrifugal pumps for the lift pumps, which considerably diminished the noise and vibration. It was physically possible for the defendants to have used centrifugal pumps in the first instance, but they were not generally used and were less convenient in the initial stages of excavation.

**Held:** the authority conferred by the statute on the defendants to sink the shaft included all things reasonably necessary for the execution of the work, and, the defendants having used reasonable skill and care to avoid causing annoyance to the plaintiff and having acted without negligence, were not liable in nuisance.

*Fenwick v. East London Rail. Co.* (1), (1875), L.R. 20 Eq. 544, explained and distinguished.

**Notes.** The Waterworks Clauses Act, 1847, s. 12, is repealed by the Water Act, 1945, and corresponds to ss. 4 and 92 of Sched. III to the Act of 1945, the provisions of which apply to water undertakers as and when applied by order.

Applied: *Gosnell v. Aerated Bread Co.* (1894), 10 T.L.R. 661. Distinguished: *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707. Applied: *Clark v. Lloyds Bank* (1910), 79 L.J.Ch. 645. *Phelps v. London Corpn.*, [1916] 2 Ch. 255. Considered: *Matania v. National Provincial Bank, Ltd. and Elevenist Syndicate, Ltd.*, [1936] 2 All E.R. 633; *Newman v. Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131. Referred to: *Knight v. Isle of Wight Electric Light and Power Co.* (1904), 73 L.J.Ch. 299; *Price Patent Candle Co. v. L.C.C.* (1908), 7 L.G.R. 84; *Odell v. Cleveland House* (1910), 102 L.T. 602; *De Keyser's Royal Hotel v. Spicer and Minter* (1914), 30 T.L.R. 257; *Harper v. G. N. Haden & Sons, Ltd.*, [1932] All E.R.Rep. 59; *Andreae v. Selfridge & Co.*, [1936] 2 All E.R. 1413.

**A** As to nuisances between neighbouring properties, see 28 HALSBURY'S LAWS (3rd Edn.) 131 et seq.; and for cases see 36 DIGEST (Repl.) 281 et seq. For the Waterworks Clauses Act, 1847, s. 12, and the Water Act, 1945, Sched. III, ss. 4 and 92, see 26 HALSBURY'S STATUTES (2nd Edn.) 737, 862, 911.

Cases referred to:

- B** (1) *Fenwick v. East London Rail. Co.* (1875), L.R. 20 Eq. 544; 44 L.J.Ch. 602; 23 W.R. 901; 38 Digest (Repl.) 303, 85.  
 (2) *Ball v. Ray* (1873), 8 Ch. App. 467; 30 L.T. 1; 37 J.P. 500; 22 W.R. 283, L.C. & L.J.J.; 36 Digest (Repl.) 293, 397.  
 (3) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430, H.L.; 44 Digest 59, 430.  
**C** (4) *Fremantle v. London and North Western Rail. Co.*, *Bliss v. London and North Western Rail. Co.* (1861), 10 C.B.N.S. 89; 31 L.J.C.P. 12; 5 L.T. 556; 9 W.R. 611; 142 E.R. 383; 38 Digest (Repl.) 400, 607.  
 (5) *A.-G. v. Gas Light and Coke Co.* (1877), 7 Ch.D. 217; 47 L.J.Ch. 534; 37 L.T. 746; 42 J.P. 391; 26 W.R. 125; 38 Digest (Repl.) 24, 115.

Also referred to in argument:

- D** *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; 38 L.J.Ch. 265; 19 L.T. 708; 33 J.P. 196; 17 W.R. 240, L.C. & L.J.; 38 Digest (Repl.) 22, 97.  
*Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, 185.  
*London, Brighton and South Coast Rail. Co. v. Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, 690.  
**E** *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59.  
*Gaunt v. Fynnyery* (1872), 8 Ch. App. 8; 42 L.J.Ch. 122; 27 L.T. 569; 37 J.P. 100; 21 W.R. 129; 36 Digest (Repl.) 259, 87.  
**F** *Walter v. Selfe* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; affirmed (1852), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, 1.  
*Fleming v. Hislop* (1886), 11 App. Cas. 686; 2 T.L.R. 360, H.L.; 36 Digest (Repl.) 250, 24.  
*Benjamin v. Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 36 Digest (Repl.) 312, 598.  
**G** *Fritz v. Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 28 W.R. 459; 24 Sol. Jo. 366; 36 Digest (Repl.) 254, 50.

**Action** by the plaintiff, David Harrison, against the defendants, the Southwark and Vauxhall Water Co., for nuisance, claiming an injunction and damages.

**H** The plaintiff was the owner and occupier of a villa and garden adjoining a piece of land fronting on the river Thames, in the parish of Hampton Wick. The defendants had acquired under their statutory powers a strip of land abutting on the river, bounded on one side by the plaintiff's garden and on the other by Kingston Bridge, for the purpose of sinking a shaft in order to construct a tunnel under the bed of the river for the purpose of laying pipes in connection with their statutory undertaking. The facts as found by the learned judge were as follows:  
**I** The defendants sunk the shaft in the land adjacent to the plaintiff's house in pursuance of the powers conferred on them by the Southwark and Vauxhall Water Act, 1866, and the Acts incorporated therewith (including the Waterworks Clauses Act, 1847), and in the execution of those powers used certain lift pumps to pump out the land water which ran into the shaft in increasing quantities as the shaft was being sunk. The noise arising from the use of the pumps, which necessarily were kept working day and night, seriously interfered with the comfort of the plaintiff and the other inmates of the plaintiff's house. The pumps were kept in use for



about three weeks, until the sinking of the shaft arrived at a point at which it was A  
no longer necessary to lower the pumps to any greater depth for that purpose.  
The defendants in the course of sinking the shaft might have used other pumps  
which would have made somewhat less noise than the lift pumps actually  
employed, e.g., a centrifugal pump known as the Woodford pump, and they had  
in fact used two of such pumps in substitution for the lift pumps ever since the  
sinking of the shaft arrived at the point of depth above mentioned. The Wood- B  
ford pumps were not usually employed in sinking shafts, and were not convenient  
for that purpose on account, among other things, of the difficulty of lowering and  
lengthening them, a process which would involve from time to time stopping the  
working of the pumps, and allowing the water to rise in the shaft so as to cause  
a loosening of the earth behind the wooden lining of the shaft, and consequent  
risk to the men employed, and also on account of the increased labour in digging C  
at the bottom of the shaft by reason of the superincumbent water.

Those difficulties and that risk were capable of being overcome by the use of  
iron rings for the lining of the shaft and the use of two Woodford pumps, so that  
one pump might always be at work while the other pump was being lowered and  
lengthened. The use of two pumps, however, would have involved an increase  
in the diameter of the shaft, and that increase in the diameter of the shaft would D  
have required great care to avoid loosening the foundations of Kingston Bridge,  
which were in immediate proximity to the narrow piece of land on which the  
defendants were sinking the shaft. The defendants were guilty of no negligence  
in using the pumps which they did use for the sinking of the shaft, which were  
the pumps ordinarily used for such a purpose, even when shafts were sunk in towns  
and in the neighbourhood of houses. The defendants in the first instance intended E  
to use lift pumps in the shaft so long as it might be necessary to use pumps in the  
shaft, i.e., for a period extending over many months, and in point of fact the  
centrifugal pumps were still at work at the date of the trial of the action.

The plaintiff through his solicitors began to remonstrate with the defendants  
as to the noise caused by the pumping on Oct. 6, 1890, and the correspondence  
between the parties continued till Oct. 20, when the plaintiff issued and served F  
the writ in this action, and gave notice of motion for an interim injunction. The  
defendants on Oct. 22 gave notice to the plaintiff of their intention to substitute  
centrifugal pumps for the lift pumps previously used, and about Oct. 28 did  
substitute the centrifugal pumps. The effect of using centrifugal pumps was to  
diminish to some extent the noise of the pumping, and the plaintiff alleged that,  
after the change was effected, the pumping caused him no serious annoyance. G

*Lawson Walton, Q.C., and A. D. Maclaren for the plaintiff.*

*Finlay, Q.C., and R. J. Parker for the defendants.*

*Cur. adv. vult.*

May 11, 1891. **VAUGHAN WILLIAMS, J.**, stated the facts, and continued: H  
The plaintiff in my opinion is not entitled to the injunction or damages which he  
claims. It was contended before me on behalf of the plaintiff that, if the noise  
of the pumping was physically capable of reduction by the use of the Woodford  
pump, as it in fact was, the plaintiff was entitled to maintain this action, and that  
it was no answer to his claim for the defendants to say that they used reasonable  
skill and care to avoid causing annoyance to the plaintiff, and were guilty of no I  
negligence.

In my opinion, however, the defendants have a good defence by reason of their  
use of reasonable skill and care and the absence of negligence. In the first place,  
it seems to me that if the defendants had without statutory authority sunk this  
shaft and done this pumping for any lawful and ordinary purpose in the exercise  
of their powers as private owners of the land, they would not have been responsible  
as for a nuisance. It frequently happens that the owners or occupiers of land  
cause, in the execution of lawful works in the ordinary user of the land, a con-

- A considerable amount of temporary annoyance to their neighbours, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one, no doubt causes considerable inconvenience to his next-door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable
- B skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law in judging what constitutes a
- C nuisance does take into consideration both the object and duration of that which is said to constitute the nuisance: *Ball v. Ray* (2). It seems to me, therefore, that the defendants are, to say the least, placed by their statute in the same position as private persons. The statute, by making the sinking of the shaft *intra vires*, and, therefore, lawful, has enabled the defendants lawfully to do that which private persons may do without any statutory authority. That being so, it seems to me
- D that the obligations of the defendants in respect of the sinking of the shaft are neither greater nor less than those of a private person, and that a private person would not in similar circumstances be held to have created a legal nuisance by reason of the annoyance caused to his neighbours in the pumping for the purpose of sinking the shaft, unless it could be shown that he had neglected to take all reasonable precautions for mitigating the annoyance to his neighbours.
- E Let me assume, however, that the sinking of the shaft would be a nuisance if done by a private person. The statute has authorised the sinking of the shaft, but the works and the manner of the execution must be distinguished. The statute has undoubtedly authorised the work, but what has it authorised in respect of the manner of execution? The plaintiff says that the statute has authorised the work, together with all things absolutely necessary for the execution thereof. I think not.
- F I think that the statute has authorised the execution of the work, together with all things reasonably necessary for the execution thereof. It was urged in argument that SIR GEORGE JESSEL, M.R., had decided in *Fenwick v. East London Rail. Co.* (1) that all that was authorised by the Railways Clauses Act, as incorporated in the special Acts of railway companies, was what was absolutely necessary for the execution of the statutory works; but, if the case is looked at, it will be seen that it
- G has nothing to do with the manner of execution, but only with the works authorised to be executed. So far as the manner of execution is concerned, all that is necessary is that the works should be done with as little damage or annoyance as can be; that is, as reasonably can be. The words of s. 12 of the Waterworks Clauses Act, 1847, are, it will be observed, almost identical with the words of s. 16 of the Railways Clauses Consolidation Act, 1845.
- H This seems to me to be the principle accepted by the House of Lords in *Geddis v. Bann Reservoir (Proprietors)* (3). This also is the principle which seems to me to govern the decision of *Freemantle v. London and North Western Rail. Co.* (4). *A.-G. v. Gas Light and Coke Co.* (5), and the other gas company cases, depend, in my opinion, on the special words used in the Gas Works Clauses Act, 1847, s. 29, viz.:
- I "Nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable in consequence of making or supplying gas."

I find nothing of that kind in the Waterworks Clauses Act; because s. 27 of that Act, which is the corresponding section to s. 29 of the Gas Clauses Act, is limited to damage to mines. Judgment must be for the defendants with costs, unless the defendants consent to forgo their costs.

The defendants consented to the action being dismissed without costs.

Solicitors: *Wilkinson, Howlett & Wilkinson; Bircham & Co.*

[*Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.*]

## R. v. THOMPSON

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Hawkins, Cave, Day and Wills, JJ.), January 21, April 29, 1893]

[Reported [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22;  
57 J.P. 312; 41 W.R. 525; 9 T.L.R. 435; 37 Sol. Jo. 457;  
17 Cox, C.C. 641; 5 R. 392]

*Criminal Law—Evidence—Confession—Inducement held out indirectly—Possibility of advantage to be inferred from language of person in authority.*

A confession of guilt, in order to be admissible in evidence in criminal proceedings, must have been made voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made.

On the trial of the prisoner on a charge of embezzling money from a company it was sought to put in evidence an alleged confession by him. Before the confession was made the chairman of the company had had an interview with the prisoner's brother and brother-in-law in which he had said: "It will be the right thing for [the prisoner] to make a clean breast of it." At the time of the confession, however, no threat or promise was made to the prisoner himself, but the court drew the inference that at that time the prisoner had been informed of the chairman's statement to his brother.

**Held:** it had not been proved that the confession had been made freely and voluntarily, and evidence of it was, therefore, inadmissible.

**Notes.** Followed: *R. v. Rose*, [1895-9] All E.R.Rep. 350. Applied: *R. v. Colpus and Boorman*, *R. v. White*, [1917] 1 K.B. 574. Referred to: *Rogers v. Hawken* (1898), 78 L.T. 655; *R. v. Brailsford*, [1905] 2 K.B. 730; *R. v. Knight* (1905), 21 T.L.R. 310; *R. v. Booth and Jones* (1910), 74 J.P. 475; *Ibrahim v. R.*, [1914-15] All E.R.Rep. 874; *R. v. Cowell*, [1940] 2 All E.R. 599; *R. v. Bass*, [1953] 1 All E.R. 1064; *Kuruma v. R.*, [1955] 1 All E.R. 236.

As to confessions and statements by the accused, see 10 HALSBURY'S LAWS (3rd Edn.) 469 et seq.; and for cases see 14 DIGEST (Repl.) 467 et seq.

Cases referred to:

- (1) *R. v. Warringham* (1851), 2 Den. 447, n.; 15 Jur. 318; 14 Digest (Repl.) 468, 4520.
- (2) *R. v. Baldry* (1852), 2 Den. 430; 21 L.J.M.C. 130; 19 L.T.O.S. 146; 16 J.P. 276; 16 Jur. 599; 5 Cox, C.C. 523, C.C.R.; 14 Digest (Repl.) 480, 4589.
- (3) *R. v. Fennell* (1881), 7 Q.B.D. 147; 50 L.J.M.C. 126; 44 L.T. 687; 45 J.P. 666; 29 W.R. 742; 14 Cox, C.C. 607, C.C.R.; 14 Digest (Repl.) 482, 4618.

Also referred to in argument:

- R. v. Garner* (1848), 2 Car. & Kir. 920; 1 Den. 329; T. & M. 7; 3 New Sess. Cas. 329; 18 L.J.M.C. 1; 12 L.T.O.S. 155; 12 J.P. 758; 12 Jur. 944; 3 Cox, C.C. 175, C.C.R.; 14 Digest (Repl.) 482, 4612.
- R. v. Bate* (1871), 11 Cox, C.C. 686; 14 Digest (Repl.) 462, 4457.



**A** **Case Stated** by Westmorland Quarter Sessions for the consideration of the Court for Crown Cases Reserved.

At Westmorland Quarter Sessions held at Kendal on Oct. 21, 1892, Marcellus Thompson was tried on a charge of embezzling moneys belonging to the Kendal Union Gas and Water Co., his masters. William Dillworth Crewdson, the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove, among other things, a confession of the prisoner. As soon as the confession was sought to be put in evidence objection was taken to its admissibility, and the justices, before receiving further proof, allowed Mr. Crewdson to be cross-examined by prisoner's counsel. In answer to the latter's questions, he stated that, prior to the confession being made, the prisoner's brother and brother-in-law had sought an interview with him, and had come to see him, and that at this interview he had said to the prisoner's brother-in-law in course of conversation: "It will be the right thing for Marcellus to make a clean breast of it." He added:

**D** "I won't swear I didn't say it would be better for him to make a clean breast of it. I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken."

No evidence was produced to the court tending to prove that the details of the interview had been communicated to the prisoner, nor to rebut the evidence of **E** Mr. Crewdson as to what took place at the interview.

It was then contended by prisoner's counsel that the above statements to the brothers were inducements held out to the prisoner to confess by a person in authority which rendered the evidence tendered by the prosecution inadmissible.

Quarter Sessions found that Mr. Crewdson was a person in authority, and inferred that the details of the interview would be communicated to the prisoner. **F** They also found as a fact that the statements made by him were calculated to elicit the truth, and that the confession was voluntary, and they accordingly admitted the evidence. Mr. Crewdson then proved that after the interview he charged the prisoner with embezzling the company's money, and one of the directors told the prisoner he was in a very embarrassing position. The prisoner replied, "I know that; I will give the company all the help I can." He said, in answer to Mr. Crewdson's charge, "Yes, I took it, but I do not think it is more than £1,000. It might be a few pounds more." No statement was made to the **G** prisoner that the confession would save him from prosecution, and no threat, and no promise were given. Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him, which list was also admitted in evidence. The prisoner was convicted, and sentenced to three years' **H** penal servitude.

The case was first argued on Jan. 21, 1893, and in the course of the argument a statement was made that there was evidence at the trial of money having been paid on behalf of the prisoner into the water company's bank account subsequently to the making of the confession. The court forming the opinion that the Case **I** should be sent back for such fact to be stated if it had been proved. The Case was therefore sent back and was amended by additional statements, gathered from the chairman's notes of evidence taken at the trial, which were as follows:

At a meeting of the directors on Aug. 9, a question was asked by one of the directors (Mr. Pollitt) as to the value of the stock on a farm at Matland occupied by the prisoner's brother, and it was suggested that a bill of sale over the stock should be given. The prisoner stated that the worth of the stock was over £1,000, but that he could not accept the suggestion about the security without telling his brother. At the same meeting, prisoner said, "My brothers have got it [meaning

the money]. It has gone to pay interest on mortgages." Mr. W. D. Crewdson A stated, "I never agreed not to prosecute if a bill of sale were given."

£340 was received from the prisoner after the charge was made, also some money found in the cashbox, also the IOU for the sum of £25 found in the cashbox. Of the sum of £340, £90 was paid into the bank by the prisoner, £250 by his brother. Mr. Crewdson stated that no arrangement was made as to the discrepancy being treated as a debt, and that the sum paid was simply by way of restitution. B

The question for the opinion of the Court for Crown Cases Reserved was, whether the evidence of the confession was properly admitted.

*Shee, Q.C. (Cavanagh with him) for the prisoner.*

*Segar (C. M. Wilson with him) for the Crown.*

April 29, 1893. **LORD COLERIDGE, C.J.**—In this case we are all agreed C that the conviction cannot be supported, and my brother CAVE has written a judgment which we have all read, and with which we all agree.

**CAVE, J.,** read the following judgment of the court.—The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in D a number of cases both at petty and quarter sessions, and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.

Many reasons may be urged in favour of the admissibility of all confessions, subject, of course, to their being tested by the cross-examination of those who E heard and testify of them, and BENTHAM seems to have been of this opinion: see **RATIONALE OF JUDICIAL EVIDENCE**, Bk. 5, chap. 6, s. 3. But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As F Mr. TAYLOR says in his **LAW OF EVIDENCE** (8th Edn.), p. 2, chap. 15, s. 872:

"Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made, for, to adopt the somewhat inflated language of EYRE, C.B.:

'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and, therefore, it is rejected.' G

The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession." H

The case cited for this position is *R. v. Warringham* (1), where PARKE, B., says to the counsel for the prosecution (2 Den. at p. 448): I

"You are bound to satisfy me that the confession which you seek to use in evidence against the prisoner was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not."

PARKE, B., adds (*ibid.*): "I reject the evidence of this witness, not being satisfied that it was voluntary." In *R. v. Baldry* (2) it is said by POLLOCK, C.B., that the true ground of the exclusion is not that there is any presumption of law that a

A confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear. He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say something. With this view the statutory caution agrees, which commences with the words, "You are not obliged to say anything unless you desire to do so."

B These principles are re-stated and affirmed by LORD COLERIDGE, C.J., in *R. v. Fennell* (3) in the following words (7 Q.B.D. at pp. 150, 151):

C "The rule laid down in *RUSSELL ON CRIMES* (5th Edn.), vol. 3, pp. 441, 442, is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter in *RUSSELL ON CRIMES* containing that passage was written by SIR E. V. WILLIAMS, a great authority upon these matters."

D If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask: Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

E In the present case the magistrates appeared to have intended to state the evidence which was before them, and to ask our opinion whether, on that evidence, they did right in admitting the confession. There was obviously some ground for suspecting that the confession might not have been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it.

F The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner's making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any, and, if so, what, communication was actually made to the prisoner before the magistrates could properly be satisfied that the confession was free and voluntary. The magistrates go on to say that they inferred that the details of the interview would be (by which, I suppose, they intend to say that they inferred they were) communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found as a fact that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary.

H The first of these findings, if the ruling of *POLLOCK, C.B.*, in *R. v. Baldry* (2) is (as I take it to be) correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and if it is an independent finding, is not warranted by the evidence; and as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that, in my judgment, it was not. Taking the statement of Mr. Crewdson to have been: "It will be the right thing for Marcellus to make a statement," and that that statement was communicated to the prisoner, I should say that that communication was calculated, in the language of *POLLOCK, C.B.*, to lead the prisoner to believe that it would be better for him to say something. All this, however, is matter of



conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation. A

I would add, for my part, I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary I think it ought not to have been received. No other principle can, in my judgment, be safely worked by magistrates. B C

*Conviction affirmed.*

Solicitors: *G. E. Cartmel; R. F. Thompson, Kendal.*

[*Reported by R. C. GLEN, Esq., Barrister-at-Law.*] D

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## Re FITZGERALD'S SETTLED ESTATES. SAUNDERS *v.* BOYD E

[CHANCERY DIVISION (Chitty, J.), July 7, 8, 1891]

[Reported [1891] 3 Ch. 394; 60 L.J.Ch. 624; 65 L.T. 242;  
40 W.R. 29]

*Portions—Double portions—Settlement—Eldest son predeceasing life-tenant—Estate passing to second son—Claims of eldest son and second son.* G

Land was limited to a father for life, with remainder to his first and other sons successively in tail male, the trustees being given power on the father's death to raise £20,000 as portions for the children other than the eldest son. The father had a power of appointment over the portions fund, and there was the usual hotchpot clause. There were five children. The eldest son disentailed with his father's consent, and the land was re-settled to such uses as the father and the eldest son should jointly appoint, and, subject thereto, to such uses as were declared by the original settlement. The father and the eldest son then raised the sum of £8,000 by mortgage of the settled land, £3,000 of which was paid to the eldest son. The £20,000 portion fund was then appointed by the father equally among the four younger children. The eldest son died in his father's lifetime, and on the father's death the land passed to the second son in tail. The personal representative of the eldest son claimed that the second son was not entitled also to the quarter share of the portion fund which had been appointed to him, and that, as the eldest son had not succeeded to the estates, he was entitled to share in the portions fund as if he had been a younger child. H I

**Held:** (i) according to the normal rules, the time for ascertaining the class of younger children entitled to portions was the time fixed for distribution

- A** of the portions fund, and, as the eldest son had then died, he would be entitled to share in the fund as if he had been a younger child, whereas the eldest son then living was excluded from sharing in the fund under the doctrine of double portions; (ii) in the present case, however, as the eldest son had received £3,000 in his father's life-time, this had to be treated in the absence of contrary evidence as worth £5,000 on the father's death, that being the aliquot share of each of the younger children, and he had, therefore, received his full share of the portions fund; and (iii) as only the "eldest" son was excluded from the portions fund, the second son was entitled to a share in it even though the bulk of the estate passed to him.

*Harrison v. Round* (1) (1852), 2 De G.M. & G. 190, applied.

- C** **Per Curiam:** It is doubtful what the position would have been if the entail had been barred but no money received by the eldest-born son, or if a small or trifling sum only were raisable by him.

**Notes.** Considered: *Re Leeke's Settlement Trusts, Borough v. Leeke*, [1937] 2 All E.R. 563. Referred to: *Re Gunter's Settlement Trusts, Owen v. Pritchard-Barrett*, [1949] 1 All E.R. 680.

- D** As to portions, see 34 HALSBURY'S LAWS (3rd Edn.) 496 et seq.; and for cases see 40 DIGEST (Repl.) 658.

Cases referred to:

- (1) *Harrison v. Round* (1852), 2 De G.M. & G. 190; 22 L.J.Ch. 322; 20 L.T.O.S. 118; 17 Jur. 563; 1 W.R. 26; 42 E.R. 844, L.C.; 40 Digest (Repl.) 867, 3391.
- E** (2) *Collingwood v. Stanhope* (1869), L.R. 4 H.L. 43; 38 L.J.Ch. 421; 17 W.R. 537, H.L.; 40 Digest (Repl.) 658, 1510.

Also referred to in argument:

- Ellison v. Thomas* (1862), 1 De G.J. & Sm. 18; 1 New Rep. 37; 32 L.J.Ch. 32; 7 L.T. 342; 8 Jur.N.S. 1139; 11 W.R. 56; 46 E.R. 7 L.C.; 40 Digest (Repl.) 658, 1506.
- F** *Wyndham v. Fane* (1853), 11 Hare, 287.
- Chadwick v. Doleman* (1705), 2 Vern. 528, 1 Eq. Cas. Abr. 344; 23 E.R. 941; 40 Digest (Repl.) 655, 1489.
- Meyrick v. Laws, Meyrick v. Mathias* (1874), 9 Ch. App. 237; 43 L.J.Ch. 521; 30 L.T. 77; 22 W.R. 341, L.C. & L.J.J.; 44 Digest 1117, 9676.

- G** **Originating Summons** to determine whether the legal personal representative of George Fitzgerald the eldest-born son of Henry Fitzgerald, was entitled to any part of the portions fund under the marriage settlement of Henry Fitzgerald.

- By a settlement executed upon the marriage of Henry Fitzgerald certain estates were settled to the use of Henry Fitzgerald for life, with remainder to trustees for a term of 1,000 years with remainder to the first and other sons of the marriage in tail male. The term stood limited upon trust, if there should be one or more child or children of the marriage "other than and not being an eldest or only son for the time being entitled under the before-mentioned limitations to the settled estates either in possession or in remainder expectant upon the decease of the said Henry Fitzgerald," that the trustees should, after his decease, or with his consent in his lifetime, raise the sum, in certain events which afterwards
- H** happened, of £20,000, for portions for younger children. Such sum was to be divided among them as Henry Fitzgerald and his wife should as therein directed appoint, and in default of such appointment, to be equally divided between such children; and it was further provided that any child entitled to a share under such appointment should not be entitled to any further share in the unappointed part of such moneys set aside or intended for portions, until he should have brought into hotchpot any appointed share, and accounted for such share accordingly.

- I** Five children were born of the marriage, George, Charles, and three others; George attained the age of twenty-one years in 1861.

In 1863 Henry Fitzgerald and George Fitzgerald executed a disentailing assurance of the settled estates. By this the estates were limited to such uses as Henry Fitzgerald and George Fitzgerald should by deed jointly appoint, and, subject thereto, to the use of Henry Fitzgerald for life, and in confirmation of the life estate limited to him by the marriage settlement, and after his death to such uses as George Fitzgerald, if he survived him, should appoint, and subject to such limitations to the uses declared by the marriage settlement. Henry Fitzgerald and George Fitzgerald, in exercise of their power of appointment, subsequently mortgaged the estates for various sums amounting to £8,000. Of these sums part, amounting to £3,000, was paid to George Fitzgerald for his own absolute use.

A sum of £5,000 was, under the powers above mentioned, appointed by Henry Fitzgerald and his wife to each of their four younger children in 1867 and 1868. In 1873 George Fitzgerald died without issue.

In 1890 Henry Fitzgerald died, and the portions then became distributable.

The defendant J. Boyd, the legal personal representative of George Fitzgerald, now claimed £2,000, part of one sum of £5,000, contending that, as Charles Fitzgerald had become entitled to the settled estates as eldest son, the appointment of the sum of £5,000 failed, and that such sum must, as unappointed, pass to George Fitzgerald under the hotchpot clause. He admitted that the sum of £3,000 paid to George Fitzgerald for his own use out of the moneys raised by him and his father, should be treated as advancement or part payment, and consequently claimed £2,000 only.

For Charles Fitzgerald it was argued that the representative of George Fitzgerald could not seek to place him in the position of a younger son, by reason of his not succeeding to the settled estates, as he had acquired a dominion over the estates, and had exercised such dominion by mortgaging under the power of appointment for that purpose. The trustees of the marriage settlement took out an originating summons to have the question determined whether J. Boyd was entitled to the £2,000, or any part of the £5,000, or whether the appointment of £5,000 to Charles Fitzgerald was valid.

*Farwell, Q.C.*, and *Bramley* for J. Boyd.

*Byrne, Q.C.*, and *Osler* for Charles Fitzgerald.

*L. Field* for the trustees.

**CHITTY, J.**—The contest is between Charles, the second-born son, and the executors of George, the eldest-born son, as to which of them is entitled to a sum of £5,000—part of £20,000 which was provided as portions for younger children.

Courts of equity have taken a broad view of settlements of this kind, and, looking at the substance, have held that son to be the eldest who takes the estate, that is, the bulk of it less the portions. And the rule is that, subject to any special terms in the settlement, the time for ascertaining the class of younger children who are entitled to portions, is the time fixed by the settlement for the distribution of the portions fund. It is then the court ascertains who is the eldest son, and he, when found, is excluded from sharing in the fund under the doctrine of double portions. Had there been in this case no disentailing deed, the result would be plain, and George, although the eldest-born son, would be entitled to share in the portions fund as a younger son, on the ground that by dying before his father he never became entitled to the estate under the limitations of the settlement; and Charles, who had become so entitled, would have become also the eldest son within the meaning of the settlement.

But there is a second rule, adopted by the House of Lords in *Collingwood v. Stanhope* (2), that, although the period fixed by the settlement for the distribution of the fund is the time for ascertaining who is to be included in and who excluded from those entitled to share therein, yet a further inquiry is necessary; for the court excludes, as being an eldest son entitled to the estate, an eldest son who, being then dead, has previously taken the bulk of the settled estate. In that case the father and son disentailed. What they do with the estate which they so



**A** place under their dominion is immaterial, for the estate is thereby taken out of the settlement. They did re-settle the estate, and made it devolve on the eldest son for life with remainder to his issue in tail, so that it was, in effect, taken away from the person entitled as tenant in tail under the old settlement. But it was in the power of the father and son to have sold the estate and retained the purchase money, in which case the eldest son would plainly have been taking the bulk of the estate.

**B** The present case is not similar to *Collingwood v. Stanhope* (2), and indeed there appears to be no similar case in the books. George concurred with his father in re-settling the estate in the usual way, to such uses as they should by deed jointly appoint, and subject thereto to the use of the father in confirmation of his life estate under the settlement, and after his death to such uses as the son, if he survived, should appoint, and subject thereto to the uses of the old settlement.

**C** It is unnecessary for me to say what the result would have been if the joint or the separate powers of appointment had not been exercised. It may be that, notwithstanding the words in the old settlement—"entitled under the before-mentioned limitations"—equity would have looked at the substance, and have said that, as in the result the original settlement was left unaffected, it would disregard the disentailing deed and resettlement. This question I leave open, for, in fact,

**D** the joint power was exercised by creating mortgages of the settled estate, in 1863 for £5,000, and in 1870 for £3,000. By this means the eldest son's interest under the settlement, in other words the bulk of the settled estate itself, was diminished by £8,000. And, assuming it to be material to show how much of this was received by the son, and I am not satisfied that is material, it appears that he received £3,000, and, applying the reasoning of LORD ST. LEONARDS in *Harrison v. Round* (1) in the absence of evidence to the contrary, the conclusion is that this £3,000 was the present value of £5,000 at the death of the father, the tenant for life; that it was a fair bargain, under which the son got his full share of the sum raised. And, indeed, the father did survive until 1890.

**E** Therefore, the estate to which Charles has succeeded was diminished in value by this sum of £3,000, and this sum was received by George. He has, therefore had out of the estate a substantial portion, more than equal to his share of the £20,000 raisable for the younger children; he has, in fact, anticipated his portion. The case might be doubtful if, on similar trusts, a small or trifling sum only were raisable by the eldest son, and it may be that such a sum would be disregarded. I leave that question untouched. But where an eldest son, by virtue of his ownership of the estate itself, has charged the inheritance with a sum equal to or in excess of his share of the portions fund, then the doctrine as to double portions applies against him, and he is not entitled to any share of the portions fund. I hold, therefore, that George Fitzgerald is excluded from claiming to be a younger son in order to share in the fund. And, as the terms of the settlement exclude only the eldest or only son, it follows that this £5,000 passes to Charles Fitzgerald.

**F** Solicitors: *Cowland & Chowne; Field, Roscoe & Co. for Taylor, Jeffery & Little, Bradford.*

[Reported by W. H. QUARRELL, Esq., Barrister-at-Law.]

## TURNER v. GOLDSMITH

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), January 23, 1891]

[Reported [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301;  
39 W.R. 547; 7 T.L.R. 233]*Agent—Commission—Duty of principal to enable agent to earn commission—  
Obligation to continue to carry on business.**Contract—Frustration—Impossibility of performance—Agreement by manu-  
facturer to employ sales agent—Destruction of factory—Obligation to continue  
to carry on business.**Master and Servant—Wrongful dismissal—Destruction of place of business—  
Obligation of master to continue to carry on business.*

The defendant, who was a shirt manufacturer, agreed that the plaintiff should act as his agent and traveller to obtain orders for the sale of shirts "manufactured or sold" by the defendant, the agency being determinable after five years and the plaintiff to receive a commission from such sales. During the five years the defendant's factory was burnt down, and he ceased to carry on his business or to employ the plaintiff.

**Held:** (i) as the defendant had expressly agreed to employ the plaintiff, the contract obliged him to do what was necessary to enable the plaintiff to earn his commission; and (ii) as there was no evidence that it was impossible for the defendant to carry on the business of manufacturing or selling shirts at another factory, the defendant was not excused from performing his obligation under the contract.

Per KAY, L.J.: If it had been shown that not only the factory, but also the business, of the defendant had been destroyed by vis major without any default of the defendant, I think that the plaintiff could not recover.

*Rhodes v. Forwood* (1) (1876), 1 App. Cas. 256, and *Taylor v. Caldwell* (2) (1863), 3 B. & S. 825, distinguished.

**Notes.** Distinguished: *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653; *Northey v. Trevillon* (1902), 7 Com. Cas. 201. Applied: *Devonald v. Rosser & Sons*, [1906] 2 K.B. 728. Distinguished: *Measures v. Measures*, [1910] 2 Ch. 248; *Lazarus v. Cairn Line of Steamships* (1912), 106 L.T. 378; *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309. Considered: *Reigate v. Union Manufacturing Co. (Ramsbottom), Ltd.*, [1918-19] All E.R.Rep. 143; *Re Rubel Bronze and Metal Co. v. Vos*, [1918] 1 K.B. 315; *Re an Arbitration between Comptoir Commercial Anversoise and Power, Son & Co.*, [1918-19] All E.R.Rep. 661; *Warren v. Agdeshman* (1922), 38 T.L.R. 588. Applied: *Bauman v. Hulton Press, Ltd.*, [1952] 2 All E.R. 1121. Referred to: *Ogdens v. Nelson*, *Ogdens v. Telford*, [1904] 2 K.B. 410; *Blackburn Bobbin Co. v. Allen* [1918] 2 K.B. 467; *Turpin v. Victoria Palace*, [1918] 2 K.B. 539; *Sweet v. Williams*, [1922] All E.R.Rep. 111; *Re Windsor Steam Coal Co. (1901), Ltd.* (1928), 140 L.T. 80; *Magnet Advertising Co. v. Arrowsmith* (1938), 82 Sol. Jo. 911; *Court Line, Ltd. v. Dant and Russell Inc.*, [1939] 3 All E.R. 314; *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; *General Publicity Services, Ltd. v. Best's Brewery Co.*, [1951] 1 T.L.R. 521.

As to implied terms in a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 121 et seq; as to frustration, see *ibid.* 178 et seq; as to a master's duty to provide work, see 25 HALSBURY'S LAWS (3rd Edn.) 467; as to an agent being wrongfully prevented from earning remuneration, see 1 HALSBURY'S LAWS (3rd Edn.) 201; as to termination of agency through the principal ceasing business see *ibid.* 243. For cases see 1 DIGEST (Repl.) 630.

Cases referred to:

(1) *Rhodes v. Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 1 Digest (Repl.) 629, 2106.

- (2) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (3) *Cowasjee Nanabhoy v. Lalbhoy Vullabhoy* (1876), L.R. 3 Ind. App. 200, P.C.; 1 Digest (Repl.) 631, 2114.

Also referred to in argument:

- M'Intyre v. Belcher* (1863), 14 C.B.N.S. 654; 2 New Rep. 324; 32 L.J.C.P. 254; 8 L.T. 461; 10 Jur.N.S. 239; 11 W.R. 889; 143 E.R. 602; 12 Digest (Repl.) 387, 3010.
- Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737; 39 L.J.Ch. 685; 23 L.T. 685; 18 W.R. 1123, C.A.; 1 Digest (Repl.) 632, 2119.
- Appleby v. Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, 5334.
- Whittle v. Frankland* (1862), 2 B. & S. 49; 31 L.J.M.C. 81; 5 L.T. 639; 26 J.P. 372; 8 Jur.N.S. 382; 121 E.R. 992; 12 Digest (Repl.) 702, 5363.

**Appeal** by the plaintiff from a decision of GRANTHAM, J., holding that he was not entitled to recover damages for a breach by the defendant of an agreement to employ him as a commission agent.

By an agreement dated Jan. 31, 1887, and made between the defendant John Goldsmith, "of Taunton, in the county of Somerset, and any partner he may hereafter take into business carrying on business as shirt, collar, and cuff manufacturers under the style of the 'Priory Manufacturing Co.,' and hereafter called the said company," of the one part, and the defendant Albert Siddon Turner, of 54 Jewin Street, in the city of London, agent and traveller, of the other part, it was recited as follows:

"Whereas, in consideration of the agreement of the said A. S. Turner, the said company agree to employ the said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained, and in consideration of the premises the said A. S. Turner hereby agrees with the said company, that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller upon the terms and subject to the stipulations and conditions hereinafter contained, and the said company so far as the conditions and stipulations are to be performed by them, and the said A. S. Turner so far as the conditions and stipulations are to be performed and observed by him respectively, hereby agree with the other or others of them to observe, perform, fulfil, and keep, the several conditions and stipulations hereinafter contained."

The stipulations in this agreement were so far as material as follows:

1st. The agency shall be deemed to have commenced on Jan. 31, 1887, and shall be determinable either by the said company or the said A. S. Turner at the end of five years from the date hereof upon three calendar months' notice in writing being given by the party desiring to determine the said agency to the other or others of them.

2nd. The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him.

5th. The said A. S. Turner shall not either by himself, partner, agent, or other person whatsoever, sell, or offer for sale, any shirts, collars, cuffs, fronts, or any goods of the description manufactured or sold by the said company during the time he shall be in their employ or for a period of three months from the date of the determination of such agency, nor shall he act as agent for any company, agent, or firm for the sale of any such manufactured goods during such period.



8th. The said company shall pay to the said A. S. Turner the sum of three and three-quarters per cent. commission on all goods sold by him for them."

In March, 1889, the manufacturing premises of the defendant in Taunton, where he carried on the business of a shirt, collar, and cuff manufacturer, as "The Priory Manufacturing Co.," were destroyed by an accidental fire, and the defendant's business was thereby put an end to, and the defendant ceased thenceforth to employ the plaintiff as his agent. The plaintiff commenced this action on May 22, 1889, claiming £400 damages from the defendant for the breach of the agreement of Jan. 31, 1887. The defendant by his defence pleaded the occurrence of the fire, and that the employment of the plaintiff being impliedly conditional upon the continued existence of the business, the defendant by reason of such fire was excused from further performance of the said agreement. The case was tried before a jury, who assessed the damages at £125, and GRANTHAM, J., reserved the question whether there had been a breach of the contract. The question was subsequently argued before GRANTHAM, J., who gave judgment for the defendant. The plaintiff applied to the Court of Appeal for a new trial or judgment.

*Winch, Q.C.*, and *Kisch* for the plaintiff.

*E. U. Bullen* for the defendant.

**LINDLEY, L.J.**—This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened.

The plaintiff wished to act as traveller to the defendant, and the defendant wished to engage him in that capacity. An agreement, dated Jan. 31, 1887, was entered into between them, which contained this recital:

"Whereas, in consideration of the agreement of the said A. S. Turner, the said company [i.e., Mr. Goldsmith and any partner he might have] agree to employ the said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained."

Stopping there, we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company—and on what terms? [His LORDSHIP read cl. 1 and 2 of the agreement, and continued:] Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission. The answer to that is that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent.

Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it. The plaintiff says: "I am entitled to damages for your breach of the agreement to employ me for five years." The defendant pleads that the agreement

A was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How then can such a condition as the defendant contends for be implied? It was contended that the point was settled by authority. I will refer to three cases on the subject.

B In *Rhodes v. Forwood* (1) it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him.

C In *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (3) there was a contract in a partnership deed to employ one of the partners during his life as sole agent to effect purchases and sales on behalf of the partnership at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership, that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

D *Taylor v. Caldwell* (2) contains some observations which are very much in point. BLACKBURN, J., there says (3 B. & S. at p. 833):

E "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor."

G The substance of that is, that the contract will be treated as subject to an implied condition, that it is to be in force only so long as a certain state of thing continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action, therefore, in my opinion, is maintainable.

I The plaintiff then is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that £125 is too much, and the plaintiff's counsel having agreed to take our assessment of damages rather than be sent to a new trial, we assess them at £50, and direct judgment to be entered for the plaintiff for that amount.

KAY, L.J.—LOPES, L.J., desires me to say that he concurs in our decision. If it had been shown that not only the manufactory but the business of the defendant had been destroyed by vis major, without any default of the defendant,

I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement. The contract is peculiar; it is to employ the plaintiff for five years certain, with power to either party to determine the employment at the end of that time by notice. The defendant has ceased to employ the plaintiff within the five years, and contends that a condition is to be implied that the manufactory must continue to exist. The plaintiff is not seeking to import anything into the contract; the defendant seeks to import the implied condition I have mentioned. I cannot import any such condition.

If it had been proved that the defendant's power to carry on business had been taken away by something for which he was not responsible, I should say that there was no breach of the agreement; but here it was not taken away, and our decision is quite consistent with the class of cases where the parties have been excused from the performance of a contract because it was considered to be subject to an implied condition.

Solicitors : *Alfred Slater*; *W. H. Elphinstone*; *Stone* for *S. B. Cresswell*, Taunton.

[*Reported by A. J. SPENCER, Esq., Barrister-at-Law.*]

## LISTER AND ANOTHER v. LANE AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), June 9, 1893]

[*Reported* [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176;  
57 J.P. 725; 41 W.R. 626; 9 T.L.R. 503; 37 Sol. Jo. 558;  
4 R. 474]

*Landlord and Tenant—Repair—Liability of tenant—Covenant to repair, uphold and maintain—Old brick house built on logs of timber on muddy soil—Rotting of timber and consequent sinking and bulging of walls—Liability of tenant to underpin.*

A landlord leased a house for a term of seven years to a tenant who covenanted to "... repair, uphold ... maintain ..." and so deliver up the premises. The house was a very old brick house built on logs of timber laid on a muddy soil, and in the course of time the walls sank and bulged owing to the rotting of the logs. After the expiration of the lease the landlord claimed that, if the tenant had underpinned the walls with concrete, it would not have become necessary, as it did, to pull down and re-build the house. In an action by the landlord claiming from the tenant the cost of demolishing and re-building the house as damages for breach of covenant,

**Held:** a covenant to repair was not a covenant to give the landlord a thing different from that which the tenant took when he entered into the covenant, and, therefore, the tenant was not bound to underpin walls which had sunk and bulged owing to the inherent nature of the house and the rotting of the logs on which it was built.

**Notes.** Applied: *Wright v. Lawson* (1903), 68 J.P. 34; *Torrens v. Walker*, [1904-7] All E.R.Rep. 800. Considered: *Lurcott v. Wakeley*, [1911-13] All E.R.Rep. 41; *Pembery v. Lamdin*, [1940] 2 All E.R. 434. Referred to: *Toronto Suburban Rail. Co. v. Toronto Corpn.*, [1915] A.C. 590; *Anstruther-Gough-Calthorpe v. McOscar*, [1923] All E.R.Rep. 198; *Hewitt v. Rowlands*, [1924]



- A All E.R. 344; *Shayler v. Woolf*, [1946] 1 All E.R. 464; *Sotherby v. Grundy*, [1947] 2 All E.R. 761.

As to the construction of covenants to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 578 et seq.; and for cases see 31 DIGEST (Repl.) 358 et seq.

Cases referred to:

- B (1) *Gutteridge v. Munyard* (1834), 7 C. & P. 129; 1 Mood. & R. 334; 31 Digest (Repl.) 358, 4892.  
 (2) *Soward v. Leggatt* (1836), 7 C. & P. 613, N.P.; 31 Digest (Repl.) 361, 4926.  
 (3) *Payne v. Haine* (1847), 16 M. & W. 541; 16 L.J.Ex. 130; 8 L.T.O.S. 414; 153 E.R. 1304; sub nom. *Paine v. Hayne*, 11 J.P. 462; 31 Digest (Repl.) 359, 4895.

- C Also referred to in argument:

*Bullock v. Dommitt* (1796), 6 Term Rep. 650; 2 Chit. 608; 101 E.R. 752; 31 Digest (Repl.) 407, 5367.

*Easton v. Pratt* (1864), 2 H. & C. 676; 4 New Rep. 69; 33 L.J.Ex. 233; 10 Jur.N.S. 732; 12 W.R. 805; 159 E.R. 280; sub nom. *Pratt and Cordrey v. Easton and Bilton*, 9 L.T. 841, Ex. Ch.; 40 Digest (Repl.) 775, 2598.

- D *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, 4900.

**Appeal** by the plaintiffs from a decision of GRANTHAM, J., by the plaintiffs, the landlords, in an action against the defendants, the tenants, to recover damages for breach of covenant to repair and deliver up in repair certain premises demised by the landlords to the tenants by a lease dated Nov. 22, 1883. GRANTHAM, J., held that the tenants had not committed any breach of covenant by not underpinning a wall and gave judgment for the tenants.

- E The lease was for a term of seven years from Michaelmas (Sept. 29), 1883, and contained a covenant by the tenants that they would

- F "At their own costs and charges, when and where, and so often as occasion should require, well, sufficiently, and substantially repair, uphold, sustain, maintain, glaze, pave, purge, scour, cleanse, empty, amend, and keep the premises, etc. . . . and so well and substantially repaired, upheld, supported, sustained, maintained, etc., at the end, or other sooner determination of the said term thereby granted would surrender and yield up the premises, etc."

- G On Aug. 22, 1890, the landlord's surveyor served on the tenants a notice specifying the repairs which they alleged the tenants were bound to execute in pursuance of the covenant. Part of the demised premises consisted of a dwelling house, and, in respect of this house, the notice stated as follows: "The brickwork of this front, although pointed up, is very much bulged, and must be dealt with." The tenants did not do anything to this wall. After the expiration of the lease, in September, 1890, the landlords began to deal with the wall of this house, and found, in November, 1891, that it was impossible then to repair it, but that it was necessary to pull down and re-build the house. The house was a very old brick house, more than a hundred years old, and was built upon muddy soil, in Lambeth, the walls being built upon what was called a mud-sill, that is, upon logs of timber laid upon the muddy soil. This timber had become rotten, and the wall had sunk and bulged. The landlords alleged that if the tenants had underpinned the walls with concrete during the term, it would not have become necessary subsequently to pull down and re-build the house.

- I The landlords claimed £700 damages, being the cost of and occasioned by pulling down and re-building the house. Lane, one of the tenants, died before the trial, and the action was continued against the other tenant, Nesham, as defendant.

*F. Terrell* for the landlords.

*McCall, Q.C.*, and *Stewart Smith* for tenant were not called on to argue.

**LORD ESHER, M.R.**—In this case we have to consider what are the rules which govern an inquiry of this kind. In *SMITH'S LANDLORD AND TENANT* (3rd Edn.), at p. 302, I think that we get the result of the cases properly stated. I do not cite that book as an authority, but I read this passage because I think that it properly states the rule. The passage is as follows :

"These cases establish that where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one."

That, I take it, is the right rule, and it is taken partly from *Gutteridge v. Munyard* (1), which is always cited upon the subject. In that case, *TINDAL, C.J.*, in directing the jury, said (1 *Mood. & R.* at p. 336) :

"Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord."

The condition of the house, therefore, at the time when it was demised must be looked at, and it must be considered what kind of a house it was and what was the nature of the house; e.g., whether it was a wooden house and not built of brick. If it was a house built upon wooden piles in soft ground, the tenant is not bound to put in concrete piles. *Soward v. Leggatt* (2) tried by *LORD ABINGER, C.B.*, in effect, says that. In *Soward v. Leggatt* (2) *LORD ABINGER, C.B.*, in directing the jury, said (7 *C. & P.* at p. 617) :

"The surveyor who has been called on the part of the plaintiff has given you an estimate; but it is also proved that when the repairs came to be done, they amounted to considerably more than the estimate; and that is generally the case, because when the work is actually done improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example; and if the joists have been now laid in a manner which will make them more durable, and last longer before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair."

Those cases show that, if a tenant takes a house, which is such a house and of such a kind that, from its inherent nature, it will in course of time fall into a particular condition, the effects of it falling into such a condition will not constitute a breach of a covenant to repair, however large that covenant may be, and that a covenant to repair is not a covenant to give the landlord a thing different from that which the tenant took, and is not a covenant to make a new and a different thing. Moreover, the results of the nature and condition of the house, and the effects of time upon a house of such a nature and condition, do not constitute a breach of covenant to repair.

What then is the evidence in the present case? The house was an old house in Lambeth, built upon mud, a soft and shifting soil; the house was, therefore, built upon a kind of wooden platform which, so to speak, would float or rest upon the muddy soil. That was the nature and condition of this house. Whatever happened to such a house as that from lapse of time is the result of the operation of time and nature, which falls upon the landlord, and does not constitute a breach of a covenant to repair. Such results are not to be taken into account in considering whether there has been a breach of a covenant to repair. If, then, the natural results of the operation of time and nature upon such a house do not constitute a breach of a covenant to repair, the tenant is not bound to do anything in respect thereof. That is precisely this case, and *GRANTHAM, J.*,

**A** was right in holding that there had been no breach of the covenant to repair. This is a very clear case, and the tenant was not liable. The appeal fails, and must be dismissed.

**BOWEN, L.J.**—I agree.

**B KAY, L.J.**—I am of the same opinion, and will say a few words as to the law applicable to this case. In considering covenants of this kind, we must always consider what was contemplated by the parties. If the covenant in this case is in the widest terms, still, according to *Payne v. Haine* (3), regard must be had to the character of the house. As to this house, its character was this. Timber was laid upon mud, the solid ground being seventeen feet below the mud, and this timber formed the foundation of the house. It is said by the landlord that the only way to keep up this house was to underpin it. Would that be a "repairing" or "upholding" of this house within the meaning of the covenant? I think not. That would be making a different character of house. It has not been proved, or alleged, that by merely replacing the timber, the tenant could have made the house safe. In my opinion, to underpin this house would not be to "repair, uphold, or maintain" this house, which is of such a character, within the meaning of the covenant. Not to underpin was not, therefore, a breach of the covenant for which the landlords could maintain the action.

*Appeal dismissed.*

Solicitors: *Venning, Sons & Mannings; Parson, Lee & Holmes.*

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]

**F**

## TATAM v. REEVE

**G** [QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Wills, J.), November 3, 1892]  
[Reported [1893] 1 Q.B. 44; 62 L.J.Q.B. 30; 67 L.T. 683;  
57 J.P. 118; 41 W.R. 174; 9 T.L.R. 39; 5 R. 83]

*Gaming—Loan for gaming—Recovery—Gaming debts paid at the request of loser—Gaming Act, 1892 (55 & 56 Vict., c. 9), s. 1.*

**H** The plaintiff, at the request of the defendant, paid for the defendant sums of money to certain persons, the names of whom, with the amounts to be paid to each, were on a slip of paper enclosed in a letter written by the defendant to the plaintiff. The sums were for bets on horse-races made and lost by the defendant to the persons named. In an action brought by the plaintiff to recover the sums so paid for the defendant at his request,

**I** **Held:** the payments made by the plaintiff were made "in respect of" agreements rendered null and void by the Gaming Act, 1845, and, therefore, by s. 1 of the Gaming Act, 1892, no action could be maintained for the recovery of the sums paid.

**Notes.** Approved: *Saffery v. Mayer*, [1901] 1 K.B. 11. Considered: *Hyams v. Stuart King*, [1908] 2 K.B. 696. Distinguished: *Re O'Shea, Ex parte Lancaster*, [1911-13] All E.R.Rep. 628. Considered: *Law v. Dearnley*, [1950] 1 All E.R. 124. Referred to: *Faulks v. Atkins* (1893), 10 T.L.R. 178; *O'Sullivan v. Thomas*, [1895]



1 Q.B. 698; *Chapman v. Macalester* (1912), Times, May 15; *Re Brice's Estate*, *Brice v. Frere* (1937), 81 Sol. Jo. 238; *MacDonald v. Green*, [1950] 2 All E.R. 1240. A

As to recovery of sums paid in respect of gaming transactions, see 18 HALSBURY'S LAWS (3rd Edn.) 176 et seq; and for cases see 25 DIGEST (Repl.) 433 et seq. For the Gaming Act, 1845, see 10 HALSBURY'S STATUTES (2nd Edn.) 746, and for the Gaming Act, 1892, s. 1, see *ibid.*, p. 777.

Case referred to:

(1) *Read v. Anderson* (1882), 10 Q.B.D. 100; 52 L.J.Q.B. 214; 48 L.T. 74; 47 J.P. 311; 31 W.R. 453; affirmed (1884), 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55; 49 J.P. 4; 32 W.R. 950, C.A.; 25 Digest (Repl.) 434, 156. B

**Appeal** from an order of a master referred by CHARLES, J., to the court, upon the undertaking by the parties that the hearing of the appeal was to be treated as the hearing of the action. C

The action was brought to recover the sum of £148, being money paid by the plaintiff to the use of the defendant at his request, to certain persons named on the endorsement of the writ.

The plaintiff took out a summons for leave to sign judgment under Ord. 14. The master refused to give leave to sign judgment, and gave unconditional leave to defend. On appeal, the learned judge referred the summons to the court, both parties agreeing to treat the appeal as the final hearing of the action upon the facts stated in the affidavits. D

The material facts as set out in the affidavits were as follows:—On July 4, 1892, the plaintiff received from the defendant the following letter:

“Dear Mr. Tatam,—Kindly settle the enclosed account for me, as I don't know where to find all the men, and I have to catch an early train to Henley.—Yours truly, H. REEVE.” E

The account enclosed in this letter purported to show that the defendant was indebted to four persons in the respective sums set opposite their names, the sums amounting in all to £148, and the names of these persons and the sums paid to each were endorsed on the writ. The plaintiff paid the sums to these persons on the same day, and the sums were due from the defendant to the persons named in respect of bets on horse races, which the defendant had made and lost. The plaintiff in his affidavit stated that the amounts paid by him were not in respect of any bets made by him on behalf of the defendant, but that he simply paid them on the defendant's request contained in the letter of July 4, 1892, and that he was not in any way liable to pay them. The affidavits contained no statement that the plaintiff knew that the payments made by him were for bets, and the defendant in his affidavit merely set up as a defence the Gaming Act, 1892. F

By s. 1 of the Gaming Act, 1892:

“Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.” H

*Bosanquet, Q.C.*, and *Lynden Bell* for the plaintiff.

*Morton Daniel*, for the defendant, was not called on to argue. I

**LORD COLERIDGE, C.J.**—I confess I have no hesitation at all in deciding this case, and it seems to me that judgment must be given for the defendant. If a person with full knowledge of what is called a debt of honour, chooses to trust another he must do so at his own risk, and with the knowledge that he must suffer if the person he has trusted chooses to repudiate his debt. The old Act—the Gaming Act, 1845—was discussed in *Read v. Anderson* (1) in which LORD ESHER,

**A** M.R., emphatically dissented from the other members of the court. In that case the Court of Appeal decided that when a commission agent was employed to make bets on behalf of his principal, and where it was admitted that if the bets had been made between principals only, the contracts would have been null and void under the statute, yet that an implied contract arose and could be enforced for repayment to the agent of the sums which the agent had paid for his principal. I entirely agree with the dissent of the Master of the Rolls in that case, for that decision really cut into the Gaming Act, 1845, as it was a decision that a person might do by means of another what he was prohibited from doing himself. However, that was the decision of the Court of Appeal, and that was an end of it.

There was an Act of Parliament passed in the present year to amend the Gaming Act, 1845, and this Act by s. 1 enacts that

**C** "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

**D** The facts here are that the plaintiff was desired by the defendant to pay certain sums of money mentioned in a slip, and the plaintiff did so pay these sums, and, as a matter of fact, these sums were for bets made and lost by the defendant. It was argued that these sums were not paid in respect of bets. I cannot agree with that contention. True they were not paid "under" an agreement rendered null and void by the Gaming Act, 1845, as there was no betting between the plaintiff and the defendant, but they were paid "in respect of" these betting agreements. In respect of what were these payments made by the plaintiff except to discharge the sums which the defendant owed under these betting contracts? I decide this case with the less hesitation as I think the plaintiff was not ignorant of the purpose of these payments. If the plaintiff had been deceived into making payments in respect of a matter he knew nothing whatever about, one would have hesitated and been sorry to come to the conclusion to which I have come in this case. I think, however, that the plaintiff knew very well the nature of the transactions, and, therefore, he must take the risk of the defendant refusing to repay him the sums he has paid. I am of opinion, therefore, that there should be judgment for the defendant.

**G** **WILLS, J.**—I am of the same opinion. The chief argument of the plaintiff's counsel was based on the assumption that the only object of the Gaming Act, 1892, was to get rid of the effect of the decision in *Read v. Anderson* (1). If that were the only object of the statute then it would not touch the present case, as the plaintiff here did not make the bets which he paid, and so the case is not the same as *Read v. Anderson* (1). During the argument I asked the learned counsel for the plaintiff what meaning was to be given to the words "in respect of," as well as the word "under," for the word "under" would have done, and would have been sufficient if the legislature had thought that the only object was to get rid of *Read v. Anderson* (1). The answer was given by both the learned counsel for the plaintiff that the words "in respect of" were equivalent to "under," and meant no more. I do not think that is so, and it must be that the words "in respect of" mean something different from the word "under." I do not think it makes any difference whether the plaintiff knew or did not know that these payments were for bets, because whether he knew or did not know they were equally made "in respect of" an agreement null and void by the Gaming Act, 1845. If the plaintiff had been misled by the defendant, then it might well be that the defendant would have been estopped from setting up this defence. It is not necessary to decide that point, as on reading the affidavits, I cannot doubt, and I have not the slightest

doubt in my own mind, that the plaintiff knew what these payments were for. **A**  
I think, therefore, that there must be judgment for the defendant.

*Judgment for the defendant.*

Solicitors: *Thornycroft & Willis; T. R. Apps.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.] **B**

## RODGERS v. RICHARDS AND OTHERS

[QUEEN'S BENCH DIVISION (Hawkins and Wills, JJ.), February 15, 1892]

[Reported [1892] 1 Q.B. 555; 66 L.T. 261; 56 J.P. 281;  
40 W.R. 331; 36 Sol. Jo. 274; 17 Cox, C.C. 474]

*Magistrates—Information—Information disclosing two offences—Objection—  
Defect "in substance or in form"—Summary Jurisdiction Act, 1848 (11 & 12  
Vict., c. 43), ss. 1, 10.*

By the Summary Jurisdiction Act, 1848, s. 1, it was provided that no objection should be taken to any summons for an alleged defect in substance or in form. Section 10 provided that every complaint should be for one matter of complaint only, and not for two or more matters of complaint, and every information should be for one offence only, and not for two or more offences. **E**

The defendants were charged on one information and in one summons under the Prevention of Cruelty to Animals Act, 1849 (repealed), s. 3, with unlawfully using a place for the purpose of fighting two dogs, and with encouraging, aiding, and assisting at the fighting of such dogs. The objection was taken on behalf of the defendants that the summons was bad upon the ground that the complaint against them was for two matters of complaint. **F**

**Held:** the objection to the summons was for a defect in substance within s. 1 of the Act of 1848, and must be overruled. **G**

**Notes.** The Summary Jurisdiction Act, 1848, was repealed by the Magistrates' Courts Act, 1952, the relevant provisions of ss. 1 and 10 of the 1848 Act being substantially re-enacted in s. 100 of the 1952 Act (32 HALSBURY'S STATUTES (2nd Edn.) 501) and r. 14 (1) of the Magistrates' Courts Rules, 1952.

Distinguished: *R. v. Wood, Ex parte Farwell* (1918), 87 L.J.K.B. 913. Not Followed: *Edwards v. Jones*, [1947] 1 All E.R. 830. Referred to: *R. v. Rawson*, [1909] 2 K.B. 748; *R. v. Secretary of State for India in Council, Ex parte Ezekiel*, [1941] 2 All E.R. 546. **H**

As to scope of information and objections, see 25 HALSBURY'S LAWS (3rd Edn.) 187; and for cases see 33 DIGEST 322, 323.

Case referred to:

(1) *Bartholomew v. Wiseman* (1891), 56 J.P. 455; 8 T.L.R. 147, D.C.; 33 Digest 322, 324. **I**

**Case Stated** by the stipendiary magistrate for the Wolverhampton and South Staffordshire District.

The defendants were on Oct. 20, 1891, charged before the magistrate, sitting as a court of summary jurisdiction at Wednesbury, on the prosecution of the inspector of the Royal Society for the Prevention of Cruelty to Animals, for that



A they did,

"on the 4th day of September, 1891, at Darlaston, in the county aforesaid, unlawfully use a place, to wit, a room, at The Old George Inn, at Darlaston, for the purpose of fighting two dogs, and did encourage, aid, and assist at the fighting of such dogs."

B Objection was taken on behalf of the defendants at the commencement of the hearing that the information disclosed two offences, the first being under the first portion of s. 3 of the Prevention of Cruelty to Animals Act, 1849, and the second offence under the latter part of the same section, and that the learned magistrate had no power then to amend the summons, as by s. 14 every complaint must be made within one calendar month after the cause of complaint had arisen. The  
C magistrate was of opinion that the offences charged were separate offences under s. 3, inasmuch as separate penalties were imposed for "using" a room, and "encouraging, aiding, etc.," at the fight, and that the information and summons were bad. He also refused to amend the information and summons, as that would practically be granting a new summons after the expiration of the limit imposed by s. 4. The prosecutor being dissatisfied with this determination, as being  
D erroneous in point of law, duly applied to the magistrate in writing, on Oct. 27, 1891, to state a Case in writing for the opinion of the court whether the magistrate's decision was correct in law.

*Colam* for the prosecutor.

The defendants did not appear.

E **HAWKINS, J.**—I am of opinion that this case must go back to the magistrate, who should not have dismissed the complaint laid before him. The magistrate dismissed the case, upholding the objection which was raised on behalf of the defendants that the information disclosed two offences, and that he had no power to amend the summons, because every complaint under the Prevention of Cruelty to Animals Act, 1849, s. 3, must be made within one calendar month after the  
F cause of complaint has arisen.

In my opinion, the case comes within the provision of s. 10 of the Summary Jurisdiction Act, 1848, which enacts that every complaint shall be for one matter of complaint only and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences, and the fact of  
G there being two offences charged in the information would make it bad if there were no further provision dealing with such a case. But s. 1 of the Act provides that no objection shall be taken to an information for any alleged defect therein. I should say that the objection taken to this information was an objection to an information for an alleged defect therein in substance within the meaning of the section, and the magistrate, if he had thought fit, could have adjourned the hearing  
H of the case to some future day in order to give the defendants an opportunity of preparing their defence. But, it further seems to me to be good sense that, if a person is summoned for committing two offences, and takes objection to being tried for the two offences at the same time, the justices can remedy the defect by trying him for one offence and not taking any notice of the second charge against him.

Our attention has been called to *Bartholomew v. Wiseman* (1), in which it  
I was held that an information was good which charged two different persons with separate offences, namely, one with causing cruelty to an animal, and the other with committing the cruelty. That decision certainly confirms the opinion which I hold that the magistrate was wrong in the present instance, and the case must be remitted back to him with this expression of our opinion.

**WILLS, J.**—I am of the same opinion. The scheme of the Summary Jurisdiction Act, 1848, is quite plain. A summons is not to be got rid of merely because there is some mistake in substance or in form, but the justices are, if they think it

necessary, to adjourn the case. But, on the other hand, if there is a substantial alteration in the charge the information may then be dismissed. The case must go back to the magistrate for him to deal with it upon its merits.

*Case remitted.*

Solicitor: *A. Leslie.*

[*Reported by W. H. HORSFALL, Esq., Barrister-at-Law.*] **B**

## THE MERCHANT PRINCE

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ., assisted by Nautical Assessors), May 10, 1892]

[Reported [1892] P. 179; 67 L.T. 251; 8 T.L.R. 480;  
7 Asp.M.L.C. 208]

*Negligence—Defence—Inevitable accident—Burden of proof.*

*Shipping—Collision—Defence—Inevitable accident—Burden of proof—Failure of steam steering gear.*

The defendants' ship, which was fitted with steam steering gear, when under way in the Mersey in daylight collided with the plaintiffs' ship while she was at anchor. The defendants denied that the collision was caused by negligent navigation, but they alleged that, although the steering gear had been tried before the voyage and found to be in good order, it had failed to act because of some latent defect or obstruction which could not have been ascertained or prevented by the exercise of reasonable care or skill on their part and that the collision had been caused by inevitable accident. The evidence showed that the gear was good, that it had been overhauled by experts from time to time, that it had never failed to act before or since the accident, and that experts who had examined it since the collision had been unable to discover why it had failed to act on the occasion in question. Part of the chain forming part of the gear had been renewed before the voyage. The tendency of new chain to stretch was known to the defendants who had tightened it the day before the collision.

**Held:** the defendants having collided in daylight with a ship at anchor, the burden lay on them to prove inevitable accident, either by proving the cause of the accident and that its result was unavoidable, or by enumerating all the possible causes and proving that with regard to every one of them the result could not have been avoided; the defendants had not discharged this burden in that they had failed to show the cause of the accident or to enumerate all the possible causes; moreover on the evidence the possible cause was the stretching and consequent kinking of the new chain used in the gear; and, therefore, they were liable.

**Notes:** Applied: *The Calderon* (1912), Times, Mar. 26. Considered: *The Olympic and H.M.S. Hawke*, [1913] P. 214; *Winnipeg Electric Co. v. Geel* (1932), 48 T.L.R. 657; *The Saint Angus*, [1938] P. 225; *Imperial Smelting Corp., Ltd. v. Joseph Constantine Steamship Line Ltd.*, [1940] 2 All E.R. 46. Distinguished: *Esso Petroleum Co. v. Southport Corp.*, [1955] 3 All E.R. 864. Referred to: *The Turret Court* (1900), 69 L.J.P. 117; *The Mulbera*, [1937] P. 82.

As to the meaning and proof of inevitable accident, see 28 HALSBURY'S LAWS (3rd Edn.) 80-81, 161, 35 HALSBURY'S LAWS (3rd Edn.) 687-688; and for cases

**A** see 36 DIGEST (Repl.) 162–163. As to the use of steering gear, see 35 HALSBURY'S LAWS (3rd Edn.) 676, 707; and for cases see 41 DIGEST 688.

Cases referred to :

- (1) *The Annot Lyle* (1886), 11 P.D. 114; 55 L.T. 576; 6 Asp.M.L.C. 50, C.A.; 41 Digest 777, 6369.
- B** (2) *Marpesia (Owners) v. America (Owners), The Marpesia* (1872), L.R. 4 P.C. 212; 8 Moo.P.C.C.N.S. 468; 26 L.T. 333; 1 Asp.M.L.C. 261; 17 E.R. 387, P.C.; 41 Digest 774, 6325.

Also referred to in argument :

*The European* (1885), 10 P.D. 99; 54 L.J.P. 61; 52 L.T. 868; 33 W.R. 937; 5 Asp.M.L.C. 417; 41 Digest 772, 6280.

**C** **Appeal** by the plaintiff from a decision of SIR CHARLES BUTT, P., in a collision action.

**D** A collision occurred about 10.30 a.m. on Mar. 4, 1891, in the river Mersey, between the plaintiffs' steamship, *Catalonia*, and the defendants' steamship, *Merchant Prince*. At the time of the collision the *Catalonia*, a steamship of 3,093 tons register, was at anchor in the Mersey, a little to the south of Tranmere Ferry. The wind was a fresh breeze from the North-West, the tide was low water slack and the weather fine and clear. The *Merchant Prince*, a steamship of 1,074 tons net, fitted with steam steering gear, while proceeding down the river ran into and damaged the *Catalonia*. The defendants did not charge the plaintiffs with negligence but they denied that the collision was caused or contributed to by the negligent navigation of the *Merchant Prince*. They alleged that those on board the *Merchant Prince* observed the *Catalonia* about a mile distant and about half point on the port bow of the *Merchant Prince*. As the *Merchant Prince* approached the *Catalonia* the pilot ordered the helm of the *Merchant Prince* to be ported, and shortly afterwards to be hard-a-ported, but it was found on trying to get the wheel over to port that the steering gear would not act, and although the engines of the *Merchant Prince* were at once put full speed astern, she came into collision with the *Catalonia*, the stem of the *Merchant Prince* striking the port quarter of the *Catalonia*. They further alleged that the steering gear of the *Merchant Prince* had been tried before she left her anchorage to proceed on the voyage, and found to be in good order; that it had failed to work because of some latent defect or obstruction which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the collision and damage were caused by inevitable accident. The learned President dismissed the action, and the plaintiffs appealed.

*Sir Walter Phillimore and J. P. Aspinall for the plaintiffs.*

*Myburgh, Q.C., and A. D. Bateson for the defendants.*

**H** **LORD ESHER, M.R.**—In this case the ship under way, which is a steamship, has collided with a ship which was at anchor. The ship which was at anchor sues the one which was under way, and which came into collision with her, in the Admiralty Court. The circumstances of the collision depend a good deal upon the place where it occurred. That place was the Mersey. They also depend upon the time when it occurred. Anyone who knows the Mersey will appreciate what it means when there is a north-westerly wind blowing nearly a gale. It means that there are a great many ships brought up in the river, and they are nearly all wind-rod; that is to say, that they are lying across the river just as this ship was. In such circumstances the *Merchant Prince*, which was above Liverpool, gets under way to go down the river. She was bound out to sea. Those in charge of her know what the state of the morning is, they know what the wind and stream are, and know that in all probability there will be a great many ships at anchor in the river. What are we told about this ship? She had come out of the Brunswick Dock the day before. She was fitted with machine steering gear, of



which the chain is a very important part. This chain goes over a cog-wheel, and then, in order to take it to the stern of the ship to work the rudder, it goes round a leading wheel on each side of the ship. A

The ship had two other means of steering. There was a wheel underneath the bridge, and another wheel aft. She, therefore, had these three means of steering. The quickest working gear which was the patent was the most complicated, but was if feasible the most capable of the three, and in a river like the Mersey it would be the best. But unfortunately the chains, which as I said before are a very important part of the machinery, wear out, and want renewing. If you put new chains on they at first stretch. The chain goes over a cog-wheel, and then round the leading wheels. It must be clear to everybody that the chain must not be quite tight, or it will not work; neither will it work if it be too loose. Therefore, it must be known to all skilled seamen who have to deal with such matters that you must not make it quite tight, and must not make it too loose. B  
But then there is another fact quite plain to anyone who thinks about it. If the chain is quite tight the links of the chain cannot kink—it is impossible. If you make it just as loose as these chains ought to be when in proper order, then they are not so loose as to cause the links to kink; but if you make them loose or leave the chain loose, and at the same time move it, then everybody must know that it is not an unlikely thing that the links will kink. If you try the experiment with your watch-chain what I mean is obvious, and we do not need experts to instruct us. C

That being the case, therefore, it would occur to any thinking man that if the chain is too tight it will not work; if I loosen it to the right amount it will work, but if I loosen it too much it will not work so quickly as it otherwise would, and the links may kink. There being a new chain on this ship, the master and officer would know, or ought to know, before they left Brunswick Dock that the links of this new chain would probably stretch on being used. What they ought to have expected did in fact happen. The links of the chain did stretch. I care not how much they stretched. They did stretch, and the officers of the ship by their conduct showed that this stretching ought to be remedied, because they tightened the chain up. Had they thought the matter out they would have said, "It is true we have tightened it up now, but it is liable to stretch, therefore it may stretch when going down the river, and if it does on such a morning as this, it will be awkward." I dare say they never thought about the kinking of the chain at all. What might they have done if they had thought the matter out? They might have said, "We will watch the chain, and if it stretches so as to seem loose, we will immediately stop the ship if necessary, and screw it up." D E F

But that is not all. It is said that they cannot use the wheel under the bridge without disconnecting it from the other. Very well then; if they cannot, why do not they disconnect it, and use that wheel as they go down the river? They were not obliged to use the patent wheel, and might have waited till they got outside the river before using it. They might also have stationed a man to watch the chain and disconnect the wheel if he saw the chain getting loose. Then again, there was the steering wheel aft. Why did they not have a man there so that, if anything happened, the ship could in a moment be steered by that wheel? That was not done. It is said that ordinary sailors would not think of these things; but these sailors, who, I have no doubt, were expert and skilful sailors, might have thought that there were means of taking that ship down the river without causing danger to other craft. G H

What has happened? This vessel while under way has run into a ship at anchor. It is said by counsel that I am about to change the law by what I am going to say. It has been laid down by this court that, where a ship under way runs into a ship at anchor; that is *prima facie* evidence of negligence on her part. The ship at anchor has only to state the fact, and that it was daylight; or, if it was night, she must show that her light was up and properly burning. That is all she has to say; the mere fact of the collision is evidence of negligence against the other ship. What is the reason for that? It is because after long experience I

**A** the courts have come to this conclusion, that as a matter of truth and fact the one ship ought to be under perfect command, and, therefore, able to get out of the way of the other ship, if she sees her, which is in a helpless state and can do nothing. The great object of the judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do. The plain rule they have laid down is this: Unless

**B** you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. They have used some variation of phraseology, but if you look into the cases you will find that the only way a man can get rid of liability for the accident, the circumstances of which prove negligence against him, is to show that it occurred by an accident which was unavoidable by him—that is, an accident the cause of which was such that he could not by any act of his have avoided the result. He can only get rid of that proof against him by showing inevitable accident; that is, by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him.

That being so, there comes the proposition which LOPES, L.J., has put into form, that a man has got to show that the cause of the accident was a cause the result of which he

**D** could not avoid. If he cannot tell you what the cause is how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be good reasoning. But when the defendants come to show the circumstances of this case they cannot show, they say, the cause of the accident, although the court can see a probable cause—I do not say it is clearly proved—and also means by which its result might have been avoided. Therefore, not only do the defendants not satisfy the burden

**E** which is upon them, but they have shown by evidence a probable cause, and have shown that, if that was the cause, there were means by which its result could without difficulty have been avoided. What was the cause, the probable cause? I do not say it is proved. Is there a probable cause? Yes, this chain refused to act. That must have been the reason why the wheel would not turn. It refused to act for a moment, and yet got right immediately after. If two of the

**F** links did kink as they went round the leading wheel, that would explain the accident. The gentlemen who advise us say that that is probably the way in which the accident happened, and that it was in all probability the cause of the accident. How did it happen? Why, because the chain became too loose. If that is so, is not that stretching of the chain a thing which the defendants could have foreseen, which they ought to have foreseen, and which, if they had foreseen

**G**—not that it would do it, but that it might do it—ought not they at the time in question to have taken means to have had the other steerages ready to act in a moment, even if they ought not to have used those other steerages, and those other steerages alone? It seems to me, from what one sees of the facts, that a probable cause is shown, and a cause the result of which could have been avoided.

But the defendants either have not shown any cause, and then they cannot have

**H** shown a cause the result of which was one that they could not avoid; or they have shown a probable cause, which, if it was the real cause as seems most likely, was one the result of which they could have avoided. I am of opinion, therefore, that we must disagree with the judge of the Admiralty Court, and hold that the defendants have not satisfied the burden of proof which lay upon them.

**I** **FRY, L.J.**—I find myself unable to agree with the decision of the judge. It is a case in which a ship in motion has run into a ship at anchor. In *The Annot Lyle* (1) it was laid down by LORD HERSCHELL that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved it to be so they were liable. The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or the other of two things: they must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which might produce the effect, and must further show with regard

to every one of those possible causes that the result could not have been avoided. Unless they show one or other of these two things, it does not appear to me that they have established the plea of inevitable accident. In the present case the defendants have not shown the cause. They have left that entirely undecided. In fact, their evidence has largely gone to show that the event never did happen; but unfortunately for them it did happen. Nor have they enumerated all the causes which might have produced the effect, and shown that they were inevitable. In fact, it is impossible it seems to me, on the evidence before us, to enumerate what might have been the probable causes of this accident. How can we say? It may be that, if we knew its real cause, we should find some simple piece of negligence on the part of some of the defendants' servants in not doing something which would have avoided the collision. Therefore, on that simple ground the defendants fail in this case. A

But I go a step further. An inevitable accident is, according to the law laid down in *The Marpesia* (2), that which cannot be avoided by the exercise of ordinary care and caution and maritime skill. The cause of the present accident was one which probably might have been avoided. It appears to me that these people were using a new chain known to be likely to stretch, that it had stretched, and that it might easily kink or jam in one of the wheels. It follows that there was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand-steering apparatus instead of the steam. If that was the state of things, it ought to have been avoided. I, therefore, feel myself unable to agree with the judge. B

**LOPES, L.J.**—In this case a moving vessel has come into collision with a vessel at anchor. As I understand it, the law is perfectly clear that in such circumstances the defendants are bound to show that what happened was inevitable. It is admitted that the defendants are unable to tell what the cause of the accident was, or how or why it happened. That being so, it cannot be said that they have discharged the burden cast upon them of showing that what happened was inevitable. Can they say that they could not avoid a thing when they do not know what the thing to be avoided was? I think not. In this case the steering gear failed. How is that to be accounted for? It appears to me that it can only be accounted for in two ways. It must have arisen from a defect in the machinery, or from bad management of the machinery. The defendants have not satisfied me that what happened did not proceed from the kinking of the chain. I rather think it did proceed from that cause. If that is so, how does the matter stand? The defendants were using a new chain, and they ought to have known that a new chain was liable to stretch. They ought to have known that a chain that stretched was liable to kink. Knowing these things, they ought to have provided against that which happened by being prepared to use one of the other of the modes of steerage with which they were supplied. In these circumstances I am unable to see that what happened was inevitable. I am unable to agree with the judge below, and I think the appeal ought to be allowed. C

*Appeal allowed.*

Solicitors: *Hill, Dickinson, Dickinson & Hill*, Liverpool; *Bateson, Daw & Bateson*, Liverpool.

[Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.]



## Re TOBIAS & CO. Ex Parte TOBIAS

[QUEEN'S BENCH DIVISION (Cave and Vaughan Williams, JJ.), January 16, February 19, 1891]

[Reported [1891] 1 Q.B. 463; 60 L.J.Q.B. 244; 64 L.T. 115; 39 W.R. 399; 7 T.L.R. 296; 8 Morr. 30]

*Bankruptcy—Discharge—Refusal—Re-consideration by court—Admissible evidence—Object of application to be enabled to appeal out of time—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 104 (1).*

Upon an application by a bankrupt for his discharge, if the judge is of opinion that the bankrupt is not entitled to an absolute order of discharge, and if the judge feels unable to fix a period of suspension, he may refuse the discharge, with liberty to the bankrupt to apply again, in which case the bankrupt can apply again as of right. The more convenient course to adopt is to refuse the discharge absolutely, in which case the bankrupt cannot apply again de novo as of right, but the judge can re-consider the refusal on an application to him, under the Bankruptcy Act, 1883, s. 104 [now Bankruptcy Act, 1914, s. 108], to review, rescind, or vary his original order, if a prima facie case is made out. An application to review need not necessarily be founded on evidence which might have been before the court on the first application for a discharge. The general, though not the invariable, rule is that the court should not grant a re-hearing under s. 104 where the only object of the applicant is to obtain another opportunity for appealing when he has let the time for appealing from the original decision go by; but when the refusal of the discharge operates as a punishment, the punishment may be remitted at any distance of time if the object of the punishment has been effected.

*Re Lloyd. Ex parte Lloyd* (1) (1889), 62 L.T. 366, considered.

**F Notes.** The Bankruptcy Act, 1883, s. 104, has been repealed and replaced by the Bankruptcy Act, 1914, s. 108.

Considered: *Re Smith*, [1947] 1 All E.R. 769. Referred to: *Re Shields, Ex parte Bankrupt* (1912), 106 L.T. 345.

As to orders of discharge, see 2 HALSBURY'S LAWS (3rd Edn.) 515 et seq.; and for cases see 4 DIGEST (Repl.) 586, 589, 624, 625. For the Bankruptcy Act, 1914, s. 108, see 2 HALSBURY'S STATUTES (2nd Edn.) 418.

Case referred to:

(1) *Re Lloyd, Ex parte Lloyd* (1889), 62 L.T. 366; 6 Morr. 297, D.C.; 4 Digest (Repl.) 625, 5574.

**H Appeal** by a bankrupt against an order of the judge of the Liverpool County Court judge refusing his discharge.

The debtor and his brother carried on business as chemical brokers in Liverpool down to May, 1884, when they were adjudicated bankrupt, with joint debts amounting to £19,290, and assets £4,000, while there was on the appellant's separate estate a deficiency of about £1,500. In October, 1884, the appellant applied for his discharge, which was refused. On Oct. 17, 1890, a second application for his discharge was made by the appellant, and also an application for an order in the alternative reviewing the order of October, 1884. During the course of the hearing the counsel for the appellant abandoned the application for a review, and the application de novo for a discharge was refused, and this appeal was brought.

From October, 1884, down to October, 1890, the appellant had held various employments, and endeavoured to earn his living, had lived on a narrow income, and had incurred no debts, and had also received £2,680 under his mother's settlement, of which he told the official receiver.

By the Bankruptcy Act, 1883, s. 104 (1):

A

“Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.”

*W. F. Taylor* for the appellant.

*Muir Mackenzie* for the official receiver.

*Cur. adv. vult.*

B

Feb. 19, 1891. **CAVE, J.**, read the following judgment of the court.—This was an appeal against an order of the county court judge of Liverpool refusing the bankrupt his discharge. The bankrupt and his brother traded as chemical brokers down to the summer 1884, when they were adjudicated bankrupt. The present appellant applied for his discharge in October, 1884, which was refused on Oct. 31, in that year. On Oct. 17, 1890, the appellant applied *de novo* to the court at Liverpool for an order of discharge, or in the alternative for an order reviewing the order of Oct. 31, 1884. In the course of the hearing the bankrupt's counsel abandoned the application for a review, and the application *de novo* for a discharge was refused.

C

This case raises for our determination the questions which were discussed but upon which no decision was given in *Re Lloyd Ex parte Lloyd* (1). I may say at once that I think the learned judge was right in regarding that case as no authority upon the point which alone came before him. When upon the hearing of the application of the bankrupt the judge is of opinion that the applicant is not entitled to an absolute order of discharge, and also feels himself unable to fix a period of suspension, he may, in refusing to grant a discharge, reserve liberty to the bankrupt to apply again, and if he does so the bankrupt may apply again in pursuance of the leave reserved as a matter of right; but having regard to the power of re-hearing hereinafter referred to, I think it would be more convenient that in such a case the judge should refuse the discharge absolutely.

D

E

Where the discharge is absolutely refused the bankrupt cannot apply *de novo* as a matter of right, as was sought to be done here, and in my opinion the learned judge was justified, after the abandonment of the application for a review, in making the order which he did make, and indeed I agree with him that he had no power to entertain the application; the refusal of Oct. 31, 1884, having been, as he says, an absolute refusal. Is then the position of a bankrupt, whose order of discharge has been refused and rightly refused on his first application, an utterly hopeless one, and must he, no matter how exemplary his subsequent behaviour, be compelled to go through the remainder of his life as an undischarged bankrupt? I should be very sorry to think that this was so, and agree with the learned judge of the county court that the refusal of a discharge is the very order above all others which may, with advantage, be considered after the lapse of time.

F

G

It appears to me that the power of re-considering an absolute refusal is conferred on the court by s. 104 of the Bankruptcy Act, 1883, which provides that every court having jurisdiction in bankruptcy under that Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. This section gives the court a discretion of the widest and most far-reaching character, and when properly exercised it is so beneficial in its operation and so calculated to advance the ends of justice that I think it ought not to be restrained by considering it in any niggardly spirit.

H

I

The general though not invariable rule has been laid down for guiding the court in the exercise of its discretion under this section, viz., that the court should not grant a re-hearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the judge when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the power to appeal is derived from the general

**A** maxim interest reipublicæ ut sit finis litium, and the maxim should not be extended beyond the limit of its utility. When litigants have gone to trial and the court has decided between them, it is inexpedient that the defeated party should be allowed to re-open the litigation at any distance of time when the position of the parties may have been materially affected by the lapse of time or the loss of material evidence. In such a case as this, however, when the refusal of

**B** the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected. No one is affected by the modification or remission of such an order except the bankrupt himself and to some extent society at large, which is benefited by the infliction of a punishment just in proportion to its justice and necessity, and is, therefore,

**C** injured and not benefited by the continuance of a punishment after the necessity for it has ceased.

I entertain no doubt that the judge was at liberty to hear an application to review the order of Oct. 31, 1884, if he thought a *prima facie* case was made out for such an indulgence. What then ought to be done in this case in which the application for a review was abandoned? We are told that it was abandoned

**D** because it was supposed (as it seems to me wrongly) that an application for a review could only be founded on evidence which might have been before the court on the original application. I see nothing at all in the section itself to warrant this limitation. If the counsel for the bankrupt thought that this was the conclusion to be drawn from any expressions of mine in *Re Lloyd, Ex parte Lloyd* (1), I regret that I should have expressed myself in a way capable of misconstruction.

**E** The learned judge seems to have discussed the merits of the case in order that we might consider it upon the merits if we were of opinion that he had power to hear the application, and, as I think he had the power to re-hear his former decision of Oct. 31, 1884, I do not see why we should not proceed to deal with the case at once, instead of sending the bankrupt to renew his application for a re-hearing, which would occasion considerable expense to all parties without any

**F** corresponding advantage.

The learned judge says he should have refused the application, even if he had thought he had the power to re-hear it, on the ground that the new facts did not bring the case (to use the judge's words) within the conditions sketched by me in *Lloyd's Case* (1). If the judge will look at that case again, I think he will see that I sketched no conditions whatever, but was simply giving an instance by way

**G** of illustration, and I should be very sorry to lay down beforehand the judge's discretion as to the circumstances which might seem to him sufficient to induce him to vary his refusal of the discharge.

In this particular case we are not informed which brother was the elder; but I think that, as counsel for the official receiver has suggested, we may not

**H** unfairly assume from the position of the names in the firm that the applicant was the younger, and we know that he had not been in difficulties before, as the other brother had been. His conduct since the bankruptcy appears, as the judge says, to have been creditable. He has worked hard, held some responsible positions, lived on a narrow income, and not incurred any debts. He has also rendered to the official receiver every assistance in getting for the creditors a

**I** sum of £2,680, which came to him under his mother's marriage settlement. It does not appear which of the brothers was the leading spirit in the partnership affairs, but at first, at all events, the present appellant seems to have been more moderate in his drawings than his brother.

Upon the whole, and having regard to the scale of punishment which has been adopted under the Act of 1883, I am of opinion that a suspension of the applicant's discharge for nearly seven years is a sufficient punishment, and that he should now have his discharge. As, however, the appellant has adopted the wrong mode of procedure, and only succeeds in getting his discharge by our indulgence,



he must pay his own costs. The official receiver will take his costs out of the deposit. A

*Appeal allowed.*

Solicitors: *Whitley & Co.*, Liverpool; *Solicitor to the Board of Trade.*

[Reported by WALTER B. YATES, ESQ., Barrister-at-Law.] B

## PONTING v. NOAKES AND OTHERS

[QUEEN'S BENCH DIVISION (Charles and Henn Collins, JJ.), April 10, 11, 26, 1894]

[Reported [1894] 2 Q.B. 281; 63 L.J.Q.B. 549; 70 L.T. 842; 58 J.P. 559; 42 W.R. 506; 10 T.L.R. 444; 38 Sol. Jo. 438; 10 R. 265] D

*Negligence—Dangerous thing left within reach of public—Yew tree belonging to defendant near boundary—Leaves eaten by horse pastured in neighbouring field when trespassing on defendant's land—Liability for horse's death.*

The plaintiff's horse was fatally poisoned by eating the leaves of a yew tree growing upon land of the defendants adjoining the plaintiff's field in which the horse pastured. No part of the yew tree projected over the plaintiff's land, but some branches could be reached by the horse stretching its neck over a ditch which belonged to the defendants and divided their land from the plaintiff's field. No duty on the part of the defendants to fence their land from the plaintiff's cattle was proved. In an action by the plaintiff for the value of the horse, E

**Held:** in the absence of any intention to injure the plaintiff's horse by placing something in the nature of a trap for him, the defendants were not liable for injury sustained by the horse through its own wrongful intrusion. F

*Fletcher v. Rylands* (1) (1866), L.R. 1 Exch. 265, distinguished. G

**Notes.** Followed: *Lowery v. Walker*, [1909] 2 K.B. 433. Considered: *Cheater v. Cater*, [1917] 2 K.B. 516. Distinguished: *Read v. J. Lyons & Co.*, [1944] 2 All E.R. 98. Referred to: *Latham v. Richard Johnson & Nephew*, [1911-13] All E.R.Rep. 117; *Read v. J. Lyons & Co.*, [1945] 1 All E.R. 106.

As to trespass by animals, see 1 HALSBURY'S LAWS (3rd Edn.) 668 et seq.; and for cases see 2 DIGEST (Repl.) 88 et seq. H

Cases referred to:

- (1) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 14 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356. I
- (3) *Firth v. Bowling Iron Co.* (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 26 W.R. 558; 2 Digest (Repl.) 303, 104.
- (4) *Crowhurst v. Amersham Burial Board* (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95; 2 Digest (Repl.) 90, 545.
- (5) *Wilson v. Newberry* (1871), L.R. 7 Q.B. 31; 41 L.J.Q.B. 31; 25 L.T. 695; 36 J.P. 215; 20 W.R. 111; 2 Digest (Repl.) 90, 547.

- A** (6) *Deane v. Clayton* (1817), 1 Taunt. 489; 1 Moore, C.P. 203; 2 Marsh. 577; 129 E.R. 196; 2 Digest (Repl.) 375, 517.
- (7) *Jordin v. Crump* (1841), 8 M. & W. 782; 11 L.J.Ex. 74; 5 Jur. 1113; 151 E.R. 1256; 2 Digest (Repl.) 375, 518.
- (8) *Bird v. Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry.M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, 808.
- B** (9) *Barnes v. Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, 1100.
- (10) *Townsend v. Wathen* (1808), 9 East, 277; 103 E.R. 579; 2 Digest (Repl.) 375, 522.
- (11) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187.
- C** (12) *Ellis v. Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, 158.
- (13) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.

**D** **Appeal** by the defendants from a decision of the deputy judge in the Andover County Court in favour of the plaintiff for £22, the value of a horse which was poisoned by eating a yew tree growing on the defendants' land.

*Horace Browne* for the defendants.

*T. W. Chitty* and *Newbolt* for the plaintiff.

April 26, 1894. The following judgments were read.

**E** *Cur. adv. vult.*

**CHARLES, J.**—This was an appeal from a verdict and judgment for the plaintiff given at Andover County Court for £22, being the value of a colt of the plaintiff which was alleged to have been poisoned by eating the defendants' yew tree. The grounds of the appeal were, first, that there was no evidence to go to the **F** jury that the colt had in fact eaten of the yew tree of the defendants; and, secondly, that if there was, the colt had eaten the yew leaves under circumstances which entailed no legal liability on the defendants.

The plaintiff was a farmer, and occupied a field separated from the premises of the defendants by a fence. On the side of the fence next to the plaintiff's field was a ditch belonging to the defendants. On the defendants' land near the fence **G** grew a yew tree, the branches of which projected over the ditch, but not beyond it. They did not overhang the plaintiff's field. At the distance of about 120 yards grew another yew tree in the garden of one Hunt, which overhung the plaintiff's field, and in the hedge of the plaintiff's field, about fifty yards from the defendants' yew, there was a small yew bush. On June 25, 1893, the colt and several other horses were in the plaintiff's field. On June 26 the colt was **H** found dead five yards from the defendants' yew, and there was no doubt, from the examination made of the body, that it had died from eating yew leaves. All the three trees—the defendants', Hunt's, and the plaintiff's yew bush—presented appearances of having been recently eaten. A veterinary surgeon stated that it was a fact within his knowledge that horses have been known to walk a mile after eating yew before dying, and then to drop down dead. Such a case, however, **I** would be, he said, exceptional. The animal most often drops down dead directly after eating, or within a short distance.

Upon this evidence the judge was asked to direct a verdict for the defendants, on the ground that there was no evidence pointing to the colt having eaten of the defendants' yew. It was equally consistent, it was said, with the colt having eaten either of Hunt's yew tree or the plaintiff's yew bush. The judge, however, thought there was a case for the jury, and they found that the colt had eaten of the defendants' tree, and not of the other trees. I have, after some hesitation, come to the conclusion that there was some evidence to support this finding,

having regard in particular to the evidence of the veterinary surgeon. The defendants' yew had been freshly eaten, and the most common case is that death ensues directly. The colt was found only five yards from the tree, and the two other possible causes of mischief were respectively 120 and fifty yards off.

This being the view I take of the evidence, it becomes necessary to consider the second point. The poisonous tree was admitted to be wholly on the defendants' land, but, inasmuch as it was so near to the boundary that an animal could easily reach the branches, it was contended that the principle of *Fletcher v. Rylands* (1) was applicable. But this argument appears to me to rest on a misconception of what that case really decided. The decision only refers to the escape from a defendant's land of something which he has brought there, and which is likely to do mischief if it escapes. In delivering the judgment of the Exchequer Chamber, BLACKBURN, J., laid down the true rule of law in words expressly approved and adopted in the House of Lords, as follows (L.R. 1 Exch. at p. 279):

"The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Various illustrations are then given, in all of which the cause of offence was "not kept in" by the defendant. Thus the person whose grass is eaten by the escaping cattle of his neighbour, whose mine is flooded by water from his neighbour's reservoir, whose cellar is invaded by filth from his neighbour's privy, or whose habitation is made unhealthy by vapours from his neighbour's factory, has in each case legitimate ground of complaint. To use the language of the court in *Tenant v. Goldwin* (2) (1 Salk. at p. 361): "He whose dirt it is must keep it that it may not trespass."

Many other cases might be referred to illustrative of the rule. In all of them, however, it will be found that the noxious thing, be it "beasts, water, filth or smells," or what not, has somehow escaped from the defendant's land. Thus in *Firth v. Bowling Iron Co.* (3), the defendants' predecessors had fenced their land with wire rope, which the defendants allowed to remain. From long exposure the strands of the wire composing the rope became decayed, and pieces of it fell on the plaintiff's adjoining pasture. One of his cows swallowed a piece, and died in consequence. The defendant was held liable to compensate the plaintiff. So, again, where the defendants planted on their own land a yew tree which projected over the plaintiff's land, and the plaintiff's horse ate of it and died, the defendants were held liable: see *Crowhurst v. Amersham Burial Board* (4). On the other hand, in a case where the declaration merely charged that "the defendant was possessed of yew trees, the clippings of which he knew to be poisonous," it was held that such an allegation of fact did not support a duty to take care to prevent the clippings from being put upon his neighbour's land where horses and cattle might eat them: see *Wilson v. Newberry* (5).

The rule of law enunciated in *Fletcher v. Rylands* (1) I think therefore has no application, and I proceed to consider whether upon any other ground the defendant's liability can be made out. Can it be said that there is any duty on a man either not to grow a poisonous tree so near the boundary of his property as to be easily accessible to the stock of his neighbour, or, if he does so, to take precautions to prevent any danger to the stock arising? Here it must be remembered that no liability on the part of the defendants to fence against the cattle of his neighbour was proved. Had any such liability been shown to exist, and had the fence been defective, it might well have been found by the jury that the colt had obtained access to the defendants' land through breach of his obligation to fence, and, the poisonous tree being immediately within the fence, that the eating of its leaves by the colt was the natural consequence of the defendants' breach of duty; but, there being no liability on the part of the defendants to repair the fence, I do not see that they can be made responsible for the eating of these yew



**A** leaves by an animal which, in order to reach them, had come upon his land. The hurt which the animal received was due to his wrongful intrusion. He had no right to be there, and his owner therefore has no right to complain.

The true test in such a case is pointed out by GIBBS, C.J., in *Deane v. Clayton* (6) (7 Taunt. at p. 533), in a judgment which was emphatically approved by the Court of Exchequer in *Jordin v. Crump* (7), though on the facts proved in *Deane v. Clayton* (6) the court was equally divided as to what judgment should be entered. We must ask, he says, in each case, whether the man or animal which suffered had or had not a right to be where he was when he received the hurt. If he had not, then—unless, indeed, the element of intention to injure, as in *Bird v. Holbrook* (8), or of nuisance, as in *Barnes v. Ward* (9), is present—no action is maintainable.

**C** It was, however, urged that there was here something in the nature of a nuisance, and that the growing of this yew tree so near the boundary was actionable in case damage was caused by it, on the same ground as that on which *Townsend v. Wathen* (10) was decided. It was there held that if a man places traps baited with flesh on his own ground so near to the premises of another that dogs kept on his neighbour's premises must probably be attracted by their instinct into the traps, and if in consequence his neighbour's dogs are so attracted and are injured, **D** an action lies. But no evidence whatever was offered in this case that the yew trees could be regarded as a trap in this sense to the plaintiff's horses, and, in the absence of any such evidence, it was, I think, the plaintiff's business to keep his horses from going too near the tree, and not the defendants' duty to take any precautions against their doing so. In the result, therefore, I think that this appeal must be allowed and judgment entered for the defendants with costs.

**E** **HENN COLLINS, J.**—I agree entirely with CHARLES, J. The yew tree in question was wholly within the defendants' boundary; therefore it seems clear that the principle of which *Fletcher v. Rylands* (1) is an instance has no application to this case. The principle there stated (L.R. 1 Exch. at p. 279) was that:

**F** "The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril."

That case, as is pointed out by MELLOR, J., in *Wilson v. Newberry* (5) was decided on the analogy of *Tenant v. Goldwin* (2) (1 Salk. at p. 361), where it was said: "He whose dirt it is must keep it that it may not trespass." Here there has been no escape or trespass of anything kept by the defendants, and, if they are liable at **G** all, it must be for not taking precautions to prevent the plaintiff's cattle from getting access to the defendants' yew tree on the defendants' own premises—in other words, for negligence. I should add that there was no evidence of any obligation on either party to maintain the fence for the benefit of the other, and the case may be treated, therefore, as if there had in fact been no fence.

**H** What, then, was the duty cast upon the defendants the breach of which grounds this action? Counsel for the plaintiff contended that the owner of anything capable of attracting cattle and dangerous to them if they yielded to the attraction was bound to use reasonable care to prevent them getting access to it. Does such a duty exist? I think not; and counsel was not able to produce any authority which went near to establish it. The point might have arisen in *Crowhurst v. Amersham Burial Board* (4). There a horse had died from eating of a yew tree **I** growing on defendant's land, and the Case as originally stated by the county court judge left it doubtful whether the death was caused by eating portions of tree which projected over the plaintiff's land, or portions on the defendant's own land which the horse was able to reach by stretching its neck over the intervening fence. The court, however, sent the Case back to be re-stated, and it was then found as a fact that the horse died exclusively from the effects of eating portions which projected over the plaintiff's land, and the Case was accordingly decided in favour of the plaintiff on the authority of *Fletcher v. Rylands* (1). The court, therefore, evidently thought that different considerations might apply to the two sets of facts.

Again, in *Firth v. Bowling Iron Co.* (3), it was not suggested that liability could be established if the cattle had died from eating wire which had fallen on the defendant's side of the fence, and this case also was brought under *Fletcher v. Rylands* (1). What, then, are the duties towards strangers of a man who keeps a dangerous thing on his own ground? There was not much evidence on the point, but it was assumed in argument, and I treat it as established, that a yew tree is a dangerous thing—i.e., it may be injurious if eaten by horses. It is, however, lawful and usual, as pointed out by KELLY, C.B., in *Crowhurst v. Amersham Burial Board* (4), to plant yew trees near fences. Though possibly dangerous, therefore, under some circumstances, there is nothing unlawful in a yew tree so planted. Further, the danger, such as it is, is obvious; it does not constitute a trap. Is the person who keeps such a thing upon his own land liable to a stranger for loss happening to the cattle of the latter while straying on such person's land without his permission? It seems quite clear on the authorities that he is not. *Jordin v. Crump* (7) is decisive on this point. There the facts admitted on demurrer were that, while the plaintiff was walking on a public footpath running across the defendant's close, his dog in chasing a rabbit on the defendant's land ran against a dog spear concealed in the bushes not far from the path and was killed. The plaintiff had notice of the existence of dog spears on the defendant's ground. ALDERSON, B., in giving the judgment of the court in favour of the defendant, adopts the reasoning of GIBBS, C.J., in *Deane v. Clayton* (6). He says (8 M. & W. at p. 788):

"The present case is much stronger than that, for here the plaintiff had express notice that dog spears were set in the wood, though, were this even otherwise, our decision would still be in favour of the defendant on the short ground that the setting of them was a lawful act, and the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the footpath."

Unless the fact that the yew tree was close to the fence makes a difference, this authority seems conclusive that the defendants are not liable, if the yew tree be regarded merely as a dangerous thing, like a dog spear, not having in itself the additional element of tempting a trespasser. It seems quite clear, however, that the principle cannot be affected by the distance from the defendants' boundary. It was the duty of the plaintiff to keep his horse from trespassing, and not of the defendants to guard against the consequences of such trespass. Such duty is clear, and the plaintiff might have been liable to the defendants, for damage done by his horse, while so trespassing, to the land of the latter: see *Cox v. Burbidge* (11); *Ellis v. Loftus Iron Co.* (12). Does it, then, make any difference that a yew tree is likely to tempt a horse to trespass? I think not, unless it were proved that it was put or kept there for the purpose of enticing the animal to his destruction, as was done in *Townsend v. Wathen* (10). The wrongful intention was the gist of that action. If such intention is disproved, it follows, if the above reasoning is correct, that there can be no liability. Indeed, the very point is put as an illustration by GIBBS, C.J., in *Deane v. Clayton* (6), where he takes the case of water in which a plaintiff has no right polluted by the act of the defendant and drunk by the plaintiff's cattle, who reach it through a trespass on the defendant's land. He says (7 Taunt. at pp. 531, 532):

"Their right to be there is the gist of the action, and in no instance has such an action been supported where cattle had no right to be in the place in which they received the damage unless the defendant had used some undue means to entice them thither, as in *Townsend v. Wathen* (10), which stands upon a distinct ground."

It is obvious that water might have just as great an attraction for cattle as a yew tree.

The result may be summarised by saying the action is one of negligence, and the possession of something attractive and injurious to cattle casts no duty on

A the owner to take precautions against their trespassing in pursuit of it when he has not placed or kept it there with that purpose. As already pointed out, a yew tree near a fence is a lawful and usual thing, and it would be strange if the owner should find himself fixed with varying obligations in respect thereof according to the varying uses to which the adjoining owner chose to put his land.

B Lastly, it was suggested that the analogy of such a case as *Lynch v. Nurdin* (13) might apply, and that as in that case a defendant who had left his cart and horse in a highway where he had a right for the time being to place them was held liable for injury to a child who trespassed upon it in his absence, so here the defendants might be liable for not taking precautions to prevent the horse getting access to the tree. The cases, however, differ in a crucial point. There the cart was left in a public highway, where the children and the plaintiff had an equal right to be; and the children were not trespassers before they got into the cart. C If the plaintiff had licensed the defendants to carry his yew tree across the plaintiff's field, and the defendants while doing so had left it unguarded, and while so left the horse had eaten it, the cases would be more nearly parallel. So of the case put during the argument, of a poisonous drug exposed in a very tempting shape in an open shop-front beside a highway within reach of a child, who, being tempted, D ate it and was injured. If an action could be maintained in such a case, it would, I think, be only on the analogy of those cases which decide that the person who makes or keeps a pitfall so near the highway as to be a danger to persons passing along it is responsible in damages to a passenger along the highway who accidentally falls into it (see *Barnes v. Ward* (9)), the child obeying its instinct being regarded as in the same position as a person who without negligence falls off the highway E into the pitfall. Those cases rest on the special duty incident to the occupation of property adjoining a highway, and have no application to a case where the question is merely between the occupiers of adjoining land; and, even if the duties were identical, the danger in the illustration is concealed, while in the case of the yew tree it is obvious. I think, therefore, that judgment ought to be entered for the defendants.

Solicitors: *Stocken & Jupp*, for Godwin, Winchester; *Peacock & Goddard*, for Longman, Andover.

[Reported by G. H. GRANT, ESQ., Barrister-at-Law.]



## DUCK v. MAYEU

[COURT OF APPEAL (Lord Esher, M.R., Bowen and A. L. Smith, L.JJ.), June 23, July 25, 1892]

[Reported [1892] 2 Q.B. 511; 62 L.J.Q.B. 69; 67 L.T. 547;  
57 J.P. 23; 41 W.R. 56; 8 T.L.R. 737; 4 R. 38]

*Tort—Joint tortfeasors—Agreement not to sue one tortfeasor—Effect on liability of other tortfeasor.*

A covenant not to sue one of two joint tortfeasors does not release the other.

The plaintiff had the sole right to present a certain play. To raise money for charity, W. employed the defendant to arrange for a company to act the play, but he omitted to pay for the plaintiff's licence permitting that to be done. When this was discovered it was arranged between the plaintiff's solicitors and W. that W. should be discharged from any liability he had incurred on payment of two guineas. The plaintiff's solicitors wrote to W. acknowledging the receipt of that sum "in full discharge of your personal liability," and stating that that was without prejudice to the plaintiff's claim against the defendant. In an action brought by the plaintiff against the defendant the defendant alleged that the letter amounted to a release of W., and, as a joint tortfeasor with him, she was also released.

**Held:** the letter amounted to a covenant not to sue A. and not to a release, and, therefore, the defendant was not entitled to release.

**Notes.** Applied: *Apley Estates Co. v. De Bernales*, [1947] 1 All E.R. 213.

As to the effect of release of joint tortfeasors, see 37 HALSBURY'S LAWS (3rd Edn.) 137; and for cases see 42 DIGEST 978.

Cases referred to:

- (1) *Cocke v. Jennor* (1614), Hob. 66; 80 E.R. 214; 42 Digest 978, 90.
- (2) *Hutton v. Eyre* (1815), 6 Taunt. 289; 1 Marsh. 603; 128 E.R. 1046; 12 Digest (Repl.) 575, 4412.
- (3) *Price v. Barker* (1855), 4 E. & B. 760; 24 L.J.Q.B. 130; 25 L.T.O.S. 51; 1 Jur.N.S. 775; 3 C.L.R. 927; 119 E.R. 281; 7 Digest (Repl.) 238, 760.
- (4) *Bateson v. Gosling* (1871), L.R. 7 C.P. 9; 41 L.J.C.P. 53; 25 L.T. 570; 20 W.R. 98; 17 Digest (Repl.) 358, 1641.

Also referred to in argument:

- Brinsmead v. Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex. Ch.; 21 Digest (Repl.) 296, 610.
- Salford Corpn. v. Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 42 Digest 978, 88.
- Willis v. De Castro* (1858), 4 C.B.N.S. 216; 27 L.J.C.P. 243; 31 L.T.O.S. 131; 6 W.R. 500; 140 E.R. 1066; 12 Digest (Repl.) 575, 4413.
- Dufresne v. Hutchinson* (1810), 3 Taunt. 117; 128 E.R. 48; 42 Digest 977, 84.

**Appeal** from a decision of DAY, J., at the trial of the action without a jury.

The plaintiff had the sole liberty of representing a play called "Our Boys," and brought the present action against the defendant for a penalty or for damages under the Dramatic Copyright Act, 1833 [repealed], for representing the play, or causing it to be represented, without the plaintiff's consent in writing first had and obtained. The Rev. Freeman Wills, in order to raise money for charitable purposes, employed the defendant, Miss Mayeu, to arrange for a company who should act a play at Wandsworth Town Hall. He hired the room, published bills advertising the performance, and took the money at the doors, while the defendant made all the necessary arrangements for the acting of the play by the company and herself, for which she was paid three guineas. The defendant went to see the plaintiff's theatrical agent, and it was agreed that one guinea was to be paid

A by Mr. Wills for the plaintiff's licence to act the play of "Our Boys." Mr. Wills accidentally omitted to pay the guinea, and the plaintiff's licence was never given. The play was acted on Jan. 23, 1891, and after the performance it was discovered that the guinea had not been paid and that the plaintiff's licence had not been obtained. The plaintiff's solicitor wrote to Mr. Wills and demanded payment of five guineas, but it was afterwards arranged between them that on payment by B Mr. Wills of two guineas he should be discharged from any liability he had incurred through the performance of the play. Mr. Wills sent to Mr. Tilson, the plaintiff's solicitor, a cheque for two guineas, and in reply received the following letter :

C "To the Rev. Freeman Wills, 28, Sun Street, Finsbury Square, April 10, 1891.—Dear Sir,—'Our Boys'—I beg to acknowledge receipt of yours of the 9th, with cheque for £2 2s. enclosed in respect of fee and costs in full discharge of your personal liability in connection with Miss Marie Mayeu's performance of above at Wandsworth Town Hall, on Jan. 23, 1891. This is of course without prejudice to my client's claim against Miss Mayeu.—Yours faithfully, W. M. Tilson."

D At the trial of the action, before DAY, J., without a jury, the learned judge gave judgment for the plaintiff for forty shillings. The defendant appealed.

*Brook Little* for the defendant.

*Morton Smith* for the plaintiff.

*Cur. adv. vult.*

E July 25, 1892. A. L. SMITH, L.J., read the following judgment of the court.—The first point for determination is, whether the defendant has established her defence, that the plaintiff had released her joint tortfeasor, the Rev. Mr. Wills, from a joint cause of action so as to release her therefrom, or whether what she has established is merely that the plaintiff had covenanted not to sue Mr. Wills.

F It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. *Cocke v. Jennor* (1) is distinct upon the point, and there are many subsequent cases to the same effect. It has also been held that a covenant not to sue one of two joint debtors does not operate as a release of the other joint debtor (*Hutton v. Eyre* (2)), the reason being that the joint action is still alive. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor; and in our judgment the principle upon which it has been held that such a covenant does not release a joint debtor applies to the case of a joint tortfeasor.

G The question then is, does the document of April 10, 1891, operate as a release of the joint cause of action against Mr. Wills and the defendant, or only as a covenant not to sue Mr. Wills? It is as follows: [Hrs LORUSHIP read the letter written by Mr. Tilson, the plaintiff's solicitor, and continued:] A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price v. Barker* (3), where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In *Bateson v. Gosling* (4) at nisi prius the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the Court of Common Pleas. For these reasons I we are of opinion that the document of April 10, 1891, is a covenant not to sue,

and is not a release of the joint cause of action, and that the defendant's defence fails in fact. In our judgment this appeal must be dismissed, and with costs.

*Appeal dismissed.*

Solicitors: *W. M. Tilson; Steadman, Van Praagh & Sims.*

[*Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.*]

## IMPERIAL LOAN CO. v. STONE

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), March 3, 1892]

[Reported [1892] 1 Q.B. 599; 61 L.J.Q.B. 449; 66 L.T. 556;  
56 J.P. 436; 8 T.L.R. 408]

*Mentally Disordered Person—Contract—Avoidance—Need for knowledge of incapacity to be known by other contracting party.*

A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity the mental incapacity of the one must be known to the other party.

**Notes.** Considered: *Leaver v. Torres* (1899), 43 Sol. Jo. 778. Applied: *York Glass Co. v. Jubb*, [1925] All E.R. Rep. 285. Referred to: *White v. White*, [1949] 2 All E.R. 339.

As to capacity of mentally disordered persons to contract, see 29 HALSBURY'S LAWS (3rd Edn.) 406; and for cases see 33 DIGEST 128 et seq.

Cases referred to:

- (1) *Beverley's Case* (1603), 4 Co. Rep. 1236; 76 E.R. 1118; 33 Digest 127, 32.
- (2) *Stroud v. Marshall* (1595), Cro. Eliz. 398.
- (3) *Molton v. Camroux* (1848), 2 Exch. 487; 18 L.J.Ex. 68; affirmed (1849), 4 Exch. 17; 18 L.J.Ex. 356; 13 L.T.O.S. 305; 154 E.R. 1107, Ex. Ch.; 33 Digest 129, 50.
- (4) *Browne v. Jodrell* (1827), 3 C. & P. 30; Mood. & M. 105, N.P.; 33 Digest 130, 59.
- (5) *Baxter v. Earl of Portsmouth* (1826), 5 B. & C. 170; 2 C. & P. 178; 108 E.R. 63; sub nom. *Bagster v. Earl of Portsmouth*, 7 Dow. & Ry.K.B. 614; 33 Digest 129, 54.
- (6) *Dane v. Viscountess Kirkwall* (1838), 8 C. & P. 679, N.P.; 33 Digest 130, 60.

Also referred to in argument:

*Harrison v. Richardson* (1835), 1 Moo. & Rob. 504.

*Lovatt v. Tribe* (1862), 3 F. & F. 9, N.P.; 33 Digest 163, 476.

*Beavan v. M'Donnell* (1854), 9 Exch. 309; 2 C.L.R. 474; 22 L.T.O.S. 243; 156 E.R. 131; 33 Digest 129, 52.

*Gore v. Gibson* (1845) 13 M. & W. 623; 14 L.J.Ex. 151; 4 L.T.O.S. 319; 9 Jur. 140; 153 E.R. 260; 12 Digest (Repl.) 43, 217.

*Niell v. Morley* (1804), 9 Ves. 478; 32 E.R. 687; 33 Digest 128, 49.

*Valentini v. Canali* (1889), 24 Q.B.D. 166; 59 L.J.Q.B. 74; 61 L.T. 731; 54 J.P. 295; 38 W.R. 331; 6 T.L.R. 75, D.C.; 28 Digest (Repl.) 508, 214.

*Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; 38 L.J.C.P. 310; 20 L.T. 887; 17 W.R. 1105; 17 Digest (Repl.) 242, 457.



- A** *Jenkins v. Morris* (1880), 14 Ch.D. 674; 42 L.T. 817, C.A.; 33 Digest 144, 216.  
*Williams v. Bayley* (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 30 J.P. 500; 12 Jur.N.S. 875, H.L.; 12 Digest (Repl.) 104, 611.  
*Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469; 38 L.T. 478; 26 W.R. 794; sub nom. *London and Provincial Marine Insurance Co. v. Davies*, *Davies v. London and Provincial Marine Insurance Co.*, 47 L.J.Ch. 511; 12 Digest (Repl.) 104, 614.
- B** *Drew v. Nunn* (1879), 4 Q.B.D. 661; 48 L.J.Q.B. 591; 40 L.T. 671; 43 J.P. 541; 27 W.R. 810, C.A.; 33 Digest 129, 53.  
*Matthews v. Baxter* (1873), L.R. 8 Exch. 132; 42 L.J.Ex. 73; 21 W.R. 389; sub nom. *Mathews v. Baxter*, 28 L.T. 169; 12 Digest (Repl.) 44, 224.

**C** **Application** by the plaintiffs for a new trial.

The action was brought upon a joint and several promissory note by the payee against one of the makers who had signed it as a surety. The defendant pleaded that at the time he signed the note he was incapacitated by insanity from understanding what he was doing, and that this insanity was known to the plaintiffs.

**D** At the trial before DENMAN, J., with a jury, the learned judge left two questions to the jury: (i) whether the defendant when he signed the note was so insane as to be incapable of understanding what he was doing; and (ii) whether this incapacity was known to the agent of the plaintiffs who was present when the note was signed. The jury found that the defendant was insane when he signed the note, but could not agree as to the knowledge of the plaintiff's agent. Upon this finding DENMAN, J., gave judgment for the defendant. The plaintiffs now

**E** applied for a new trial.

*Channell, Q.C.*, and *Le Riche* for the plaintiffs.

*Witt, Q.C.*, and *G. A. Scott* for the defendant.

**F** **LORD ESHER, M.R.**—In this case DENMAN, J., has ordered judgment to be entered for the defendant on the finding of the jury in answer to the first question put to them, and if we disagree with him as to the effect of that finding our only course will be to order a new trial.

The action is brought upon a promissory note signed by the defendant as surety, and his defence is that he was so insane at the time he signed the note as to be incapable of understanding what he was doing. The jury have found that that was a fact. In addition to that the defendant pleaded that the plaintiff knew that the defendant was in that state, and on that point the jury were unable to agree. The question, therefore, for our decision is whether the latter allegation was a necessary part of the plea, and, if so, on whom the burden of proof lies. I shall not go through all the cases from the beginning, but, as I think it would be well for this court to lay down an absolute rule, I will state my view of what is the result of all the cases. It is this. When a person enters into an ordinary contract, and afterwards alleges that he was so insane at the time he did so that he did not know what he was doing, though he proves that to be so, the contract is as binding on him in every respect and to every extent as if he had been fully sane, unless he also prove that, at the time of making the contract, the person he contracted with knew him to be so insane as not to know what he was

**G** doing. For many years it has been the law that a plea that the defendant was so insane at the time of entering into the contract that he did not know what he was doing has been held not to be a good plea, unless there was an averment of the plaintiff's knowledge of this insanity of the defendant. The necessity of this last averment could not be supported unless the law is what I have stated. The defendant must prove, besides the fact of his insanity, the fact that the plaintiff knew of it. The jury therefore in this case having disagreed and given no finding on a material part of the defendant's plea, the case must go back for

**H** a new trial.

**FRY, L.J.**—I am unable to agree with the ruling of **DENMAN, J.**, in this case. **A**  
The law of England on this point is very old. **LITTLETON**, in his treatise on  
**TENURES**, says, in s. 405 that a man shall not be received to say that he was not  
of sane memory at the time of such descent, etc.,

“pur ceo que nul home de pleine age serra resceive en ascun plee per la ley a  
destultifer et disabler le person demesne.” **B**

Again, in the well-known *Beverley's Case* (1), before the King's Bench, it was laid  
down (4 Co. Rep. at p. 1236):

“that every deed, feoffment, or grant, which any man non compos mentis  
makes, is avoidable, and yet shall not be avoided by himself, because it is a  
maxim in law that no man of full age shall be in any plea to be pleaded by **C**  
him, received by the law to stultify himself,”

and reference was made to **LITTLETON'S TENURES**. **FITZHERBERT** had before that  
taken a different view in *NATURA BREVIIUM*, but his view was held not to be law  
in *Stroud v. Marshall* (2). **COKE** refers to **FITZHERBERT'S** opinion, but he adopts  
that of **LITTLETON**, saying (Co. Lit. at p. 247b):

“and **LITTLETON** here is of opinion that neither by plea, nor by writ, nor other-  
wise, he himselfe shall avoid it, but his heire (in respect his ancestor was  
non compos mentis) shall avoid it by entrie, plea, or writ. And herewith the  
greatest authorities of our books agree; and so it was resolved with **LITTLETON**  
in *Beverley's Case* (1), where it is said that it is a maxim of the common law  
that the partie shall not disable himselfe.” **D**

Therefore, although in certain cases the Crown, and in other cases persons claiming  
under one who was non compos mentis, might set up a man's mental incapacity,  
the man could not do so himself. **E**

In *Molton v. Camroux* (3) **POLLOCK, C.B.**, says (2 Exch. at p. 502):

“On looking into the cases at law we find that in *Browne v. Jodrell* (4) **LORD** **F**  
**TENTERDEN** says:

“I think the defence [of unsoundness of mind] will not avail, unless it be  
shown that the plaintiff imposed on the defendant.”

In *Baxter v. Earl of Portsmouth* (5) **ABBOTT, C.J.**, with the concurrence of the  
rest of the court, laid down the same doctrine. In *Dane v. Viscountess Kirkwall* (6) **G**  
**PATTESON, J.**, in directing the jury, said (8 C. & P. at p. 685):

“It is not sufficient that Lady Kirkwall was of unsound mind, but you must  
be satisfied that the plaintiff knew it and took advantage of it.”

On the old rule, therefore, has been engrafted this exception, that, when a defendant  
can show himself to have been non compos mentis at the date of the contract, and  
can show also that the plaintiff knew of this fact, then, and then only, he can  
avoid his contract. That is the only exception to the old rule, as is shown by  
*Molton v. Camroux* (3). In this case, therefore, the defendant has not proved his  
defence, and, as we cannot order judgment to be entered for the plaintiff upon  
the only finding of the jury, we must order a new trial. **H**

**LOPES, L.J.**—The result of the authorities on this branch of law may, I think,  
be summed up thus. A contract made by a person of unsound mind is not voidable  
at that person's option if the other party to the contract believed at the time he  
made the contract that the person with whom he was dealing was of sound mind.  
In order to avoid a fair contract on the ground of insanity the mental incapacity  
of the one must be known to the other party. A defendant must plead and prove  
both his insanity and the knowledge of the plaintiff; the burden of proof of both **I**

those facts lies on the defendant. As he has not done so in this case, we must send it for a new trial.

*New trial ordered.*

Solicitors: *C. T. Foster; T. H. Hiscott.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## LONDON JOINT STOCK BANK v. SIMMONS

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten and Lord Field), December 14, 15, 17, 1891, April 4, 1892]

[*Reported* [1892] A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394]

*Bank*—*Advance to customer*—*Security*—*Bearer bonds*—*Pledge by agent of owner without authority*—*Title of bank to bonds.*

*Negotiable Instrument*—*Bearer bond*—*Bonds of foreign bank*—*Coupons payable to bearer*—*Passing by delivery on Stock Exchange.*

The respondent, who was a customer of a firm of stockbrokers, H. D. & Co., had left in the hands of D. for safe custody bonds of the Buenos Aires Land Mortgage Bank, of the value of 15,000 dollars. These bonds had attached to them coupons which were payable to bearer, they passed by delivery on the Stock Exchange, and they were dealt with by the bank as negotiable instruments. On Oct. 12, 1887, D., without authority from the respondent, in order to raise money for his own purposes, sold the respondent's bonds. On Oct. 28 he re-purchased similar bonds of equal value, which were entered in the books of the firm as being the property of the respondent. On the same day he deposited the bonds, with other securities, at the appellant bank as security for a loan to himself, out of which he paid for the bonds so purchased. In June, 1888, H. D. & Co. became insolvent, and the bank, who had retained the bonds in their possession up to that time, sold them, to repay themselves for the loan to D. In an action by the respondent against the bank to recover the bonds or their value,

**Held:** the bonds were negotiable instruments; when they were pledged with the bank there was, on the evidence, no circumstance to put the bank on inquiry regarding the transaction and so the bank took the bonds in good faith as well as for value; accordingly, the bank had obtained a valid title to the bonds, and the respondent's action must fail.

*Earl of Sheffield v. London Joint Stock Bank* (1) (1888), 13 App. Cas. 333, explained and distinguished.

**Notes.** Considered: *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120. Applied: *Thomson v. Clydesdale Bank*, [1893] A.C. 282. Considered: *Manchester Trust v. Furness*, [1895] 2 Q.B. 539. Distinguished: *Smith v. Prosser*, [1907] 2 K.B. 735. Followed: *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 168. Considered: *Auchteroni v. Midland Bank*, [1928] All E.R.Rep. 627; *Reckitt v. Barnett, Pembroke and Slater, Ltd.*, [1928] 2 K.B. 244. Referred to: *Redfern v. Rosenthal* (1901), 85 L.T. 313; *Molyneux v. Hawtrey*, [1900-3] All E.R.Rep. 472; *Weiner v. Gill*, [1905] 2 K.B. 172; *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52.



As to securities for advances by bankers, see 2 HALSBURY'S LAWS (3rd Edn.) 229-236; and for cases see 3 DIGEST (Repl.) 300 et seq.

Cases referred to :

- (1) *Earl of Sheffield v. London Joint Stock Bank, Ltd.* (1888), 13 App. Cas. 333; 57 L.J.Ch. 986; 58 L.T. 735; 37 W.R. 33; 4 T.L.R. 389, H.L.; 3 Digest (Repl.) 306, 961.
- (2) *Goodwin v. Roberts* (1876), 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 24 W.R. 987, H.L.; 3 Digest (Repl.) 305, 956.
- (3) *Gorgier v. Mieville* (1824), 3 B. & C. 45; 4 Dow. & Ry.K.B. 641; 2 L.J.O.S.K.B. 206; 107 E.R. 651; 6 Digest (Repl.) 419, 2959.
- (4) *Foster v. Pearson, Stephens v. Foster* (1835), 1 Cr.M. & R. 849; 5 Tyr. 255; 4 L.J.Ex. 120; 149 E.R. 1324; 6 Digest (Repl.) 131, 971.
- (5) *Fletcher v. Heath* (1827), 7 B. & C. 517; 1 Man. & Ry.K.B. 335; 6 L.J.O.S.K.B. 95; 108 E.R. 815; 1 Digest (Repl.) 394, 550.
- (6) *Cole v. North-Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, 501.
- (7) *Bank of Bengal v. Fagan* (1849), 7 Moo.P.C.C. 61; 5 Moo. Ind. App. 27; 18 E.R. 804; 1 Digest (Repl.) 349, 288.
- (8) *Gill v. Cubitt* (1824), 3 B. & C. 466; 5 Dow. & Ry.K.B. 324; 3 L.J.O.S.K.B. 48; 107 E.R. 806; 6 Digest (Repl.) 397, 2844.
- (9) *Down v. Halling* (1825), 4 B. & C. 330; 6 Dow. & Ry.K.B. 455; 3 L.J.O.S.K.B. 234; 107 E.R. 1082; 6 Digest (Repl.) 397, 2846.
- (10) *Raphael v. Bank of England* (1855), 17 C.B. 161; 25 L.J.C.P. 33; 26 L.T.O.S. 60; 4 W.R. 10; 139 E.R. 1030; 6 Digest (Repl.) 131, 968.
- (11) *Cooke & Sons v. Eshelby* (1887), 12 App. Cas. 271; 56 L.J.Q.B. 505; 56 L.T. 673; 35 W.R. 629; 3 T.L.R. 481, H.L.; 1 Digest (Repl.) 665, 2328.

Also referred to in argument :

*London and County Banking Co. v. London and River Plate Bank* (1888), 21 Q.B.D. 535; 57 L.J.Q.B. 601; 61 L.T. 37; 37 W.R. 89; 4 T.L.R. 774, C.A.; 3 Digest (Repl.) 170, 261.

*Lang v. Smyth* (1831), 7 Bing. 284; 5 Moo. & P. 78; 9 L.J.O.S.C.P. 91; 131 E.R. 109; 6 Digest (Repl.) 421, 2969.

*Jones v. Peppercorne* (1858), John. 430; 28 L.J.Ch. 158; 32 L.T.O.S. 240; 5 Jur.N.S. 140; 7 W.R. 103; 70 E.R. 490; 1 Digest (Repl.) 639, 2168.

*Jones v. Gordon* (1877), 2 App. Cas. 616; 47 L.J.Bey. 1; 37 L.T. 477; 26 W.R. 172, H.L.; 6 Digest (Repl.) 131, 974.

*Loughnan v. Barry and Byrne* (1872), I.R. 6 C.L. 457; 39 Digest 686, 0.

*Bishop v. Shillito* (1819), 2 B. & Ald. 329, n.; 106 E.R. 387; 39 Digest 517, 1334.

*Cohen v. Hale* (1878), 3 Q.B.D. 371; 47 L.J.Q.B. 496; 39 L.T. 35; 26 W.R. 680; 3 Digest (Repl.) 246, 655.

**Appeal** by the defendants, the London Joint Stock Bank, from a decision of the Court of Appeal (LINDLEY, BOWEN, and FRY, L.JJ.) reported [1891] 1 Ch. 270, H affirming a decision of KEKEWICH, J.

*Sir H. Davey, Q.C., Finlay, Q.C., and Rawlins* for the bank.

*Rigby, Q.C., Warmingtton, Q.C., and Grosvenor Woods* for the respondent.

Their Lordships took time for consideration.

April 4, 1892. The following opinions were read.

**LORD HALSBURY, L.C.**—I believe this case, when it is examined carefully, raises no question of law, though doubtless some questions raised in other cases seem at first sight to be touched by it. There is no doubt that the property which is the subject of debate (the character and quality of which I will discuss later) was at one time the property of the plaintiff. There is no doubt that the plaintiff, having left this property in the hands of a person named Delmar, one of the members of the firm of Herapath, Delmar & Co., merely for safe custody, gave

A no authority, express or implied, to Delmar to dispose of it, and there is no doubt that unless that property has been changed it is still the property of the plaintiff, and ought to be restored to him. I prefer stating the proposition in this form because, though the disposal of one set of bonds, and the re-purchase of others in their place, and their suggested appropriation as substitutes for those unlawfully disposed of, raises another question, it appears to me that the same question  
B would arise in a much simpler form, but subject to precisely the same principles of law, in the form which I have suggested. Applying myself, therefore, to the simple form in which I have suggested that the question might be raised, the first point relied on is that the property in question is, according to the law merchant, negotiable, and if passed over, even by a person who had no title, to one who received for value, in good faith, and without knowledge of the want of title in  
C his predecessor in title, a good title is made by such transfer to the innocent holder for value.

If the facts support this proposition it cannot be doubted, but first, as to the character and quality of the property itself. It consists of bonds known as "Cedulas." It seems to me here impossible to dispute that the bonds in question were negotiable instruments. I should have thought so upon the evidence, and  
D after the decision of your Lordships' House in *Goodwin v. Roberts* (2). But I should equally think so here from the course pursued at the trial. I take the statement of the facts from the judgment of BOWEN, L.J., who said ([1891] 1 Ch. at p. 294):

"An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken  
E to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negotiable so that delivery by a person who has no title confers, nevertheless, a title on a bona fide holder for value without notice. We should require either a more unqualified admission or else more conclusive evidence before we could accept the view that bonds  
F like these had become part of the currency of this country so as to have acquired the peculiar characteristics of a completely negotiable instrument. The appellants' counsel alleged that they had been misled at the trial by the form of the admission, and asked that, before we decided the case on the hypothesis that these bonds were not completely negotiable, an issue might be directed to try that question. For fear of a miscarriage of justice, we will, therefore,  
G assume in the appellants' favour and for the purpose of this case only that the documents in question had been proved to be completely negotiable instruments."

It is, to my mind, clear, therefore, that your Lordships, if any doubt remained on the question whether these bonds were or were not negotiable in the true  
H commercial sense of the term, could not decide this case without directing an issue such as the appellants' counsel demanded; in the event of your Lordships considering that the evidence and admission made at the trial of what is after all in each case a question of fact, were insufficient, it would be impossible to decide adversely to the appellants. For my own part, I do not see how, after the evidence and the admission made at the trial, it is possible to suggest that that  
I matter of fact is left in doubt.

The remaining part of the proposition is, as I have said, equally a question of fact. Did the bankers receive these bonds in good faith, and, though it is almost involved in that proposition, without any reason to suppose that the person from whom they received them had no right to so dispose of them? I am of opinion that they did. There is not, to my mind, the least reason to suppose that the bank did not take these bonds in the ordinary course of business, and with a full belief that the person from whom they received them was either the owner or had full authority to deal with them.

The Court of Appeal appear to have been much influenced by the decision of your Lordships' House in *Earl of Sheffield v. London Joint Stock Bank, Ltd.* (1). The first observation that I would make is that if, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another. The only question of law decided in the *Earl of Sheffield's Case* (1) was that a purchaser, even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell—no very novel principle of law, nor one upon which I should think much doubt could exist. The second observation I make is that in this case the claim is to take from the bankers the securities they have received without paying what had been advanced upon them. In the *Earl of Sheffield's Case* (1) no one doubted that the bankers were entitled to receive the amount which had in fact been authorised by the owner of the securities to be raised upon them. But the cardinal distinction between the two cases is that in this case, upon the facts proved, I am of opinion that the bankers were under the full belief and conviction that the bonds were being lawfully dealt with, whereas in the *Earl of Sheffield's Case* (1) I thought (and I believe those of your Lordships who were parties to that judgment thought also) that the bank had actual knowledge that the person pledging them had only a limited authority to raise money upon them. And although it was also considered that the bank sincerely believed that, as a matter of law, that gave them a right to hold the securities for advances made beyond that limited amount, your Lordships held that the mistake of the bankers as to the matter of law did not cure the effect of their knowledge of the fact that the person to whom they advanced the money was exceeding the limit of his authority. In expressing my opinion in the *Earl of Sheffield's Case* (1) I said (13 App. Cas. at p. 341):

"But I do not believe Mozley's business could have lasted a month if the banks had not allowed this system to continue by exchanging securities. Mozley was, as he says himself, entitled to pledge them to the extent to which he had advanced money upon them, and the conclusion I draw from the facts proved is that the banks knew very well the system of money-lending pursued by Mozley, and trusted to him that he would not over-pledge, so to speak, the securities of his customers. Otherwise the very first security refused to Mozley's customer upon his tendering the amount advanced upon it, would have brought the whole business to a very speedy end. If this is the true view of the facts, it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire."

LORD WATSON said (*ibid.* at p. 343):

"In my opinion the character of the transactions between the respondents and Mozley was, of itself, sufficient to notify to them that his interest was limited. The bank officials, when examined before the judge of first instance, substantially admitted that they knew that the bulk of the securities lodged by Mozley were those of his customers; and apart from the admission, it is a matter of plain inference that they must have had that knowledge."

LORD MACNAGHTEN said (*ibid.* at p. 348):

"The banks knew that the person who dealt with them as owner was not acting by right of ownership."

LORD BRAMWELL, though he was careful to disclaim an absolutely accurate definition of what was notice of the infirmity of the title, indicated, in his opinion (*ibid.* at p. 346), that at the same time the banks lent their money, they had

"notice of the infirmity of the pledgor's title or of such facts and matters as made it reasonable that inquiry should be made into such title."



A He added that the definition was probably incomplete, but sufficient for the case he was then deciding.

Assuming all your Lordships who were parties to that decision to have been right in your view of the facts, and I certainly see no reason to doubt the conclusion at which I, in common with your Lordships arrived, it is obvious to ask: What new principle of law is it possible to suggest was there laid down? It is manifest  
B there was none. When I turn from the facts proved in the *Earl of Sheffield's Case* (1) to the case now before your Lordships (although I must make a protest that it is not a very profitable inquiry to consider whether one case resembles another in its facts), I am of opinion that every one of the elements relied upon in that case to show the knowledge of the bank of the infirmity of the title is absent here. I can find no trace of any such course of business brought home to the knowledge  
C of the bankers as would give them the least suspicion that their clients had not full authority to deal as they were dealing with the securities in their hands. I observe the question was plainly put by counsel for the bank to one of the witnesses, who was asked whether there was a custom on the Stock Exchange for brokers to make one client's bonds or stocks security for another client's debt, and the answer was—No. It was then put that if the securities of ten clients were  
D brought en bloc to the bank to borrow £10,000, the effect might be to make one client's property the security for money borrowed for another; the witness disclaimed any suspicion of any such transaction, and I confess I cannot share the view that KEKEWICH, J., took of the re-examination. Counsel for the respondent asked, in substance, whether the banks did not suppose that they were dealing with honest men, obviously suggesting, to my mind, that it would be dishonest for  
E Mr. A. to make Mr. B. security for Mr. A.'s loan. KEKEWICH, J., seems to have been under the impression that relying on the broker's honesty did not alter the result. But, to my mind, it makes the whole difference. If there are £10,000 borrowed, and ten different clients' securities, what is there to tell the bank, or to suggest to the bank, that the ten clients had not each either a joint interest in the £10,000, or a several interest, which their several property justifies the broker  
F in pledging? I do not, of course, mean to suggest any such mental process on the part of the broker as that he should be supposed to be appropriating only such part of the deposited securities as would properly be pledgeable to each individual customer, but what appears to me very clear is that there is nothing in the nature of the transaction, nothing in the position of broker and customer respectively which makes it a reasonable inference that the broker was exceeding his authority, or, indeed, that there was anything which could be reasonably supposed to raise  
G a doubt on the subject.

The inferences derived from the business carried on by the money-lender in the *Earl of Sheffield's Case* (1) were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit  
H securities. The deposit of securities as "cover" in a broker's business is as well known a course of dealing as anything can possibly be, and the phrase that they are deposited en bloc seems to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the  
I broker's authority was applied to each individual security by his own client. It would, therefore, to my mind, be as totally different from the facts proved or inferred in the *Earl of Sheffield's Case* (1) as anything could well be. I do not think that in that case any countenance was given to the notion that because Mozley, the money-lender, was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt. To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in the

*Earl of Sheffield's Case* (1) could justify so novel an idea. The broad proposition laid down by ABBOTT, C.J., in *Gorgier v. Mieville* (3) (3 B. & C. at p. 47) that a negotiable instrument by delivery to any person holding it gives a good title to any person honestly acquiring it, seems to me to be decisive of this case. The property in question, for reasons I have already given, was, or must be presumed to be, negotiable. I think there was nothing in the evidence to raise a doubt that it was honestly acquired by the bank, and I am therefore of opinion that the judgment of the Court of Appeal should be reversed. A B

**LORD WATSON.**—I concur in the opinion which has been read by the Lord Chancellor, and I shall endeavour to state shortly the considerations which induce me to differ from the decision of the Court of Appeal.

In the court below, as at your Lordships' Bar, three questions were discussed. Were the Cedula bonds for 15,000 dollars, deposited by Delmar with the appellant bank, on account of his firm, the property of the respondent? Were those bonds negotiable instruments? Lastly, if the bonds belonged to the respondent, and were negotiable, is the bank, in a question with the respondent, entitled to retain them? I am prepared to answer the first of these questions in the affirmative. I am of opinion with BOWEN, L.J., and for the same reasons, that the bonds, before they were taken to the bank on Oct. 20th, 1887, had been appropriated to the respondent, in substitution for his original bonds of the same amount, which Delmar had previously disposed of without authority. The second question must also, in my opinion, be answered in the affirmative. Each bond, according to its tenor, appears to me to represent that the document will pass from hand to hand, and that any bona fide holder will be entitled to claim fulfilment of its terms from the Buenos Aires Bank, by whom it was issued. Then there is direct testimony to the effect that, on the London Stock Exchange, the bonds do pass from hand to hand by delivery only, and are treated as negotiable securities, and no attempt was made to shake that testimony either by cross-examination, or by adducing evidence to the contrary. In my opinion it necessarily follows from the negotiable character of the documents, that Delmar, who was lawfully in possession of them for a special purpose, was, nevertheless, in a position to give a valid title to any person acquiring the bonds from him in good faith, and for value, although the transaction on his part, involved a fraud upon the respondent. That is the rule of law which was laid down by PARKE, B. (following the older authorities), in *Foster v. Pearson* (4), and it met with the approval of this House in *Goodwin v. Roberts* (2). C D E F

That the appellants gave value for the bonds is not disputed, and I have not found anything in the evidence or in the circumstances of this case to suggest that they acted otherwise than in good faith. They were dealing with a broker, at that time of unblemished repute, and, seeing that brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers, I think the appellants were entitled to assume, in the absence of aught to indicate the contrary, that whether the bonds belonged to Delmar, or to a customer, he had full authority to deal with them. The real question is whether the appellants believed, at the time, that Delmar had such authority, and I see no reason to doubt that they honestly entertained that belief. G H

The Court of Appeal, whose judgment was delivered by BOWEN, L.J., seem to have held that, in point of fact, the appellants believed that Delmar had authority to raise money on the Cedula bonds in question, within the limit of their market value, but not to deposit them en bloc, together with other securities in order to raise a lump sum upon the whole. Even upon that assumption I should have given judgment for the appellants. They were, in my opinion, clearly entitled to retain the bonds for the amount which Delmar had apparent authority to borrow. I may observe that in the case where the true owner authorises a specific chattel to be impledged for its market value, he might suffer prejudice, and it would be an excess of the authority which he gave, to deposit it as part security for a larger sum. I doubt whether the same principle applies where the authority relates, I

A not to a specific chattel, but to negotiable securities which are the subject of traffic upon the Stock Exchange. In that case it appears to me to be immaterial to the true owner whether his securities are pledged by themselves for their full market value, or are deposited with other securities in order to cover an advance beyond that value.

B The learned judges in the courts below do not appear to have accepted the judgment of this House in *Earl of Sheffield v. London Joint Stock Bank* (1) in the same sense in which it has been regarded here with reference to that case. I can only say that it certainly was not my intention to apply any other rule to its decision than that which was laid down in *Foster v. Pearson* (4). But I was satisfied, upon the evidence before us, that the banks concerned had such notice and knowledge of the limited title of their pledgor as made it inconsistent with fair C mercantile dealing that they should retain Lord Sheffield's securities for any sum beyond the extent of the pledgor's interest.

LORD HERSCHELL stated the facts and continued: I do not propose to enter upon the inquiry whether the plaintiff can establish a title to the bonds deposited with the bank, for, in the view which I take of the case, it is unnecessary to do D so. I shall assume, for the purpose of my opinion, that these bonds were the property of the plaintiff. The first question which arises, and, to my mind, a cardinal one, is: Are these bonds negotiable instruments? The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in E the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them even F when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them. I shall advert hereafter to the conditions which are requisite in order to render the title of one who takes a negotiable instrument valid as against the true owner; but I dwell for the moment on the distinction to which I have called attention, because it is obvious that the facts to be proved by any one seeking to retain property he has obtained as against G the person in fraud of whom it has been delivered to him, will differ essentially according as that property is or is not a negotiable instrument.

At the trial of the action, evidence was given on behalf of the bank that Cedula bonds are commonly dealt with on the Stock Exchange. On the question being put: "Are they dealt with as negotiable securities?" the learned judge intervened with the observation: "There is no dispute about that," on which the learned H counsel for the plaintiff said: "I do not want to make that admission." The question was then put and answered in the affirmative. There was no cross-examination by the plaintiff's counsel directed to this point, nor was any testimony adduced to the contrary. Having regard to the evidence thus given as to the nature of the bonds, and to the decision of this House in *Goodwin v. Roberts* (2) I can entertain no doubt that these Cedula bonds are negotiable instruments within I the purview of that decision.

The question then which presents itself is whether the appellants who are in possession of negotiable instruments which were delivered to them, I will assume, in fraud of the plaintiff, the true owner, can make good their title to them? That they became owners for value is not disputed. Nor is it disputed that they took with full honesty of purpose. The allegation in the statement of claim is as follows:

"The bank knew and had notice not only from the general course of business hereinbefore referred to, but from the particular transactions between them and



the plaintiff's brokers, that the securities deposited with them by the plaintiff's brokers were the securities of the customers of such brokers, and in the belief that the brokers who brought them made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank, and relying on the integrity of the brokers the defendant's bank from time to time made, and continued to make advances to the brokers on such securities as the brokers from time to time deposited with them."

Applying this allegation to the transaction under consideration, it would be impossible to conceive a more unequivocal admission that the appellants acted in complete good faith in taking the bonds in question. But the statement of claim goes on to allege that the bank

"made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities, or otherwise."

It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that the respondent relies. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming that for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt and as to the authority which he possessed, and that having made no such inquiry they obtained as against his principal no better title than he had. It was admitted that anyone buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the proposition that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary and are not compelled in order to secure a good title for yourself to inquire into the nature of his title, or the extent of his authority. The Factors Act, 1825 [repealed by the Factors Act, 1889], which gives validity to sales and pledge by persons entrusted with the documents of title to goods, contained a proviso

"that the purchaser or pledgee had not notice by the documents, or otherwise, that the seller or pledgor was not the actual and bona fide owner of the goods sold or pledged; a proviso which, especially after the decision in *Fletcher v. Heath* (5) rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only:"

per BLACKBURN, J., in *Cole v. North-Western Bank* (6) (L.R. 10 C.P. at p. 367). Accordingly the legislature intervened and altered the law by the Factors Act, 1842 [repealed by the Act of 1889]. The recital is noteworthy, that

"advances on the security of goods and merchandise have become a usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto."

Under this Act a document of title to goods may safely be taken by way of pledge from one known to be an agent without any inquiry as to his authority.

It would be strange, indeed, if a negotiable instrument might not as safely be taken. Advances on the security of negotiable instruments are as usual and ordinary a course of business as advances on the security of goods and merchandise, and it is surely just as

"expedient and necessary that reasonable and safe facilities should be afforded thereto."

- A It was truly said that it was due to the act of the legislature that documents of title to goods may safely be taken by way of pledge from an agent, and that there had been no such legislation in relation to negotiable instruments. But why not? The answer, to my mind, is plain; because it never was supposed to be necessary in order to give validity to such a transaction in the case of negotiable instruments. It is admitted that in the case of a sale, legislation was not requisite, that the fact
- B that the instruments were negotiable sufficed; why not then in the case of a pledge? If the contention of the respondent is to prevail, a negotiable instrument will be less negotiable than a bill of lading, or a dock warrant; a strange conclusion surely. The truth is, in my opinion, that what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, to render the mere possession of them evidence of authority to deal with them in the ordinary
- C course of business, and to preclude the necessity of any further inquiry.

I proceed now to consider what the authorities show to be the conditions necessary to give a good title to a person taking a negotiable instrument from one who had as against the true owners no authority to transfer it. In *Foster v. Pearson* (4) PARKE, B., said (1 Cr.M. & R. at pp. 855, 860):

- D “The rule of law was long considered as being firmly established that the holder of bills of exchange endorsed in blank or other negotiable securities transferable by delivery could give a title which he himself did not possess to a bona fide holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been
- E treated as essential to the validity of his title besides, and independently of honesty of purpose.”

It will be observed that the learned judge considered two conditions only to be well established as essential to confer a good title upon the holder of a negotiable instrument, viz., that he should have taken it bona fide and for value. The other condition which he mentions, that due care and caution should have been exercised

F by the taker of the securities he refers to as a departure from “a rule of law long considered as being firmly established,” and he deprecates its introduction. The law has now for some time been settled on this point in accordance with the view indicated by PARKE, B.

In *Bank of Bengal v. Fagan* (7) LORD BROUGHAM said (7 Moo.P.C.C. at p. 72):

- G “It may be taken as established that whatever may have been the law laid down in *Gill v. Cubitt* (8) and *Down v. Halling* (9) and one or two other cases, and not abandoned, at least as far as language went which the court used in subsequent cases, is now law no longer, and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him.”

- H This passage was quoted by WILLES, J., in delivering his judgment in *Raphael v. Bank of England* (10), where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable instrument in good faith and for value. I think, therefore, that the rule of law enunciated by PARKE, B., is firmly established as the existing law.

- I No authority to the contrary was cited at the Bar, unless it be the recent case in this House of *Earl of Sheffield v. London Joint Stock Bank* (1). It is certain that none of the noble and learned Lords who took part in that decision criticised or questioned, much less purported to overrule, any prior authority. I will state what I understand to be the grounds of the decision. The person from whom the bank took the securities in that case was himself a pledgee of them; as such he had an undoubted right to re-pledge them. He in fact re-pledged them as security for a sum exceeding that for which he held them in pledge. They were with a number of other instruments, some negotiable and others not negotiable, made security for his entire indebtedness to the bank. The question which arose

was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and learned Lords came to the conclusion, as I understand, that the bank knew that Mozley held the securities in question as pledgee only in respect of an advance made upon them, or that, if they did not actually know this, what they knew of the nature of his business as a money-lender, and the information which they derived from their transactions with him made it almost certain that this was the case; that, knowing or having every reason to believe that his title was only that of pledgee for a limited advance, they knew, or had reason to believe that, in pledging them to the bank for his entire indebtedness, he was exceeding any authority he had to deal with them; that, under these circumstances, it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent; that these circumstances, as it was said, put them upon inquiry. A B C

I gather that their Lordships must further have been of opinion that, if the bank had made reasonable inquiries, they would have ascertained the facts, and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mozley held them, and that in offering them as a security for a greater sum Mozley was exceeding any authority he had to deal with them. My reason for inferring that their Lordships entertained this opinion is that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry, and been in possession of the result of it. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different. There was in the case then before the House, however, no ground for supposing that, if Mozley had been asked the question, the facts would not have been elicited. D E F

When once the conclusion was reached that the bank must be taken to have known that Mozley was exceeding any rights which he possessed in relation to the securities in purporting to pledge them for the sum he did, it followed that it would be contrary to good faith for the bank to retain them for anything beyond the sum for which he could legitimately pledge them, and that, as regards the excess, the bank, though holders for value, were not holders of the securities in good faith. It will thus be seen that the decision, which certainly did not purport to be a new departure or to lay down any principle of law differing from that already established, turned entirely upon the view taken of the facts. It would be unbecoming as it is unnecessary for me to express any opinion whether the findings were warranted by the facts proved. It is enough for me to say that the decision leaves untouched what I believe to have been down to that time the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. *Earl of Sheffield v. London Joint Stock Bank* (1) may, perhaps, be a binding authority as to the conclusion of the facts arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. G H I

One word I would say upon the question of notice, and being put upon inquiry. I should be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if



**A** he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

Applying myself now to the facts of the present case, I cannot find any warrant for such conclusions of fact as those which, as I think, led to the recent decision of your Lordships' House on which so much reliance has been placed. The bank did not know, and had no reason to know, in what capacity Delmar became possessed of the bonds. They might be his own; he might be purchasing them for himself or for a principal, and be seeking by an advance from the bank to obtain the means of paying the price, or they might be bonds on which he had himself made an advance. I cannot see that there was anything to suggest to the bank that he was committing a wrong, or to make it reasonable and right that they should make further inquiry before entering upon the transaction. It was suggested, and this view seems to have found some favour with the court below, that, though the bank might have been justified in thinking that Delmar had the power to pledge the bonds for an advance to their full market value, they were not justified in supposing that he could be entitled to pledge them en bloc with other securities for a lump sum. If the course of dealing between the bank and Delmar was, as alleged, such that he was entitled at any time to obtain back any of the securities deposited on delivering others of an equal value, the distinction does not strike me as very important. But, even if it could be material were the plaintiff seeking to redeem his bonds, and the question were for what sum the bank could claim to retain them, it does not seem to me to be material in the present case, where the plaintiff is not seeking to redeem his bonds, but insists that the bank have no title to them at all. Further, assuming for the moment that the bank were put on inquiry and ought to have asked Delmar whether the bonds were his, and if not, by what title he claimed to deal with them in the manner proposed, can it be doubted what would have been the result of such an inquiry? Why, your Lordships have listened to an elaborate argument, for which there was ample scope, designed to establish that the bonds were in fact Delmar's, and that if he had answered, as I think he undoubtedly would, that the bonds were his own, his answer would have been accurate. How can it possibly be contended that, if the bank had made further inquiry, they would have ascertained that Delmar was not entitled to make the pledge on which the bank take their stand?

I have made these observations for the purpose of showing the marked distinction which there is between the facts of the present case and those which had to be considered in *Sheffield's Case* (1). But I desire to rest my decision upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance, held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required. I do not think that the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed, and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting. For the reasons I have given I think the judgment appealed from ought to be reversed.

**LORD MACNAGHTEN.**—There are only three possible questions in this case: (i) Did the "Cedulas," which were deposited with the London Joint Stock Bank

on Oct. 28, 1887, belong to the respondent at the time when they left the office of Herapath, Delmar & Co.? (ii) Were these "Cedulas" negotiable instruments? (iii) Did the bank take them in good faith? That the bank gave value for them was never disputed. In the view which your Lordships take of the last two questions, the answer to the first, whatever it may be, cannot affect the result of the case. But, as both courts have considered the question and answered it on consideration in the affirmative, I am unwilling to pass it by in silence lest I should seem to intimate a doubt for which, in my opinion, there is no room. A B

The firm of Herapath Delmar & Co. consisting of a Mr. Herapath, who was admittedly innocent of any fraud, and a Mr. Delmar, who was undoubtedly a fraudulent person, held 15,000 dollars "Cedulas, series J." on account of the respondent. They were held by the firm for safe custody only. On Oct. 12, 1887, Delmar, without the knowledge of his partner, and in fraud of his customer, sold them. On the same day Delmar on account of his firm contracted to buy "Cedulas" of the same amount and of the same denomination to be delivered on Oct. 28. In due course "Cedulas" to answer this contract were delivered and paid for. To whom did these "Cedulas" belong when they came into the office of Herapath, Delmar & Co.? The object of the purchase, of course, was to repair and conceal the wrong which had been committed. Both the clerks concerned in the transaction, who had no reason to suspect anything improper, say they knew at the time whose they were, and that they were the respondent's; neither of them was asked any question as to how he got this knowledge, nor is it material. There is no reason to distrust their recollection. And the only conclusion is that in some way or other, by word of mouth or by writing or by conduct, Delmar, who had dominion over these "Cedulas," must have declared that they belonged to the respondent. Thus, even without the aid of the entry in the number book, the value of which depends on a disputed fact, the date when the original entry was corrected or altered, there was as it seems to me a sufficient appropriation of the "Cedulas" in question to show that they were the property of the respondent subject to his right to repudiate the transaction when he came to know the true facts. C D E

Then, were these "Cedulas" negotiable instruments? The "Cedulas" in question are foreign bonds with coupons attached payable to bearer. Admittedly they pass from hand to hand on the Stock Exchange, and according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the quality of complete negotiability. In a matter of this sort it is not, I think, desirable to set up refined distinctions which are not understood, or are uniformly and persistently ignored in the daily practice of the Stock Exchange. F G

Lastly, did the bank take the "Cedulas" in good faith? They took them with other securities from a firm of stockbrokers who were at the time of unblemished reputation. They took them in the ordinary way of business to cover their current advances. In regard to this question the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said that the bank ought to have known it. But even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster v. Pearson* (4) such a practice—and the practice prevails in the case of stockbrokers just as much as in the case of billbrokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual. H I

If it had not been for a mistaken interpretation of your Lordships' decision in the *Earl of Sheffield's Case* (1), I doubt whether the present case would ever have been brought into court. That case depended upon its own peculiar circumstances. The settled law relating to negotiable securities was not in question. No one impugned it. No one, as I understand the argument, thought of reviving qualifications

**A** long since exploded. But then it was held that the bank knew, or ought to have known, that the securities which the moneylender Mozley was depositing with them had been pledged to him by his several customers, and, therefore, that they were not his own, and that he could not pledge them for their full value. There was no want of good faith on the part of the bank in taking them in security to the extent of Mozley's pledgeable interest. But there was, as it seems to me, a want of good faith in claiming a right to retain them for more than that limited interest, whatever it might turn out to be. In commenting on the *Earl of Sheffield's Case* (1), counsel for the bank, referring to some remarks of mine in which the expression "representation" occurred, observed that the words used went too far. Of course there were no representations on the part of Mozley but what were contained in the memorandum of charge. And certainly I did not mean to convey that, if the bank had received from Mozley explanations which a reasonable man could possibly accept, the bank might not have held the securities for their whole value. But I think the criticism of the learned counsel was perfectly well founded, and I should have better expressed myself if I had said that whereas it had been supposed that the memorandum of charge neutralised the knowledge otherwise properly attributable to the bank, it seemed to me that that knowledge must prevail over the inference to be derived from the memorandum. I agree that the judgment appealed from ought to be reversed.

**LORD FIELD.**—I also am of opinion that this appeal must be allowed. First I am satisfied that the Cédulas in question are instruments in which property and possession are inseparable, and that delivery and possession, if taken in good faith, confer a valid title. They impliedly contain a promise to pay to bearer; they are issued and circulated in a foreign State; and, although the evidence as to the extent of their negotiability in this country was not (probably owing to a misapprehension) so full as it might have been, enough, I think, appears to bring the case within the authorities of *Gorgier v. Mieville* (3), and *Goodwin v. Roberts* (2). Secondly, it is not disputed that the bank are holders for value. It is not suggested that they were themselves guilty of any dishonesty or bad faith; on the contrary, **BOWEN, L.J.**, expressly finds that they were "honestly of opinion that Delmar could lawfully make the pledge in question." Their title, therefore, as holders in good faith cannot be defeated if it is shown that they also held without notice, i.e., not necessarily actual notice or knowledge of any infirmity, but without the knowledge of circumstances calculated to excite suspicion in the mind of the bank manager, who with the means of further knowledge at hand, wilfully abstained from availing himself of those means and making inquiry from a suspicion that the result would be to inform him of some vice or infirmity of title by which the pledge the bank were about to take might be rendered insecure.

It was at one time, no doubt, thought that the title of a holder for value of a negotiable instrument would be destroyed if the omission to inquire arose not from any suspicion of a defect, but merely from a want of due care and caution on his part, but the authorities cited by **LORD HERSCHELL** have conclusively established that such is not the law. In one of those cases, *Raphael v. Bank of England* (10), the plaintiff had at some earlier period received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten, and was not present to his mind at the time of taking, and he was held entitled to recover. In another case, *Foster v. Pearson* (4), cited by my noble friend, some of the objections to the plaintiff's title were somewhat analogous to those in the present case. One of them was that the bills then in question were pledged to the plaintiff by the bill broker for an antecedent debt of his own, but **PARKE, B.**, after stating that the rule that the holder of negotiable securities transferable by delivery can give a title which he himself does not possess to a bona fide holder for value had been long considered firmly established, added that it was unnecessary to decide the validity of a usage for a bill broker to pledge for his own antecedent debt (which had been set up, but failed in proof), because,



assuming the broker to have no such power as between him and his employer, or as to third persons who receive the bills with knowledge of all the facts, it by no means followed that Messrs. Fosters would not have a right to hold the bill. They might have supposed that the brokers were acting rightly in pledging their customers' bills, even if they knew them to be such, for their prior advance, because they might have given to those very customers a part of the £2,500, which was the amount of that prior advance. It is, I think, worthy of observation that in the present case a portion of the £6,500 which was advanced to Delmar on Oct. 27, undoubtedly went to provide cash to meet a cheque drawn in payment for the substituted "Cedulas." I do not suggest, of course, that the bank manager was aware of this, or that it could have formed any part of his calculations in taking the security; but it tends to show, as regards any inquiry of Delmar, if the defect in the appellants' title rests upon the absence of inquiry of Delmar, which was the only means of further knowledge that presented itself to the manager, how little probability there is that the answer would have disclosed the absence of authority on his part to make the pledge.

Another objection taken to the appellant's title in this case, as putting the manager upon inquiry, also existed in *Foster v. Pearson* (4). But it was overruled, for it was said that, although a bill broker must ordinarily be taken to be an agent to procure the loan of money on each customer's bill separately, without any right to mix bills together, and pledge the mass for one entire sum advanced to him personally, yet his employment is one which depends entirely upon the course of dealing, and there would be nothing unusual or unreasonable in such a course of dealing in the city of London for bill brokers to raise money for their employers by pledging the bills of different proprietors for one advance. In answer to the objection, PARKE, B., said that, although on the one hand one proprietor may have to answer for the non-payment of another's bill, on the other hand it may give facilities to the raising of money on negotiable paper, for it may well happen that a capitalist would advance money in this way who would not discount each particular bill. Indeed, in the case now before your Lordships, it was suggested, and may well be the case, that by that means the broker's customer obtains a loan on more favourable terms than if the broker could only pledge for each customer's individual debt.

Looking to the various exigencies of a stockbroker's legitimate business, as now carried on in the city of London, I fail to see any circumstances which ought in the present case to have caused the bank manager to suspect that Delmar was pledging securities which had been entrusted to him for safe keeping. The previous long connection with, and high character of the firm of which he was a member, their extensive previous dealings, in which no irregularity is suggested as having taken place, tended to obviate the necessity for any inquiry, and I do not see any satisfactory ground for coming to the conclusion that the manager wilfully abstained from making it. Indeed, the grounds upon which, as I understand, the judgments of the courts below rest their decision exclude any such wilful closing of the eyes of the manager. What I understand is said against him is that, as he took the "Cedulas" with knowledge that they might not belong in full dominion to the brokers, the manager wilfully abstained from inquiry into Delmar's title from a misconception of law in thinking that he had authority in law so to do without express authority given by the customer.

The learned judges below did not in any way question the principles upon which the authorities I have referred to rest, but they appear to have thought that the present case was covered by the recent decision of this House in the *Earl of Sheffield's Case* (1). That case has undergone a very searching examination at your Lordships' Bar, and I have had the advantage of hearing the true view of it, as intended and understood by the Lord Chancellor and those of my noble and learned friends who advised your Lordships on that occasion, and I am quite satisfied, not only that no intention existed of questioning those principles, but that no such qualification is anywhere indicated. The decision seems to me to

**A** have proceeded rather upon the lines of *Cooke & Sons v. Eshelby* (11), and cases of that class in which actual knowledge of the existence of an agency of a limited character only is held to put the person dealing with the agent upon inquiry as to the extent of it. It was, indeed, contended at your Lordships' Bar that mere knowledge that a proposed transferee might be dealing with a security as an agent was sufficient to put the transferee of a negotiable security upon inquiry, the mere absence of which, if a defect was in fact found to exist, would be fatal to his title. But I cannot accede to this contention. It is contrary to the authorities I have referred to, and it runs counter to the policy of the legislature, which seems to me to be to protect rather than endanger the rights of persons taking securities of a negotiable character honestly and in good faith. It is for these reasons that I think that the appeal must be allowed.

C

Appeal allowed.

Solicitors: *Clarke, Rawlins & Co.; R. S. Gregson.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

D

E

## ROYAL AQUARIUM AND SUMMER AND WINTER GARDEN SOCIETY v. PARKINSON

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), February 4, 5, 6, 20, 1892]

F

[Reported [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352]

*Slander Absolute privilege Qualified privilege—Tribunal acting administratively—County council considering applications for music and dancing licences—Malice—Reckless publication of slander regardless of truth—Burden of proof.*

G

Absolute privilege attaches to all judicial proceedings and also to the proceedings of tribunals which have the attributes of a court of justice, e.g., a military court of inquiry: *Dawkins v. Lord Rokeby* (1) (1875), L.R. 7 H.L. 744; but it does not extend to the proceedings of a tribunal acting administratively, e.g., a county council when considering applications for music and dancing licences, although such a tribunal has to decide judicially in the sense of acting fairly and impartially. The statement of a member of a county council on such an occasion, however, will, if made bona fide and without malice, be entitled to qualified privilege.

H

Malice can be established by proof of a state of mind short of deliberate falsehood, but which leads the person publishing the words complained of, from anger or some other wrong motive, to be reckless whether the aspersions he casts on other people are true or false, regardless of the truth. The burden of proving malice is on the plaintiff in an action for defamation.

I

**Notes.** Considered: *R. v. L.C.C., Empire Theatre*, post; *Hodson v. Pare*, [1899] 1 Q.B. 455. Applied: *Barratt v. Kearns*, [1905] 1 K.B. 504. Considered: *Burr v. Smith*, [1908–10] All E.R.Rep. 443; *Attwood v. Chapman*, [1914–15] All E.R.Rep. 1034; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405; *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; *Everett v. Griffiths*, [1920] 3 K.B. 163; *R. v. Bath Compensation Authority*, [1925] 1 K.B. 685; *Collins v. Whiteway*, [1927] 2 K.B. 378; *Hearts of Oak Assurance Co. v. A.-G.*

(1931), 47 T.L.R. 579; *O'Connor v. Waldron*, [1934] All E.R.Rep. 281. Applied: *A Smith v. National Meter Co.*, [1945] 2 All E.R. 35; *Addis v. Crocker*, [1960] 2 All E.R. 629. Followed: *Lincoln v. Daniels*, [1961] 3 All E.R. 740. Referred to: *R. v. Russell, Ex parte Morris*, [1904-7] All E.R.Rep. 292; *Tenby Corp'n. v. Mason*, [1908] 1 Ch. 457; *R. v. Local Government Board, Ex parte Arlidge* (1913), 78 J.P. 25; *R. v. L.C.C., Ex parte London and Provincial Electric Theatres*, [1915] 2 K.B. 466; *Slack v. Barr* (1918), 82 J.P. 91; *Roff v. British and French Chemical Manufacturing Co. and Gibson*, [1918] 2 K.B. 672; *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104; *Winstanley v. Bampton*, [1943] 1 All E.R. 661.

As to absolute and qualified privilege as defences to actions for defamation and malice, see 24 HALSBURY'S LAWS (3rd Edn.) 48 et seq., 78-82; and for cases see 32 DIGEST 102 et seq., 154 et seq.

Cases referred to:

- (1) *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex. Ch. affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 40 J.P. 20; 23 W.R. 931, H.L.; 16 Digest (Repl.) 113, 2.
- (2) *R. v. London County Council, Ex parte Akkersdyk, Ex parte Fermenta*, [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168; 56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175, D.C.; 33 Digest 103, 698.

Also referred to in argument:

- Munster v. Lamb* (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 W.R. 243, C.A.; 32 Digest 105, 1368.
- Scott v. Stansfield* (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 16 W.R. 911; 32 Digest 104, 1352.
- Thomas v. Churton* (1862), 2 B. & S. 475; 31 L.J.Q.B. 139; 6 L.T. 320; 8 Jur.N.S. 795; 26 J.P.Jo. 308; 121 E.R. 1150; 32 Digest 104, 1357.
- R. v. Skinner* (1772), Lofft. 54; 98 E.R. 529; 32 Digest 104, 1348.
- Seaman v. Netherdift* (1876), 2 C.P.D. 53; 46 L.J.Q.B. 128; 35 L.T. 784; 41 J.P. 389; 25 W.R. 159, C.A.; 32 Digest 106, 1374.
- Clark v. Molyneux* (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 26 W.R. 104; 14 Cox, C.C. 10, C.A.; 32 Digest 159, 1922.
- Kirby v. Simpson* (1854), 10 Exch. 358; 2 C.L.R. 1286; 23 L.J.M.C. 165; 18 J.P. 696; 18 Jur. 983; 156 E.R. 482; 38 Digest (Repl.) 92, 667.
- Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 32 Digest 128, 1597.
- Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.
- Labouchere v. Earl of Wharncliffe* (1879), 13 Ch.D. 346; 41 L.T. 638; 28 W.R. 367; 8 Digest (Repl.) 655, 30.
- Purcell v. Sowler* (1877), 2 C.P.D. 215; 46 L.J.Q.B. 308; 36 L.T. 416; 41 J.P. 789; 25 W.R. 362, C.A.; 32 Digest 146, 1764.
- Usill v. Hales* (1878), 3 C.P.D. 319; 47 L.J.Q.B. 323; 38 L.T. 65; 26 W.R. 371; 14 Cox, C.C. 61; 32 Digest 135, 1665.

**Application** by the defendant for judgment or a new trial on the ground of misdirection and that the verdict was against the weight of the evidence at the trial before HAWKINS, J., with a special jury.

The plaintiffs were proprietors of a place of public entertainment at Westminster, and they claimed damages for a slander upon them in the way of their business uttered by the defendant, a member of the London County Council, at a meeting of the council in October, 1890, held to consider applications for music and dancing licences under the Disorderly Houses Act, 1751, s. 2, the jurisdiction of the justices at quarter sessions under that Act having been transferred to the London



A County Council by the Local Government Act, 1888. At this meeting the plaintiffs applied for a licence, and in a speech made by the defendant in opposition to the application he uttered the following words, which were the subject of this action:

B "I spent about half an hour at the Aquarium a few months ago, and during the time I was there there was a performance going on upon the stage of the Aquarium of some Japanese figures. They were not living figures, but exceedingly large automata, and the talk was provided of course by someone who was invisible. These two figures, a male and female Japanese, were chasing a butterfly round the stage, and they came to a point where the female figure sat down and said: 'I have got it.' The male figure, standing in front, said: 'Where?' And then, I state, there was the most indecent action of the female figure that you could possibly imagine. Now, I say that that is just as bad as though the figures were living. It was done on the stage in the afternoon, when we are told that it is so respectable that we are to take our families there. I say that that was an indecent action. I will tell any gentlemen privately exactly what it was; but so it was, and I consider that that was an indecent performance."

D He added that those were the reasons why he intended to vote against granting a licence to the plaintiffs. The defendant pleaded that he spoke the words without malice, and that, even if he had been actuated by express malice, the occasion on which he spoke afforded him absolute immunity, and that he was entitled to notice of action under the Justices Protection Act, 1848, s. 9 [repealed], the words spoken by him being a thing done in the execution of his office. At the trial, HAWKINS, J., directed the jury that, if they thought that the defendant uttered the words complained of without malice and with an honest belief in their truth, then, however untrue the words might have been, he was privileged by the occasion on which they were uttered, but, if the defendant did not honestly believe his statement to be true, and made it for the purpose of defeating the plaintiffs in their application for a licence, the plaintiffs would be entitled to damages. The jury found a verdict for the plaintiffs for £250, and the learned judge upon further consideration gave judgment for them for that amount.

*Sir Henry James, Q.C., Murphy, Q.C., and R. M. Bray* for the defendant.

*Lockwood, Q.C., and H.F. Dickens* for the plaintiffs.

*Cur. adv. vult.*

G Feb. 20, 1892. The following judgments were read.

LORD ESHER, M.R.—In this case an action has been brought by the plaintiffs for slander in the way of their business, and the jury have found that the defendant made a statement which he knew at the time to be false, and have H awarded the plaintiffs £250 damages. That being so, application is now made to us that judgment should be entered for the defendant on several grounds. The statement was made by the defendant at a meeting of the London County Council of which he is a member, and the occasion of his making it was when there was a question before the council whether a music and dancing licence should be granted to the plaintiffs. He expressed his opinion very strongly that it should I not be granted, and used the strongest language, saying that he had been to the Aquarium and had seen there the most indecent performance he or anyone else had ever seen. The performance was described by him as taking place between two figures, dressed one as a man and the other as a woman, who were supposed to be chasing a butterfly. Even if the figures had been so dressed, it would have been nonsense to say that the performance was the most indecent that had ever been seen; but it turns out that the figures were dressed as two men, so that the indecency was really only the defendant's imagination. The jury found in effect that he knew what was the truth, and he told a deliberate

falsehood, and the question which this court has now to determine is whether there was evidence to go to the jury to support that verdict. A

It was argued on behalf of the defendant, in the first place, that when he uttered the words which are complained of he was exercising a judicial function, and is, therefore, entitled to perfect immunity, whatever he may have said. It is true that, in respect of what is said before a court of justice, whether or not it may be false or scandalous or malicious perfect immunity from any liability to an action is enjoyed by the person who utters it, whether he be judge, counsel, or witness. The immunity of a witness is, of course, only from an action for slander, not from an indictment for perjury. The ground of that rule is public policy, and nothing else. It is true with regard to courts of justice of all kinds, both great and small, and the rule has even been carried further. It is applicable in the case of authorised tribunals which, though not courts of justice, have the attributes of a court of justice. In *Dawkins v. Lord Rokeby* (1) the doctrine was extended so as to apply to a military court of inquiry, which was an authorised inquiry and conducted as nearly as possible in the same way as it would have been in a court of justice. It was in that sense that that tribunal was said to have been acting judicially, namely, acting as nearly as possible in the same way as a court of justice. But the doctrine has never been carried further than as applying to courts of law, and to tribunals acting as nearly as possible in the same way. B C D

Can it be said that a county council acts in the same way as a court of law when it is considering applications for music and dancing licences? It is difficult to say that the members are judges acting judicially in such a case; judges would hardly make speeches such as the defendant, and no doubt many other members, did on this occasion. The truth is that the proceedings before such a body have no resemblance to an inquiry before a court of justice, and the rule as to immunity for what is spoken before a court could not be applied in this case. There is another point urged before us on behalf of the plaintiffs—that this duty with regard to licences which has been transferred from the justices is not a judicial, but is an administrative, duty. Justices at quarter sessions had two separate and distinct duties. When trying prisoners they are no doubt a court of justice, and, as such, entitled to the absolute immunity I have mentioned; but they also had administrative duties, for the purpose of performing which they held consultation with each other, as, for instance, when granting licences. When such administrative duties were transferred to the county council, the consultation held by the council for the purpose of performing such duties still remains what it was; it is not a judicial act. This administrative consultation which was being held when the defendant uttered the words complained of was, therefore, not in a court of justice, and consequently the defendant is not entitled to the perfect immunity which he claims. E F G

Then comes the question whether this was a privileged occasion. When persons are engaged in performing a duty of great public importance, and when for the purpose of doing that duty they consult together with the object of coming to a decision in the matter, no doubt the occasion is a privileged one. Then what may be said there, although it may be slanderous, is privileged, so long as the person who utters it is acting bona fide; that is to say, so long as he is using the occasion for its proper purpose, and is not abusing it. It is sometimes said that the question is whether such a person is acting bona fide, and not maliciously; but that is not, I think, quite a good way of putting the point—it is better to say: Is he using the occasion honestly, or is he abusing it? If he makes a statement which he knows to be untrue, he must be abusing the occasion. The jury in this case have found that the defendant knew at the time that he was telling a falsehood. I myself should be loth to find that. But there is a state of mind, short of deliberate wilful falsehood, which would justify a jury in holding that the defendant had abused the occasion, and in that sense had acted maliciously. If from anger, or from some other wrong motive, a person H I

A allows his mind to get into such a state that he is reckless whether the aspersions he casts on other people are true or false, then I think that a jury is justified in finding that he has not used, but has abused, the occasion.

Therefore, the question here turns upon whether there was evidence of such a state of mind in the defendant. It has been said that anger is such a state of mind; but I have no doubt that gross and unreasoning prejudice with regard to the subject-matter that was being dealt with would have the same effect. If a person charged with the duty of dealing with other people's affairs allows his mind to get into such a state as that, so that he is reckless whether the statements he makes while pushing forward his own views are true or false, there would be evidence on which a jury would be justified in finding that he had abused the occasion. Is there evidence here that the defendant allowed his mind to get into that state? It does not seem that anyone else believed the figures to represent a man and a woman, and I do not think that the defendant could really have made the mistake if he had taken any care about the matter. The expressions he has used show that he allowed his mind to get into that reckless state that I have referred to, in consequence of the prejudice he was under. His statement before the county council that the performance was the most indecent that could be imagined shows that his observation was most casual, that he could not have taken any pains to satisfy his mind, and that he was not acting simply and fairly from a consideration of what his duty was. He made his statement utterly regardless of the truth, or of any personal injury he might be inflicting, perfectly reckless whether what he was saying was true or false. I think that the jury were justified in finding that that was the nature of his conduct, and that he had abused the occasion, and, therefore, they were entitled to give the verdict that they have given.

[HIS LORDSHIP dealt with a point on s. 9 of the Justices Protection Act, 1848 (repealed), and concluded:] The verdict, therefore stands, and this application must be dismissed. I must add that by our judgment we are not differing in any way from what was said in *R. v. London County Council; Ex parte Akkersdyk* (2). That case merely decides that wherever a man has authority to decide upon a matter affecting another he must decide fairly and impartially, according to the rules of reason and justice. A person cannot be at the same time accuser and judge.

FRY, L.J.—I am of the same opinion. Several arguments have been addressed to us, but the principal one, which I will deal with first, was that the defendant is entitled to absolute immunity from an action for anything said by him as a member of the county council while dealing with applications for licences for music and dancing.

For the purposes of that argument, therefore, I will assume that the defendant made the defamatory statement complained of both falsely and maliciously. The first inquiry is: What is the law with regard to immunity in cases of this description; and I will then consider the nature of the duty cast upon the defendant. The largest statement of the immunity, so far as I can find, is in the judgment of the Exchequer Chamber in *Dawkins v. Lord Rokeby* (1), in which it is laid down (L.R. 8 Q.B. at p. 263) that

I "the authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law."

I accept that statement, but I doubt whether the words "or tribunal" do not rather embarrass it, because, though it may be used there as an equivalent to "court," the word "tribunal" has not any ascertainable meaning in English, as the word "court" has. But I think that the judgment of the court proceeds on the footing that "tribunal" means the same as "court," because it goes on



to inquire into the nature of the particular court then in question, and the conclusion come to (*ibid.* at p. 266) is that a military court of inquiry, A

"though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognised in the articles of war and many Acts of Parliament."

I do not wish to attempt any definition of a "court," but in English law a court may perform various functions. Parliament is a court, though its chief duties are deliberative and legislative; the duties of only a part of it are judicial. There are many other courts which are not courts of justice, such as courts of investigation like the coroner's court. B

I think, therefore, that the immunity does not depend upon whether or not the court is a court of justice, but whether it is legally a court or not. When the court exists, the law attaches to it certain privileges, one of which is the immunity in question. But it is said that this law as to immunity is based on principles of public policy, and that wherever a body has to decide questions and in so doing has to act judicially there is a judicial proceeding to which this immunity ought to attach. It appears to me that in that argument "judicially" is used as meaning that the inquiry should be carried on with that fairness and impartiality which characterise proceedings in a court of justice and are proper to the functions of a judge, not as meaning that the members of the body engaged in the inquiry are members of a court. Consider how far that would go if every one acting fairly and impartially in an inquiry were held to be acting judicially so as to be entitled to this immunity. It would apply to assessment committees, boards of guardians, arbitrators, inns of court when considering the conduct of one of their members [but see *Lincoln v. Daniels*, [1961] 3 All E.R. 740], and the General Medical Council when considering questions affecting the position of a medical man. In my opinion, it is unnecessary that such persons should be entitled to absolute immunity for anything they may say, and I do not think that the law of England gives them that protection; they are amply protected by the ordinary law of privilege. It should be borne in mind that there is a great difference between the constitution of those kinds of bodies and most courts. Courts are generally presided over by some person specially chosen because of his fitness for the place, and they generally have a fixed form of procedure which tends to minimise the risks that might result from this absolute immunity. These considerations do not apply to the bodies I have referred to. But further, there is no precedent for what has been contended for here, and I am, therefore, of opinion that the fact of a body having to decide judicially in the sense of acting fairly and impartially is not enough ground for the claim of absolute immunity which has been made. I wish here to make one observation, in order to prevent what I have said from being misunderstood. I have spoken of the immunity given to courts; but I do not wish to express any doubt that matters may be done judicially by a person acting as a member of a court, though not done by him while sitting in open court, as to which this immunity may exist. The point does not arise here. I only advert to it to prevent my being misunderstood. C  
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The question then arises whether the county council, when considering applications for music and dancing licences, were acting as a court, and whether the defendant was acting as a judge or member of that court. The first of those two questions turns on the language of the Disorderly Houses Act, 1751, s. 2 of which authorises and empowers quarter sessions to grant music and dancing licences, as they in their discretion shall think proper, to places of entertainment in London and Westminster. That appears to me to confer on the magistrates an administrative power or duty. There are no words in the statute indicative of any particular mode of procedure or requiring them to hear and determine. I

A On the contrary, there is a direction that after the licence has been granted certain things shall be done in open court—

“every such licence shall be signed and sealed by the said justices in open court, and afterwards be publicly read by the clerk of the peace.”

B Those provisions are applicable to something which has previously been done by the magistrates in their private room, not in court in the eyes of the public. Therefore, the language of the Act and the discretion given by it show that the proceedings are administrative, not judicial, and so far as the Act provides the magistrates could proceed originally without any public hearing at all. We have been much pressed with the words “in their discretion” used in the Act, and it has been argued that these words mean “judicial discretion.” But it is not every discretion that is judicial. A statute of Henry VIII gave power to the justices of a county to levy such money as they should think by their discretion convenient and sufficient for the repairing of the county bridges, but it could not be contended that that discretion is judicial. There is nothing in the section which gives the magistrates a judicial discretion, though their power is to be exercised discreetly.

D Then comes the question whether there is anything in the Local Government Act, 1888, making any alteration in the matter. The conclusion I have arrived at is that it is quite clear from the language of the Act that it was intended to draw a broad line between the administrative and judicial functions of the magistrates, and to transfer the former to the county council while leaving the latter to the justices. The first section of the Act establishes a council for the management of the administrative business of the county, and s. 3 provides that to this council there shall be transferred the administrative business of the justices of the county in quarter sessions assembled, and it goes on to enumerate the kinds of business transferred, mentioning in para. (v) the licensing under any general Act of houses and other places for music and dancing. But the matter does not rest there, because s. 78 shows an intention to exclude from the transfer of the duties of the justices all their judicial powers. Subsection (2) provides that the transfer of powers and duties enacted by the Act shall not authorise any county council to exercise any jurisdiction under the Summary Jurisdiction Acts or perform any judicial business or otherwise act as justices or a justice of the peace. The statute, therefore, so far from giving colour to the suggestion made on behalf of the defendant, clearly declares that the county council has no judicial functions. I, therefore, come to the conclusion that the meeting of the county council when the statements complained of were made was not a court, and the defendant is not entitled to the immunity which he claims.

Lastly, as to the question whether there was any evidence to go to the jury of express malice which would destroy the defendant's privilege. The figures alluded to by the defendant were produced before the jury, and evidence was given about them as to their dresses and the nature of their performance which might have induced the jury to believe that the defendant could not have come honestly to the conclusion at which he said he had arrived. I express no opinion whether I should have come to the same conclusion as the jury. There was evidence for them, and they have found malice. The application fails on all the grounds that have been put forward, and must be dismissed. With regard to *R. v. London County Council* (2), I think that the judgment proceeded on the ground that the county council was bound to act fairly and impartially. It does not decide that the county council is a court.

**LOPES, L.J.**—This is a most important case, and though I agree with the able and exhaustive judgment of *HAWKINS, J.*, and with those just delivered, I desire to give my reasons for so doing. The plaintiffs bring their action against the defendant for slanderous words used about them in respect of their business. The defendant says the action is not maintainable on three grounds: first, because

the slanderous words are absolutely privileged, he being a member of the county council; secondly, if not absolutely privileged, they are privileged to a qualified extent, or sub modo—that is, being uttered on a privileged occasion, they are not actionable unless express malice is proved, and that of such malice there is no evidence; thirdly, that he is entitled to notice of action under the Justices Protection Act, 1848, s. 9 [repealed], and that no such notice of action has been given. A

These grounds must be considered separately. First, with regard to the absolute immunity claimed by way of privilege. Privilege or immunity in respect of defamation is of two kinds—absolute privilege, which is conceded to members of the Houses of Parliament, judges, etc.; and qualified privilege, to which every subject of the Queen is entitled, provided that the occasion on which the defamatory matter is written or spoken is privileged, and that there is an absence of express malice. The first seems rather to attach to the person or character of the person writing or speaking the defamatory matter; the second to the occasion when the defamatory matter is written or spoken. The authorities establish beyond all question that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will, to check any abuse of it by those who appear before them. It is, however, a privilege that ought not to be extended. It belongs, in my opinion, to courts recognised by law, and to such courts only. B

It was contended that so confining the absolute privilege was contrary to the decision of *Dawkins v. Lord Rokeby* (1). That contention cannot be supported. The foundation of the decision is that the court of inquiry in that case was a tribunal constituted, sanctioned, and recognised by law. KELLY, C.B., says (L.R. 8 Q.B. at p. 266): C

“A court of inquiry, though not a court of record nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted, and recognised in the articles of war and many Acts of Parliament.” D

*Dawkins v. Lord Rokeby* (1), therefore, forms no exception to the general rule which I have stated. E

The defendant contends that the Local Government Act, 1888, has conferred this absolute privilege upon members of the county council, because there has been transferred to them by that Act certain business of the quarter sessions in respect of which they have judicial duties to perform. The word “judicial” has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate. F

It becomes, therefore, necessary to consider the Local Government Act, 1888. The material sections are ss. 3, 28, and 78. Section 3 transfers to the county council the administrative business of the justices of the county in quarter sessions G



**A** assembled. It is admitted that all that is transferred by this section is administrative business, business which was transacted out of court by the quarter sessions, except under sub-s. (5) of s. 3, viz., the licensing of houses and other places for music and dancing, which is the matter with which we are especially concerned in this case, and with which I will deal later on. Section 28 gives to the county council in respect of the business transferred, taking it shortly and calling in **B** aid the definition of "powers" in s. 100, all the privileges and immunities which the quarter sessions, or any committee thereof, or any justice or justices, had in respect of the business transferred. The proviso contained in the second part of s. 78 is material. It runs thus :

**C** "Provided that the transfer of powers and duties enacted by this Act shall not authorise any county council, or any committee or member thereof, (a) to exercise any of the powers of a court of record; or (b) to administer an oath; or (c) to exercise any jurisdiction under the Summary Jurisdiction Acts, or to perform any judicial business, or otherwise act as justices or a justice of the peace."

**D** I understand that the legislature intended that all the administrative business of the quarter sessions was to be transferred to the county council, and they were in all respects to be placed in the same position as the justices had previously occupied with respect to that administrative business, and in respect of it were to enjoy the same privileges and immunities which the justices had previously enjoyed, but they were not to have any jurisdiction to perform any duties which the justices discharged in court. That part of the judicial business **E** of justices of the peace was to remain undisturbed in the justices. If this is a correct view, the county council did not acquire the absolute privilege now contended for. The justices never had it when discharging administrative duties in their private room. They could only invoke it when administering the law in court. The county council have not that jurisdiction to which only the absolute privilege can attach.

**F** But it is said that s. 3 of the Local Government Act, 1888, transferred to the county council the licensing of houses and other places for music and for dancing under the Disorderly Houses Act, 1751, which is not administrative business, but business to be transacted by the justices in court. The Local Government Act deals with it as administrative business, and so calls it; and s. 78 (2) says that the county council are not to perform any judicial business, by which I **G** understand, having regard to the terms of that proviso, any business such as is performed by justices in court. But did the Act of 1751 contemplate any proceedings in court? Was it not rather an application to the justices in their private room that was intended? Section 2 says that the justices are hereby authorised and empowered to grant such licences as they in their discretion shall think proper, signified under the hands and seals of four justices. Every licence **H** is to be signed and sealed by the justices in open court, and afterwards publicly read by the clerk of the peace, together with the names of the justices subscribing the same. This leads me to the conclusion that the granting of the licence was not a proceeding in court, and was for that reason published afterwards in open court in the way prescribed. Section 4 of the Act excludes from the operation of the Act certain theatres and licences of the Lord Chamberlain. I **I** believe the jurisdiction to be exercised by the justices under s. 2 was very similar to the jurisdiction exercised by the Lord Chamberlain. Nothing but administrative business, therefore, was transferred to the county council, and the business with regard to licences for music and dancing forms no exception. The conclusion at which I arrive is, that the defendant is not entitled to the absolute privilege he claims, and his first ground for impeaching the judgment fails.

The defendant's second ground for impeaching the judgment is that there was no evidence of malice which ought to have been left to the jury. The slanderous words complained of were uttered in the course of a debate with regard to the

propriety of granting the plaintiffs a licence for music and dancing. The occasion was privileged, and the learned judge so held. Not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive. This casts upon the plaintiffs the burden of proving express malice, or malice in fact. If it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive. Applying this principle to this case, I think there was evidence which justified the jury in their finding of malice. The defendant, as he states, “was on the look-out, and disapproved of music-halls and theatres;” he was “a long way from the stage and only had an imperfect opportunity of seeing the performance.” He was only there once. It was admitted that the indecent action complained of would not be indecent if the figure in question was a male, though it would be indecent if a female. It was proved beyond dispute that the figure in question was a male, and there is a considerable body of evidence which is uncontradicted to show that no person viewing the performance with an unprejudiced eye, and using that amount of caution and circumspection which everybody ought to exercise before defaming another, could possibly make a mistake as to its sex. The figures were produced, and the jury saw them. I am unable, in such circumstances, to say that there was no evidence upon which a jury might reasonably find that, to say the least, the defendant visited the Aquarium with a mind unduly inclined to mark iniquity, and subsequently stated as true that which he did not know to be true, recklessly, not taking the trouble to ascertain whether it was true or not, and did this by reason of his objection to places of amusement like the Aquarium. If the jury so thought, they were justified in finding malice. A  
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[His LORDSHIP said that the repealed s. 9 of the Justices Protection Act, 1848, did not apply, and concluded:] The judgment for the plaintiffs must, therefore, stand, and this application must be dismissed with costs. With regard to *Akkersdyk's Case* (2), I do not think that the decision there has any application to the present case. It proceeded on the principle that no person who is bound to act fairly in respect of a matter can act as an accuser and also as a judge at the same time. G

*Application dismissed.*

Solicitors: *Frank Richardson & Sadler; May, Sykes & Batten.*

[Reported by E. MANLEY-SMITH, ESQ., Barrister-at-Law.]

## JOHN YOUNG &amp; CO. v. BANKIER DISTILLERY CO.

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten, Lord Morris and Lord Shand), June 12, 13, July 27, 1893]

[Reported [1893] A.C. 691; 69 L.T. 838; 58 J.P. 100]

*Water—Riparian rights—Right of lower riparian owner to restrain upper riparian owner from pumping water into stream from underground—Water rendered unfit for purpose of lower riparian owner.*

A lower proprietor must submit to the flow of water which comes down upon his lands by the natural force of gravitation from higher lands, whether flowing in a defined channel or not, or above or below the surface; but he is not bound to receive water pumped from below the surface by artificial means, which would never have reached his land by the ordinary force of gravitation.

The respondents were owners of a distillery situated on the banks of a stream, the water of which they used for the purposes of their business. The appellants were the owners of coal mines higher up the stream. In the course of working their mines the appellants pumped large quantities of water from the lower strata into the stream. The water so pumped in, although pure, was hard, and, although it did not affect the water in the stream for ordinary purposes, it rendered it much less suitable for distilling purposes.

**Held:** the respondents were not bound to receive water brought to the surface of the appellants' land by artificial means, and the appellants had no right to continue to pump water into the stream to their prejudice.

**Notes.** Considered: *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A.C. 485; *Brocket v. Luton Corpn.*, [1948] W.N. 352; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1952] 1 All E.R. 1326.

As to riparian rights, see 39 HALSBURY'S LAWS (3rd Edn.) 514 et seq.; and for cases see 44 DIGEST 11 et seq.

Cases referred to:

- (1) *Blair v. Hunter, Finlay & Co.* (1870), 9 Macph. (Ct. of Sess.) 204; 43 Sc. Jur. 169; 34 Digest 726, e.
- (2) *Baird v. Williamson* (1868), 15 C.B.N.S. 376; 3 New Rep. 86; 33 L.J.C.P. 101; 9 L.T. 412; 12 W.R. 150; 143 E.R. 831; sub nom. *Williamson v. Baird*, 10 Jur.N.S. 152; 34 Digest 724, 1063.
- (3) *Pennsylvania Coal Co. v. Sanderson* (1866), 56 Am. Rep. 89.

**Appeal** from a decision of the First Division of the Court of Session in Scotland, consisting of the Lord President (ROBERTSON), LORDS McLAREN, ADAM and KINNEAR, in favour of the respondents, the plaintiffs, below, in an action brought to have the appellants interdicted from discharging the water from their coal workings into a stream called the Doups Burn.

*The Lord Advocate* (Balfour, Q.C.) and *C. S. Dickson* (of the Scottish Bar) for the appellants.

*Sir H. Davey*, Q.C., *H. Courthope Munroe*, and *J. Wilson* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

July 27, 1893. The following opinions were read.

**LORD WATSON.**—The facts of this case, which may be stated shortly, give rise to a question of general importance.

The respondents are owners, under a feu right which excepts minerals, of a parcel of land in the county of Stirling, bounded on the west by a small stream, known as the Doups Burn, which has its course from north to south. A distillery was erected by their predecessors in the feu, and has been in use ever since. The



appellants are tenants of the reserved coal below the feu, and of a considerable tract of the adjoining coal seams. In the course of their mineral workings they raise water by pumping from a pit on the north, which they discharge into the Doups Burn before it reaches the respondents' land. So far the facts do not appear to have been disputed in the court below.

Upon the evidence the learned judges of the First Division have unanimously held, and I see no reason to differ from their conclusions: (i) that the water added by means of the appellants' pumping operations could never reach the burn, either before or while it flows along the respondents' feu, if it were left to the law of gravitation; (ii) that the water of the burn is pure and soft in quality; (iii) that the added water, though pure, is hard in quality; (iv) that the addition is of volume sufficient to make the water of the burn, as it passes the respondents' land, hard instead of soft; and (v) that the hard water so produced is much less suitable for distilling than the naturally soft water of the burn.

From the judgment delivered by the Lord President it appears that the respondents in maintaining their right to have the appellants interdicted from discharging the pit water into the Doups Burn, presented their case in two different aspects. In the first place, they complained of the quality of the pit water on the same footing as if it had been water taken from the burn, used by the appellants for some secondary purpose, and then returned to the stream in a pure but hard condition. In the second place, they complained that the pit water, which could not find its way to the burn in the natural course of events, had been introduced by artificial means to their prejudice.

Upon the first hypothesis their Lordships' decision was in favour of the appellants. They appear to have affirmed that it is the right of a riparian proprietor not only to use water for secondary purposes, but in so using it to alter its chemical properties to any extent, so long as he does not render it impure in the sense of being unfit for primary uses. To that view of the law I am not prepared to assent. It was not necessary to decide the point, and its decision is unnecessary for the disposal of this appeal. But seeing that it was decided, I think it right to say that I am not satisfied that a riparian owner is entitled to use water for secondary purposes, except upon the condition that he shall return it to the stream practically undiminished in volume, and with its natural qualities unimpaired. I am not satisfied that, in returning the water in a state fit for primary uses, he has any right to alter its natural character, and so make it unfit for uses to which it had been put, or might be put, by a riparian proprietor below.

Upon the second contention their Lordships decided against the appellants, and granted interdict accordingly. The ratio of their decision is very clearly and forcibly stated by the Lord President, with whose opinion I entirely concur. The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly increased by operations which are in æmulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water conveyed artificially from a distant stream.

The law of Scotland upon this point is the same as that of England. In *Blair v. Hunter, Finlay & Co.* (1), LORD GIFFORD said (9 Macph. (Ct. of Sess.) at p. 207):

"Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The rule that the upper heritor cannot interfere with the gravitation of the water

**A** so as to make it more injurious to the land below is clearly stated by ERLE, C.J., in *Baird v. Williamson* (2), which was rightly accepted by the First Division as establishing a principle conclusive of the present case. Against that principle the appellants were only able to cite one American case, *Pennsylvania Coal Co. v. Sanderson* (3), which I do not notice further, because it was decided upon the express ground that in so far as concerns the present question the law of Pennsylvania differs essentially from the law of England. I therefore move that the interlocutor appealed from be affirmed, with costs.

**LORD HERSCHELL, L.C., and LORD ASHBOURNE** concurred.

**LORD MACNAGHTEN.** This case has been very fully and ably argued on the part of the appellants. It is said to be a case of general importance, and it certainly contains an element of novelty. But the question involved in it is not, I think, attended with any difficulty. The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream in its natural flow without sensible diminution or increase, and without sensible alteration in its character or quality. Any invasion of this right causing actual damage, or calculated to found a claim which may ripen into an adverse right, entitles the party injured to the intervention of the court.

The respondents are riparian proprietors in regard to the Doups Burn. They carry on the business of distillers on their property by means of a distillery which has been at work there for the last sixty years. The appellants, without any prescriptive right so to do, are pouring into the burn a large body of water which they pump up from their mines. The respondents do not complain of the increased volume of the stream. The increase in itself is no disadvantage to them. But they say that the foreign water is of a quality different from that of the natural stream, and that it prejudicially affects the burn water for distilling purposes. The appellants insist that they are entitled to continue their operations, and therefore, although the respondents can, and do at present, protect themselves by taking their supply at a point higher up the stream, it is necessary to determine the question of right.

**G** It is proved that the water of the burn flowing past the respondents' property is less suitable for distilling purposes than it used to be. It used to be very soft water. It has been made very hard. The appellants have thus seriously impaired the manufacturing value of the burn. They have, in fact, destroyed its special value. Their answer is, that the ingredient introduced is only water, and very good water too. It may be very good water for some purposes; but that is not much satisfaction to the respondents, if it will not do for the one purpose for which they want to use it. It seems to me that the appellants have no more right to pour into the burn foreign water, which has the effect of changing its natural quality, than they would have to put into it some chemical substance which would produce a similar alteration.

**I** Then the appellants urged that working coal was the natural and proper use of their mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulated in their mine, and they added that this watercourse is the natural and proper channel to carry off the surplus water of the district. All that may be very true; but, in this country at any rate, it is not permissible in such a case for a man to use his own property so as to injure the property of his neighbour. I have therefore no doubt that the appellants are not justified in pouring into the burn foreign water to the injury of the respondents.

While I agree with the learned judges of the First Division in this, which is the ground of their decision, I am compelled to add that I am unable to concur in one proposition which their Lordships lay down as a proposition of law. They held that, if the particular change in the quality of the Doups Burn of which the respondents complain had been effected, not by the introduction of foreign water, but by some manufacturing process employed by an upper proprietor entitled to the use of the flowing stream, the respondents would have been without remedy. It is not necessary to decide the point. But, as at present advised, I am disposed to think that, if the appellants had abstracted the natural water of the burn, and had returned it to the stream so altered in quality or character as to be materially less serviceable for the reasonable use of the respondents, though still fit for primary or ordinary uses, they would have been equally liable to an interdict, just as they would be liable if they were to return water unchanged in its chemical constitution, but so changed in the temperature as to be injurious to a lower riparian proprietor. I therefore concur in the motion which has been proposed.

**LORD MORRIS** concurred.

**LORD SHAND.**—I concur in the opinions of my noble and learned friends. I fully share the doubts which have been expressed as to the right of any upper proprietor so to use the water of a stream as to affect injuriously its natural quality as restored to the bed to the prejudice of the lower riparian owner, even though the water restored should be fit for ordinary primary purposes. It is true that, in the cases which have hitherto occurred, both in Scotland and in this country, where the complaint has been of pollution by an upper heritor, the claim has been made that the water should be transmitted in such a state of purity as to be fit for the use of man and beast, and the other primary uses of running water, and that, where no prescriptive right to pollute has been proved, decree has been given to this effect. The object of the pursuers in these cases was served by having the pollution put down, and their right to the transmission of water, fit for primary purposes, declared. These cases do not, however, establish the proposition that, if a running stream should possess natural qualities which may be valuable to lower proprietors for some manufacture or otherwise, an upper proprietor using the water for his own purposes may deprive the water of those qualities, provided he restore it fit for ordinary primary uses. There seem to be strong reasons for holding that the lower owner is entitled to have the water transmitted to him with its natural qualities unimpaired, and that the principle of the cases which have given effect to the claim to have the water transmitted unimpaired in quality, and fit for primary purposes, would support that view. But, at all events, I am at present unable to assent to the view expressed by the learned judges in the Court of Session.

I am, however, clearly of opinion that, while a lower proprietor must submit to the flow of water coming down upon his lands by the natural force of gravitation, he is not bound to receive water brought up from a depth by artificial means, such as pumping. The appellants would, no doubt, be entitled in mining to excavate and remove the strata of minerals in the lands leased to them to any depth practicable to which they might choose to go. If in so doing, in the ordinary course of working, they should happen to tap springs or a water waste, from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine-owner is not entitled to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or might only do so more gradually and slowly, and in much smaller volume. This is, I think, the rule or principle on which the court decided *Baird v. Williamson* (2), the decision in which has been approved of by your Lordships.

I know of no distinction between the law of Scotland and the law of England in the class of questions relating to the common interest and rights of upper and



A lower proprietors on the banks of a running stream. The whole series of authorities in both countries seems to be entirely against the claim or pretension of the appellants for their own profit to pump up water from the depths of their pits and send it into the stream, greatly enlarging the quantity of water in the bed, and impairing its quality. In these circumstances the appellants' counsel invited your Lordships to follow the decision in an American case, decided in the Supreme Court of Pennsylvania in February, 1866 (*Pennsylvania Coal Co. v. Sanderson* (3)). In that case undoubtedly the court held that the owners of a mine were entitled to pump up water from the low strata of the mine, and to send it into an adjoining stream, although the quantity of the water was thereby increased, and its quality so affected as to render it totally unfit for use for domestic purposes by the lower riparian owners. The case had been twice previously before the court, and on both occasions the judgment was given against the mine-owner. On the third occasion, which arose in consequence of a third trial to assess the damages, the jury found a very large sum due to the lower owner; but the verdict was quashed, and the whole case was reconsidered with reference to the legal rights of the parties, and with the result which I have just stated. In a court of seven judges there were three who dissented from the judgment, including the Chief Justice of the State. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight. These grounds appear to me from a perusal of the judgment to be fairly stated in the head-note as follows:

E "The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal."

F I shall only add that, while the enormous value of the mining interests in the district of Pennsylvania from which the case came, which is fully explained in the judgment, might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceeding by interdict at the instance of surface owners, and to confine them to a right to damages only for injury sustained, that value could, in my opinion, afford no good legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure his neighbour's estate, by subjecting it, by means of artificial operations, to the burden of receiving water enlarged in quantity and destroyed in quality, without payment of compensation or damages for the injury done. The case has no application to the present, because the decision was based on special circumstances as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than interpreting the law so as to give effect to sound, just, and well-recognised principles as to common interest, and rights of upper and lower proprietors in the running water of a stream.

*Appeal dismissed.*

I Solicitors: *Grahames, Currey & Spens*, for *Webster, Will & Ritchie*, Edinburgh; *A. Beveridge*, for *G. Monro Thomson*, Edinburgh.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## HEBDITCH v. MacILWAIN

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Davey, L.J.J.), April 5, 1894]

[Reported [1894] 2 Q.B. 54; 63 L.J.Q.B. 587; 70 L.T. 826;  
58 J.P. 620; 42 W.R. 422; 10 T.L.R. 387; 9 R. 452]

*Libel—Privilege—Qualified privilege—Privileged occasion—Publication to person having no duty, interest, or power in the matter—Bona fide belief by publisher that duty, interest, or power existed.*

Where a defendant has published a defamatory document to a person who has no duty, or interest, or power to deal with the subject-matter of the libel, the occasion does not become privileged by reason of the fact that the defendant had at the time of the publication a bona fide and reasonable belief that that person had such duty, interest, or power.

The plaintiff was a candidate at an election of parish guardians and was elected to office. The defendants, who were electors, sent a letter to the board of guardians alleging improper conduct of the plaintiff in obtaining votes. The allegations proved to be untrue and libellous, but the defendants honestly believed that it was their duty to make them to the board.

**Held:** as the board of guardians could not set the election aside or give any redress to the defendants the fact that the defendants honestly believed that the board had a power or duty in the matter was immaterial and the occasion was not privileged.

*Tompson v. Dashwood* (1) (1883), 11 Q.B.D. 43, overruled.

Per LORD ESHER, M.R.: The proof that an occasion is privileged lies on the defendant, and if he proves it, then the burden is on the plaintiff to prove malice; but there is no need for him to prove malice until the defendant has first proved that the occasion when the libel was published was privileged. Whether or not an occasion is privileged is a question of law, a question for the judge, not for the jury.

**Notes.** Considered: *Minter v. Priest*, [1930] All E.R.Rep. 431. Referred to: *R. v. Rule*, [1937] 2 All E.R. 772; *Bata v. Bata* (1948), 92 Sol. Jo. 574.

As to qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq.; and for cases see 32 DIGEST 112 et. seq.

Cases referred to:

- (1) *Tompson v. Dashwood* (1883), 11 Q.B.D. 43; 52 L.J.Q.B. 425; 48 L.T. 943; 48 J.P. 55, D.C.; 32 Digest 116, 1478.
- (2) *Waring v. McCaldin*, I.R. 7 C.L. 282.
- (3) *Stuart v. Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, 1545.
- (4) *Harrison v. Bush* (1856), 5 E. & B. 344; 3 C.L.R. 1240; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196; 20 J.P. 147; 1 Jur.N.S. 846; 2 Jur.N.S. 90; 3 W.R. 474; 4 W.R. 199; 119 E.R. 509; 32 Digest 123, 1550.
- (5) *M'Dougall v. Claridge* (1808), 1 Camp. 267, N.P.; 32 Digest 132, 1633.
- (6) *Fairman v. Ives* (1822), 5 B. & Ald. 642; 1 Dow. & Ry.K.B. 252; 106 E.R. 1325; 32 Digest 133, 1639.
- (7) *Pearson v. Lemaitre* (1843), 5 Man. & G. 700; 6 Scott, N.R. 607; 12 L.J.C.P. 253; 1 L.T.O.S. 170; 7 J.P. 336; 7 Jur. 748; 134 E.R. 742; 32 Digest 162, 1957.
- (8) *Scarll v. Dixon* (1864), 4 F. & F. 250; 32 Digest 115, 1476.
- (9) *Toogood v. Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.

**A** Also referred to in argument :

*Cleaver v. Sarraude* (circa 1800), cited in 1 Camp. at p. 268, N.P.; 32 Digest 122, 1638.

**Application** by the defendants for judgment or a new trial of an action for libel by VAUGHAN WILLIAMS, J., with a jury, at Taunton Assizes.

**B** The plaintiff had been a candidate at an election of guardians for the parish of South Petherton, in the county of Somerset, and was elected. After the election the defendants, who were electors, wrote and sent to the board of guardians a letter imputing to the plaintiff improper conduct in obtaining votes at the election, and asking for an investigation. The improper conduct alleged was the tampering with the voting papers, as they were handed in, by a person in the employ of the plaintiff, who was engaged in collecting the votes, and treating with drink at certain public-houses several of the voters. At the trial

**C** of the action VAUGHAN WILLIAMS, J., left the following questions to the jury: (i) Is the letter libellous? Answer: Yes. (ii) Is the plea of justification proved, either wholly or in part? Answer: No. The third question became unnecessary by reason of the jury's answer to the first. (iv) Did the defendants, and each of them, honestly believe it to be their duty to make each and all the communications in the letter, and did they each sign the letter under a sense of duty? Answer: In part. (v) Did the defendants, and each of them, honestly and reasonably believe that the board of guardians were the proper authority to whom to apply in respect of each and all of the matters mentioned in the letter? Answer: Yes. The learned judge then re-directed the jury as to the fourth

**E** question, and left them two questions in its place, referring to the two parts of the letter, the questions in each case being: Did the defendants write that under a sense of duty and believing the board to be the proper persons to write to? Answer as to the first part, Yes; as to the second part, No. Upon that the learned judge ruled that the occasion was not wholly privileged, and said he would put no question as to malice. He then directed the jury to find the amount of damages. The jury returned a verdict of £10 damages, and the learned judge

**F** gave judgment for the plaintiff accordingly. The defendants now moved for judgment or a new trial.

*J. Alderson Foote* (*Metcalf* with him) for the defendants.

*Blake Odgers, Q.C.*, and *Whately* for the plaintiff.

**G** **LORD ESHER, M.R.**—In this case the plaintiff has brought an action of libel against the defendants for writing and publishing with regard to the plaintiff that when he was a candidate in an election of guardians of the poor he had bribed some of the electors. Such an action as that consists not merely in writing a libel, but in writing and publishing, and the material point is the publication of what has been written. In this case it has been proved to the satisfaction of

**H** the jury that the defendants wrote a document which was libellous on the plaintiff, and that they published it to the board of guardians. The defendants argue that though that may be so, yet the libel was published on a privileged occasion, and that the plaintiff had not proved malice. The proof that an occasion was privileged lies on the defendant, and if he proves it, then the burden is on the plaintiff to prove malice; but there is no need for him to prove malice until the defendant

**I** has first proved that the occasion when the libel was published was privileged. Whether or not an occasion is privileged is a question of law, a question for the judge, not for the jury.

The facts in the present case upon which the question of law, whether or no the occasion was privileged, has to be determined are these. The plaintiff had been a candidate, and had been elected at this election of guardians. The defendants are persons who had a right to vote at this election and after the election was over they sent the defamatory letter to the board of guardians, and this is the publication relied on. It is clear that the board could do nothing.



They could not set aside the election or do anything in the matter. That being so, the first question for the judge at the trial was whether the defendants had an interest in the matter. I am not prepared to say that they had not. I am inclined to think that they had, because they were electors, but for the purposes of this judgment I will assume that they had an interest. The next question is, were the board of guardians interested? I think they were not. It seems to me that they had no duty or power to move in the matter. Under these circumstances it seems to me perfectly clear that the occasion was not privileged.

To that the defendants reply that, though the board of guardians may not have had any interest or duty in the matter, nevertheless the occasion was privileged because the defendants believed honestly and reasonably, or not unreasonably, that the board of guardians had a power or duty in the matter, and were able to give the defendants some redress, and that was the reason why the defendants sent the letter to the board. I cannot accept that proposition. In what way can the belief of the defendants, who have made a mistake and published a libellous document to certain persons who have no interest or duty or power in the matter, affect the question whether the occasion of the publication was privileged? It is true that the belief of the defendants may be important upon the question of malice, but if the occasion was not in any other respect privileged I cannot see what is the importance of the defendants' belief.

However, the argument was put forward as being based upon authority. I do not think that any court has decided the point which has been argued here, but certainly it has not been so decided by the Court of Appeal. It is unnecessary for us to justify our decision by a minute discussion of all the cases that have been cited in the argument. The first case relied on is *Waring v. McCaldin* (2), and FITZGERALD, B., no doubt used an expression in that case which justified its citation here, but I do not think he meant to decide the point. He says in his judgment:

"If without express malice I make a defamatory charge which I bona fide believe to be true against one whose conduct in the respect defamed has caused me injury, to one whose duty it is, or whose duty I reasonably believe it to be, to inquire into and redress such injury, the occasion is privileged."

The alternative there mentioned is what is relied on here. But is that the real judgment of the learned judge? Immediately before the sentence I have just read he said:

"The occasion of making a defamatory communication is thus privileged—when it is made by one having an interest in making, or a duty to make, that particular defamatory communication . . . to one having a corresponding interest or duty in respect of that subject-matter—that is to say, who has an interest in hearing, or a duty to arise upon hearing, such defamatory communication."

So that, having laid down the law correctly, he immediately after is supposed to lay down the proposition that the defendants' belief will make an occasion privileged. I cannot believe that the words relied upon are his real judgment, and I think he must have used them inadvertently. I do not think he meant to decide the proposition cited here for the defendants, but, if he did use these words purposely, I cannot agree with him.

The only case cited which is binding on us is *Stuart v. Bell* (3), which is a decision of the Court of Appeal; but I think that, when that case is looked into, it will be found to be an authority against the defendants' contention. After considering a number of cases, LINDLEY, L.J., then says ([1891] 2 Q.B. at p. 348):

"Now, adopting the language of ERLE, C.J., I ask, do the circumstances show that the statement complained of was made in the discharge of some social or moral duty, or that the speaker or the person addressed had an interest in making or receiving the communication?"

A He then discussed the question of the defendant's interest, and continued (*ibid.* at p. 349):

B "But the question still remains, whether the defendant was not under a moral or social duty to make such communication. Both the defendants and Stanley say that the defendants acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief."

C That seems to me distinct authority that the belief of the defendant at least is immaterial. Then *Harrison v. Bush* (4) was cited as an authority; but LORD CAMPBELL, C.J., there declined to give any opinion on the point, so that it seems to me that the case cannot be cited as an authority upon this question. *M'Dougall v. Claridge* (5) and *Fairman v. Ives* (6) were also cited, but from what was said by the Court of Common Pleas, when those cases were cited in *Pearson v. Lemaitre* (7), it appears that they are both within the ordinary rule, and do not assist the defendants here. The report also of *Scarll v. Dixon* (8) is not satisfactory.

D There is one case which seems to be in favour of the defendants' contention, and that is *Tompson v. Dashwood* (1). There, I think, the judges did draw a distinction between writing and publishing a libel; but, as I have said, the cause of action depends on the publication of the document, not on the writing of it. The only way in which that case can be dealt with is to say that we do not agree with it, and in my opinion it was wrongly decided. Therefore, with regard

E to the present case, when it was proved that the defendants had published this libel, and that the board of guardians to whom it was published had no interest, or duty, or power, to deal with the complaint made to them, then the judge ought, without more, to have held that the occasion was not privileged, and that there was no further question in the case except as to damages. Therefore, the last questions which the learned judge left to the jury were unnecessary and irrelevant,

F and it is immaterial what the findings of the jury upon them were. I am of opinion, upon the undisputed facts of this case, that the occasion was not privileged, and this application therefore fails, and must be dismissed.

G **SMITH, L.J.**—I agree that this application fails. The action is for libel, and the plaintiff established a *prima facie* case, namely, that the defendants had falsely and maliciously published a document which was defamatory of the plaintiff. The defendants in reply say that the occasion was privileged, and so seek to rebut the presumption of malice which the law implies on the publication of a libellous document. The question therefore arises, what constitutes a privileged occasion.

H The law was laid down by PARKE, B., in *Toogood v. Spyring* (9) and also by LORD CAMPBELL, C.J., in *Harrison v. Bush* (4). In the latter case it was laid down (5 E. & B. at p. 344) that

I "a communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty [and I will add here, whether legal, moral, or social] is privileged if made to a person having a corresponding interest or duty, although it contains criminary matter which, without this privilege, would be slanderous and actionable."

That is to say, there must be a corresponding duty or interest in the person sending and in the person receiving the libellous document. In this case it is clear that the board of guardians had no interest or duty in the matter complained of by the defendants, and therefore it follows that the libel was not published upon a privileged occasion. That was to a certain extent admitted, but it was argued that, though the communication was addressed to persons who had no

interest or duty in the matter, nevertheless the occasion would be privileged if the defendants bona fide and reasonably believed that the board of guardians had some interest, duty, or power. That does not seem to me to be the law. The belief of a libeller cannot make an occasion privileged if it is not otherwise privileged. A

In *Stuart v. Bell* (3) LINDLEY, L.J., pointed out that the question of privilege does not depend on the defendant's belief, and I entirely agree with him there. Several cases were cited in support of the defendants' contention, but I must pass most of them by. The strongest case is *Waring v. McCaldin* (2), in which FITZGERALD, B., used the words which the Master of the Rolls has already read. I do not think that the passage in his judgment which is relied on is right in law. It seems to me, therefore, that my brother VAUGHAN WILLIAMS ought, at the trial of this action, to have ruled that the occasion was not privileged. No doubt he thought it safer to leave to the jury the later questions, but they were unnecessary. Even if we were wrong in the law which we are applying to this case, I think that on the findings of the jury the defendants would be out of court. I agree that this appeal ought to be dismissed. B C

DAVEY, L.J.—I agree that this appeal must be dismissed.—I agree also with what the Master of the Rolls has said with regard to *Tompson v. Dashwood* (1), and I think that the case cannot be supported. D

Upon the question whether the occasion of the publication of a libel is privileged, I cannot see how the state of the defendant's mind can of itself make any difference. I think it is unnecessary to discuss all the authorities that have been cited by the learned counsel for the defendants, because I think none of them, except *Tompson v. Dashwood* (1) are really in his favour, and *Stuart v. Bell* (3) in this court is against him. As to *Waring v. McCaldin* (2), I must say, with great respect to FITZGERALD, B., that I think the dictum that has been cited to us was uttered per incuriam, and cannot be supported. I agree that the appeal fails. E

*Application dismissed.* F

Solicitors: Rowcliffes, Rawle & Co., for John Trevor-Davies, Yeovil; Taunton & Dade, for Richard Howard, Weymouth.

[Reported by E. MANLEY-SMITH, ESQ., Barrister-at-Law.]



A

## TICHBORNE v. WEIR

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), July 21, 1892]

[Reported 67 L.T. 735; 8 T.L.R. 713; 4 R. 28]

B *Landlord and Tenant—Repair—Liability of assignees of lease—Lessee out of possession for more than twenty years—Real Property Limitation Act, 1883* (3 & 4 Will. 4, c. 27), s. 34.

C In 1802 D., the landlord's predecessor in title, granted to B. a lease for eighty-nine years of a house containing a covenant to repair. B. created an equitable mortgage of the lease by deposit with G., and in 1836 G. entered into possession, paid the landlord the rent agreed in the lease granted to B., and continued in possession until 1876, when by deed he assigned all his interest in the lease to the defendant who continued in possession and paid the same rent to the landlord until 1891, when he delivered up possession to the landlord. The landlord sued the defendant for breach of the covenant to repair contained in the lease granted to B.

D **Held:** the effect of s. 34 of the Real Property Limitation Act, 1833 [now s. 16 of the Limitation Act, 1939], was not to transfer to G. the right and title of B., so that G. did not become subject to the covenant of the lease which he assigned to the defendant, but only to extinguish it by barring the remedy, and, consequently, the defendant was not liable under the covenant in the lease granted to B.

E **Notes.** Section 34 of the Real Property Limitation Act, 1833, has been replaced by s. 16 of the Limitation Act, 1939: see 13 HALSBURY'S STATUTES (2nd Edn.) 1175.

Considered: *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391. Applied: *Taylor v. Twinberrow*, [1930] All E.R.Rep. 342. Applied: *St. Marylebone Property Co., Ltd. v. Fairweather*, [1961] 3 All E.R. 560; [1962] 2 All E.R. 288. Referred to: *Re Jolly, Gathercole v. Norfolk*, [1900-3] All E.R.Rep. 286; *Re Atkinson and Horsell's Contract*, [1911-13] All E.R.Rep. 893; *Official Trustee of Charity Lands v. Ferriman Trust, Ltd.*, [1937] 3 All E.R. 85.

F As to nature of title acquired by the operation of the period of limitation, see 24 HALSBURY'S LAWS (3rd Edn.) 258; and for cases see 32 DIGEST 485 et seq. As to who are liable as assignees of a lease, see 31 HALSBURY'S LAWS (3rd Edn.) 651 et seq.; and for cases see 31 DIGEST (Repl.) 447 et seq.

G Cases referred to:

(1) *Incorporated Society in Dublin v. Richards* (1841), 1 Dr. & War. 258; 35 Digest 652, *t.*

(2) *Doe d. Jukes v. Sumner* (1845), 14 M. & W. 39; 14 L.J.Ex. 337; 9 Jur. 413; 153 E.R. 380; 32 Digest 485, 1478.

H Also referred to in argument:

*Scott v. Nixon* (1843), 3 Dr. & War. 388; 40 Digest (Repl.) 164, \*684.

*Burroughs v. McCreight* (1844), 1 Jo. & Lat. 290; 32 Digest 460, *c.*

*Anstee v. Nelms* (1856), 1 H. & N. 225; 26 L.J.Ex. 5; 27 L.T.O.S. 190; 4 W.R. 612; 156 E.R. 1186; 32 Digest 489, 1510.

*Dawkins v. Lord Penrhyn* (1878), 4 App. Cas. 51; 48 L.J.Ch. 304; 39 L.T. 583; 27 W.R. 173, H.L.; 32 Digest 484, 1463.

I *Sanders v. Sanders* (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 30 W.R. 280, C.A.; 32 Digest 458, 1250.

**Appeal** by the plaintiff's landlord from a decision of CAVE, J., without a jury, in an action by the landlord of a house in Gray's Inn Road for damages for breach of a covenant to repair against the defendant who had been in occupation as tenant and was, as the landlord claimed, liable on the covenants as assignee of the lease. CAVE, J., held that the lease never vested in the defendant and that

the defendant was not liable on the covenants in the lease and gave judgment for the defendant. A

In 1802 the landlord's predecessor in title, Mrs. Doughty, who was owner in fee simple, granted a lease of the house to Baxter for a term of eighty-nine years at a yearly rent and this lease contained the covenant upon which the present action was brought. Baxter created an equitable mortgage of the lease by deposit with Giraud, and afterwards in 1836 Giraud entered into possession of the premises without any acknowledgment to Baxter, who disappeared in 1836. Giraud remained in possession for forty years till 1876, paying to the landlord the rent agreed in the lease to Baxter. In 1876, by a deed made between Giraud and the defendant reciting the lease granted by Mrs. Doughty to Baxter and reciting that the premises were at that time legally vested in Giraud for the rest of the term, Giraud assigned all his estate and interest in the lease to the defendant, who then entered into possession and continued paying the same rent as Giraud till the end of the term in 1891, when he delivered up possession of the premises to the landlord, the successor in title of Mrs. Doughty. B C

Section 34 of the Real Property Limitation Act, 1833, provides :

"That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished." D

*Murphy, Q.C.*, and *Hadley* for the landlord.

*Channell, Q.C.*, and *Chester Jones* for the defendant, were not called on to argue. E

**LORD ESHER, M.R.**—The real point argued before us in this case is, whether the effect of s. 34 of the Real Property Limitations Act, 1833, has been to transfer the lease formerly held by Baxter to Giraud, who for over twenty years had been in possession of the land without any acknowledgment to Baxter, who had equitably mortgaged the lease to him. The question is whether Giraud became subject to the covenants of the lease, and whether he has assigned the lease to the defendant. If the statute transferred the lease to Giraud, then Giraud became tenant of the landlord whether the landlord liked it or not. Reliance was placed on the words of the section, though it says not a word about transferring anything to anybody; it merely says the right "shall be extinguished." If that is all, the right of the man out of possession is extinguished so that he cannot eject the man who is in possession, but nothing is given to the latter by the statute. As no one can turn out the man in possession, his possession is the same in effect, as LORD ST. LEONARDS says in *Incorporated Society in Dublin v. Richards* (1), as if he had a title conveyed to him. F G

But it is argued that cases have decided that a title is transferred by the statute. It is not said that there is any reported case which clearly decides that Giraud became under the statute a transferee of the lease; but it is contended that judges have used words which show that such is the case. The landlord relies on phrases used by LORD ST. LEONARDS, a very great real property lawyer; but they were used when he was speaking of a fee simple, and when no question was raised about a lease. The opinions of well-known writers of conveyancing textbooks are also opposed to the contentions put forward on behalf of the plaintiff. Textbooks written by living authors who are practising barristers are not quoted in the courts, but passages have been read from two books of great authority. HAYES in his own marginal note says in his book on CONVEYANCING (6th Edn.), vol. 1, p. 269: "The statute does not convey but destroys the right." Therefore, the matter comes to this. The words of the statute do not carry the proposition which is contended for, the reason of the thing is against it, there is an absence of judicial authority, and the views of well-known textbook writers are uniformly against it. All these reasons show that the effect of the statute is not that the right of one person is I

A conveyed to another, but that the right is extinguished and destroyed. That being so, the judgment of CAVE, J., is right, and this appeal must be dismissed.

**BOWEN, L.J.**—I am of the same opinion. It seems to me that the whole of the argument addressed to us depends on the proposition that the statute transferred Baxter's rights and liabilities as against the landlord to Giraud. I think that the statute makes no transfer of any kind. Section 34 of the Real Property Limitations Act, 1833, says that, at the determination of the period limited by the Act to any person for making an entry or distress or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land (which word includes a chattel interest) for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished. It is argued that the extinguishment of the title must have the effect of transferring the term to the man in possession, although there is no mention in the statute of any transfer.

The argument is really an overstraining of the words used by LORD ST. LEONARDS in *Incorporated Society in Dublin v. Richards* (1) and of PARKE, B., in *Doe d. Jukes v. Sumner* (2), and a construing of them to mean more than what is said in the Act. It is true that the effect of the statute is not only to bar the remedy, but also to extinguish the title of the person out of possession, and in that sense the person in possession holds by virtue of the Act, but not by a fiction of a transfer of title. In DART'S VENDORS AND PURCHASERS (6th Edn.), vol. 1, p. 463, it is stated that

"Possession for a time exceeding the statutory limit not only bars the remedy, but also extinguishes the right of the original owner. It has been said that the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the statutory period has elapsed; but though it is true that the possessory owner, after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. If the statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and wherever it was in settlement, his interest therein would constantly be varying according to the successive limitations of the settlement; but this is clearly not the operation of the statute."

Similar language is used in HAYES ON CONVEYANCING, p. 269, and the reasoning there given is entirely germane to the matter. He says :

"We must not, however, confound the negative effect of the statute with the positive effect of a conveyance. In the example last considered, the rights of A. and B. do not become the rights of C. under a species of involuntary alienation effected by the statute. If that hypothesis were adopted, it would follow that, when the bar became complete as against A., the tenant for life, C. acquired a lawful estate pur autre vie; in short, that where the land is in settlement the adverse possessor would be from time to time invested with interests measured by those of the successive takers, whether chattel or freehold, and consequently be owner today of a short term of years, tomorrow, of the fee. Such is not the operation of the statute."

That language is used in reference to a fee simple, but here we have not to deal with the fee.

From 1802 to the present time nothing has been done to bar any right of the original lessor. Giraud never acquired the fee simple, it was only as against Baxter that he acquired anything. The most that can be said is, that he acquired an absolute title to the land as against everybody but the landlord. He was not



liable on the covenants in the lease. The arguments used in the books which I have read support the only view consistent with the statute. Only in one metaphorical sense can the section be said to give a title to land. Then there is another point arising out of the payment of rent to the landlord. It was said that the defendant had estopped himself, by paying the rent agreed upon in the lease to Baxter, from saying that he had not accepted the term. If a man pays rent to the landlord on the footing of accepting a term and the liabilities under it, and the landlord accepts the rent on those conditions, then such a person might be estopped from denying that he has become tenant to the landlord on those conditions. But the terms of payment of the rent in this case fall short of showing that the defendant meant to stand for all purposes in the shoes of the original lessee. The landlord has his rights against Baxter on his covenants, but not against the defendant, unless the defendant has taken the lease by assignment or has estopped himself from denying that he is assignee of the term. There is nothing here to show any such estoppel.

**KAY, L.J.**—This is an action on a covenant in a lease to restore the demised premises in a good state of repair. The lease was created in 1802 and terminated in June, 1891. The lessor, Mrs. Doughty, was the landlord's predecessor in title of the fee simple. The lessee, Baxter, deposited the lease by way of equitable mortgage with Giraud, and in 1836 Giraud entered into possession of the land. Baxter then disappeared altogether. Giraud remained in possession till 1876, when he executed a deed which recited the lease of 1802, but then, instead of going on to say as usual "by divers mesne assignments etc.," it continued, "whereas the said premises legally vested in the said Giraud for the rest of the term." Giraud then assigned his interest in the rest of the term subject to the conditions and covenants of the original lease. The lessor was not a party to this deed. The deed shows that Giraud had not the ordinary title which the assignee of a lease usually has, though it raises a presumption that the lease was assigned to him. On the occasion of the conveyance Giraud made a statement that he had no assignment of the lease, but only a title by a possession of forty years. The question is, what is the effect of that title.

There is no doubt that covenants running with the land would bind anyone coming into possession of the estate which Baxter had, and if the lease is anyhow vested in the defendant, he would be bound by such covenants. Therefore, the question is, whether Baxter's estate is vested in the defendant. It was argued that the effect of the statute was to transfer the term from Baxter to Giraud, and so it would be vested in the defendant. Under the Real Property Limitations Act, 1833, s. 34, "the right and title" of Baxter "to the land" (which by the interpretation clause includes chattel interest) was "extinguished." That is the operation of the section, and we are now asked to construe the Act so as to make it say that Baxter's right and title was transferred to Giraud. There is no authority for saying that this is the meaning of the Act. Great textbook writers may be quoted to show the general opinion of the profession at the time. MR. DART and MR. HAYES are quite opposed to the correctness of the argument now put forward. Passages have been read from judgments in which the word "transfer" has certainly been used. But in the first case cited, *Incorporated Society in Dublin v. Richards* (1), the word is used by LORD ST. LEONARDS just after he had used the word "extinguished;" and even if the detached sentences relied on be carefully read they are quite consistent with a meaning different from that which is attributed to them by the argument. The defendant got an estate in the land which he has admitted, by paying rent, is not the fee simple, and by operation of the statute Baxter's right to claim the term was extinguished. It follows that Giraud during the rest of the term was free from liability to Baxter or anyone claiming under him, but it does not follow that he acquired Baxter's estate.

There is another point as to whether the defendant is estopped from denying that he was in possession of Baxter's lease. He admits he is in possession of the

- A land, he and Giraud have paid the rent agreed on in the lease of 1802, and they have claimed possession for the rest of the term. The landlord's title to the land has been completely admitted, but there is no other evidence of the defendant's being bound by all the terms of the lease, or of his holding all Baxter's estate. There being no such admission, either express or implied, we must hold that there is no evidence of such an extensive estoppel as that which has been contended for.
- B I think that the defendant, for the reasons I have stated, is not liable on the covenants in the lease, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Gadsden & Treherne; Lewis & Sons.*

C [Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

D

## RAMSAY v. MARGRETT

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), March 9, 1894]

E [Reported [1894] 2 Q.B. 18; 63 L.J.Q.B. 513; 70 L.T. 788;  
10 T.L.R. 355; 1 Mans. 184; 9 R. 407

*Bill of Sale—Receipt of purchase money—Not part of transaction which passed goods—"Apparent possession"—Sale of goods by husband to wife—Goods remaining in house—Possession consistent with that of either husband or wife—Possession attributed to wife who had legal title—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 4, s. 8.*

F

A wife, who was living in the same house as her husband, agreed to buy his furniture and effects, and paid a fair price for them. Subsequently, the husband signed an ordinary receipt for the goods in which he acknowledged that the goods were the absolute property of the wife. The goods remained in use in the house which they both continued to occupy.

G

**Held:** (i) the receipt was not part of the transaction which passed the property in the goods, and, therefore, it was not a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878, so as to require registration under that Act.

H

(ii) (per LORD ESHER, M.R., and DAVEY, L.J.) even if the receipt had been a bill of sale within s. 4 of the Act, the goods were not within the apparent possession of the husband within s. 8 of the Bills of Sale Act, 1878, since, as the goods remained in the house, their possession was consistent with either that of husband or wife, and possession must be attributed to the wife who had the legal title.

I

**Notes.** Followed: *Withers v. Berry* (1895), 39 Sol. Jo. 559. Applied: *Clapham v. Ives* (1904), 91 L.T. 69. Considered: *Re Lavey, Ex parte Trustee*, [1918-19] B. & C.R. 116. Explained and Applied: *French v. Gethin*, [1921] All E.R.Rep. 415. Distinguished: *Youngs v. Youngs*, [1940] 1 All E.R. 349; *Hislop v. Hislop*, [1950] W.N. 127. Referred to: *Re Satterwaile, Ex parte Trustee* (1895), 2 Mans. 52; *Re Reis, Ex parte Clough*, [1904] 1 K.B. 451; *Re Magnus, Ex parte Salaman* (1910), 80 L.J.K.B. 71; *Canvey Island Comrs. v. Preedy*, [1922] 1 Ch. 179; *Fleetwood-Hesketh v. I.R.Comrs.*, [1935] All E.R.Rep. 682; *Bennett and White (Calgary), Ltd. v. Sugar City Municipal District No. 5*, [1951] A.C. 786; *Re Cohen, National Provincial Bank v. Katz*, [1953] 1 All E.R. 378.

As to receipts for purchase money being included in the term bill of sale, see **A**  
 3 HALSBURY'S LAWS (3rd Edn.) 262 et seq.; and for cases see 7 DIGEST (Repl.)  
 9 et seq. As to personal rights arising from marriage, see 19 HALSBURY'S LAWS  
 (3rd Edn.) 8 et seq.; and for cases see 27 DIGEST (Repl.) 93 et seq. For s. 4 and s. 8  
 of the Bills of Sale Act, 1878, see 2 HALSBURY'S STATUTES (2nd Edn.) 558, 565;  
 and for the Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES  
 (2nd Edn.) 799. **B**

Cases referred to :

- (1) *Charlesworth v. Mills*, [1892] A.C. 231; 61 L.J.Q.B. 830; 66 L.T. 690;  
 41 W.R. 129, H.L.; 7 Digest (Repl.) 4, 7.
- (2) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490;  
 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Morr. 246, C.A.; 7 Digest **C**  
 (Repl.) 22, 96.
- (3) *Jones v. Chapman* (1849), 2 Exch. 803; 18 L.J.Ex. 456; 14 L.T.O.S. 45;  
 13 J.P. 730; 154 E.R. 717, Ex. Ch.; 43 Digest 406, 284.
- (4) *North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Rail. Co.*  
 (1887), 35 Ch. 191; 56 L.J.Ch. 609; 56 L.T. 755; 35 W.R. 443; 3 T.L.R.  
 206, C.A.; affirmed sub nom. *Manchester, Sheffield and Lincolnshire Rail.*  
*Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; 58 L.J.Ch. 219;  
 59 L.T. 730; 37 W.R. 305; 4 T.L.R. 728, H.L.; 7 Digest (Repl.) 6, 12. **D**
- (5) *Woodgate v. Godfrey* (1879), 5 Ex.D. 24; 49 L.J.Q.B. 1; 42 L.T. 34; 28  
 W.R. 88, C.A.; 7 Digest (Repl.) 8, 26.

Also referred to in argument :

- Marsden v. Meadows* (1881), 7 Q.B.D. 80; 50 L.J.Q.B. 536; 45 L.T. 301; 29 **E**  
 W.R. 816, C.A.; 7 Digest (Repl.) 9, 30.  
*Jarman v. Woolloton* (1790), 3 Term Rep. 618; 100 E.R. 765; 27 Digest (Repl.)  
 99, 734.

**Appeal** by the defendant from a decision of WRIGHT, J., at the trial of an inter-  
 pleader issue, without a jury.

The plaintiff, Lady Ramsay, the wife of Sir Alexander Ramsay, claimed to be **F**  
 entitled to certain furniture, plate and effects which had been taken in execution  
 by the defendant, a judgment creditor of Sir Alexander Ramsay. WRIGHT, J., held  
 that there had been a bona fide sale of the furniture, plate and effects by the  
 husband to his wife, that a receipt which he gave her for the purchase price was  
 intended to be only an ordinary receipt and was not part of the transaction of the  
 sale of the goods, and that the receipt was not a bill of sale within s. 4 of the **G**  
 Bills of Sale Act, 1878, and did not require registration thereunder. He gave  
 judgment for the plaintiff, and the defendant appealed.

Sir Alexander and his wife, the plaintiff, lived together in a house which was  
 taken in his name, though she paid the rent. The furniture and plate which were  
 in use in the house belonged to him. In August, 1892, as he was in financial **H**  
 difficulties, she agreed to buy the furniture and plate, and paid him £1,700 out of  
 her separate estate, that being the full value of the goods. After the money was  
 paid, Sir Alexander signed and gave to the plaintiff the following receipt, which  
 had been drawn up by the plaintiff's solicitor :

"Received . . . Aug. 8, 1892, from [the plaintiff] . . . £1,200, making, with . . .  
 £500 paid to me on 3rd instant, the sum of £1,700 in payment of the agreed  
 purchase money for all my furniture, plate, . . . and other household and **I**  
 garden effects at [the house], which I hereby acknowledge are now absolutely  
 her property."

After the sale the goods continued to be used in the house as before. This receipt  
 was not registered as a bill of sale.

The defendant, a judgment creditor of Sir Alexander Ramsay, having levied  
 execution upon the furniture, an interpleader issue was ordered to be tried and  
 from the judgment in this issue the defendant appealed.



**A** *Herbert Reed, Q.C., and A. T. Lawrence* for the defendant.  
*Douglas Walker, Q.C., and Muir Mackenzie* for the plaintiff.

**LORD ESHER, M.R.**—The first question in this case is as to the real meaning of the judgment of **WRIGHT, J.** This was an interpleader issue which he tried without a jury, so that upon any question of fact his decision is in precisely the same position as a finding of a jury.

**B** The facts which he found were these. The plaintiff, Lady Ramsay, was a married woman who had separate property of her own. Her husband was in debt, and she agreed with him honestly to buy from him certain furniture and plate which was in the house where they both lived. She did not bargain about the price, she gave him their full value so that he might pay his creditors. He having agreed to

**C** sell for a fair price, she paid him the money, and either then or soon afterwards—it is not clear when exactly—she asked for a receipt. The learned judge found that what she asked for was “an ordinary receipt,” that is to say, a receipt for the money she had paid. The receipt was drawn up for her by her solicitor, and so far as it goes it is a receipt, but at the end of it he put an acknowledgment by the husband that he had sold the goods to her. I see no reason to doubt the judge’s

**D** finding as to those facts. There was nothing suspicious about any of the persons concerned, and both the husband and wife seem to me to be perfectly truthful, and, moreover, it is perfectly clear from other evidence that the plaintiff did in fact pay the money to her husband.

What is the law applicable to those facts? It is argued that, though the facts are as I have stated, yet a creditor of the husband is entitled to levy an execution on these goods, not on the ground that the wife did not pay for them, not on the ground that the husband did not really intend to pass any property to her by the sale, but on the ground that the document which he gave her is within s. 4 of the Bills of Sale Act, 1878. That document is not really a bill of sale, that is to say, a document by which the property in certain chattels is intended to pass from one person to another. But there are some documents which, though not really bills of sale, are deemed to be bills of sale within the Act. The last case of authority upon that is *Charlesworth v. Mills* (1) in the House of Lords. A rule was there laid down by **LORD HALSBURY, L.C.**, and **LORD HERSCHELL** to this effect, that if the document in question is intended by the parties to be part of the bargain which is to pass the property in the goods, then, whatever be its form, it is to be deemed to be a bill of sale though it may not really be so. If the document is not

**G** part of the bargain, if the bargain which passes the property is complete without the document, then the document is not to be deemed to be a bill of sale. That is the test to be applied. An ordinary receipt for money which has been paid for goods sold is not part of the bargain which passes the property in the goods. If the giving of a receipt had been a condition precedent to the payment of the

**H** money, it would be a part of the bargain; but when after the goods are sold the buyer simply asks for a receipt for the money he has paid, the receipt is no part of the contract, and, according to the rule laid down in the House of Lords, it is not to be deemed to be a bill of sale. In this case **WRIGHT, J.**, has found as a fact that the receipt was nothing more than an ordinary receipt for money paid, and upon that finding alone, as the receipt was not intended by the parties to be any

**I** part of the bargain by which the property passed, this document is not to be deemed to be a bill of sale within the Bills of Sale Act, 1878.

It was further argued that the creditor was entitled to seize these goods in execution under s. 8 of the Act of 1878 because they were in the “apparent possession” of the husband. But that section speaks of the “apparent possession of the person making such bill of sale,” so that until that person has given a bill of sale he is not within that section. As I have already said, I do not think that this receipt is a bill of sale within s. 4 of the Act of 1878, and consequently no question arises here as to apparent possession. That is enough to decide this case.

However, if it were necessary to decide whether possession of the goods was given to the plaintiff, I should say that in my opinion it had been given. This particular point could not have arisen before the passing of the Married Women's Property Act, 1882, because up to that time married women could not at law have any separate property. Formerly, if a married woman was entitled to any property it was held by trustees for her, it was not hers simply. If personal property was left to her simply, it became her husband's. Since the passing of the Married Women's Property Act, 1882, such property will remain the property of the wife, and does not pass to the husband. So far as personal property is concerned, a husband and wife are now in the same position as two men would be. In the present case we have a wife with money and a husband with furniture, and, upon a proper bargain being made, the furniture became hers and her separate property. The furniture was in the house in which the husband and wife were living together, so that you could not tell which of them was in actual possession. What is the rule of law under those circumstances? When the possession is doubtful, the law will attach it to the property, so that since the property of the goods is in the wife, the possession also will be in her. That would be enough to settle this case. So that, in either view, whether this receipt is a bill of sale or not, the judgment of WRIGHT, J., is correct, and this appeal must be dismissed.

**LOPES, L.J.**—I am of the same opinion. The learned judge at the trial found that the transaction between the husband and wife was bona fide, and the document given was an ordinary receipt and not an "assurance." A question has been raised whether possession of the goods in question passed from the husband to the wife, who was living with him in the same house, but I decline to give any opinion on that question because I think it is unnecessary to the case. Upon the other point, the question is whether the document was an "assurance." Was it part of the transaction by which the property in the goods passed from the husband to the wife? There are several tests by which that question may be tried. Is it necessary to look at the document in order to show the wife's title to the goods? I think not. Need she have proved the document in order to prove her title? I think not. Was the document intended to pass the property? I think not. The last case upon this point is *Charlesworth v. Mills* (1). LORD HERSCHELL there says ([1892] A.C. at p. 241):

"Now, this document, beyond all question, was not a document which was intended to transfer or did transfer the property in these goods; because, if there is anything clear in the transaction, it is this, that at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document, he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession."

Every word of that applies here, and this case appears to me to be well within that decision. This document was not a bill of sale, and I think that this appeal should be dismissed.

**DAVEY, L.J.**—I am of the same opinion. The first point is whether this document is within the purview of the Bills of Sale Act, 1878. In my opinion it is not. It has been held in this court, in *Ex parte Hubbard* (2), and affirmed by the House of Lords in *Charlesworth v. Mills* (1), that the Bills of Sale Act, 1878, does not apply to a case in which the property in goods passes and is accompanied with possession.

As to possession, it is only in consequence of the Married Women's Property Act, 1882, that the question could arise between husband and wife as in this case. The plaintiff purchased from her husband furniture which at the time of her purchase was in use in their common household, and after the purchase the goods

A remained where they were. Did the possession of them pass to her? How does the case stand on principle? In *LITTLETON'S TENURES*, s. 701, it is said:

"Where two be in one house, or other tenements, and the one claimeth by one title and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements."

B Following that is this passage in *POLLOCK AND WRIGHT ON POSSESSION*, at p. 24:

"Where possession in fact is undetermined, possession in law follows the right to possess."

Then in *Jones v. Chapman* (3) MAULE, J., said (2 Exch. at p. 821):

C "It seems to me that, as soon as a person is entitled to possession, and enters in assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer the person who has the title in actual possession, and the other person is a trespasser."

D It was argued that that applied only to real estate. But I can see no reason why the same principle should not be applied to personal chattels.

Then it was said that there was, in this case, no apparent change of possession, that the ostensible possession of the goods was the same as before the sale. The same point was raised in *Charlesworth v. Mills* (1), and LORD HERSCHELL said

E ([1892] A.C. at p. 242):

"The question whether it is a possession which excludes the apparent possession of the other party might arise under the [Bills of Sale] Act of 1878; but it is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it? When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those two persons to constitute a good pledge, it seems to me that the case is at an end. I say "inevitably admitted," because how can it be disputed that as between the two persons to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person a possession of the goods which would entitle him to hold them as a security for the advance? And that is all that a pledge is."

F In the present case the question is, whether possession of the furniture passed from the husband to the wife. Under the circumstances, I draw the inference that they intended that the goods should become out and out the goods of the wife, just as other articles which she had and which were in her possession were hers. In other words, they intended that possession of the goods as well as property should pass to the wife. That intention, I think, was carried out, and she had afterwards the sole disposition of them. As the goods remained in the house where they were both living, her possession of the goods was quite as consistent with everything as her husband's possession. It is difficult to see what she could have done more than what was done, because she bought the goods with the intention of using them in the house as before the sale. If there had been a tradition, symbolical or actual, there would have been no doubt in the matter, but in my opinion no formal act was necessary to transfer the possession. In my opinion, therefore, such possession was given as took the case out of s. 8 of the Bills of Sale Act, 1878.

I On the other point I agree with the judgments that have been delivered. WRIGHT, J., has found that this document was intended to be only a common receipt, and the words which the solicitor put in at the end of it were not part of the transaction of sale. The document, therefore, is not within the Bills of



Sale Act, 1878, because it has been decided that the definition of "bill of sale" in s. 4 only applies to such receipts as are intended to operate as "assurances," That was laid down by BOWEN, L.J., in *North Central Wagon Co. v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (4). I may also refer if necessary to the judgments in *Woodgate v. Godfrey* (5). I agree with the findings of WRIGHT, J., and upon those findings the Bills of Sale Act, 1878, does not apply here.

*Appeal dismissed.*

Solicitors: *Smythe & Brettell; G. S. Warmington & Co.*

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

## MOSER v. MARSDEN

[COURT OF APPEAL (Lindley and Kay, L.JJ.), February 4, 1892]

[Reported [1892] 1 Ch. 487; 61 L.J.Ch. 319; 66 L.T. 570;  
40 W.R. 520; 36 Sol. Jo. 253]

*Practice—Parties—Joinder—Adding defendant—Addition desired because judgment in action might affect applicant commercially—R.S.C., Ord. 16, r. 11.*

The plaintiff brought an action against the defendant to restrain him from using a machine which the plaintiff alleged was an infringement of his patent. M., the maker and patentee of the machine in dispute, which he had sold to the defendant, applied to be joined as a co-defendant on the ground that the defendant would not contest the action efficiently.

**Held:** the court had no jurisdiction under R.S.C., Ord. 16, r. 11, to add M. as co-defendant for, though M.'s interest might be affected commercially by a judgment against the defendant, it would not be legally affected.

**Notes.** Distinguished: *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1950] 2 All E.R. 605. Followed: *Amon v. Raphael Tuck & Sons, Ltd.*, [1956] 1 All E.R. 273. Referred to: *Re I. G. Farbenindustrie A. G. Agreement*, [1943] 2 All E.R. 525.

As to misjoinder or nonjoinder of parties, see 30 HALSBURY'S LAWS (3rd Edn.) 394, para. 735; and for cases see DIGEST (Practice) 423. For R.S.C., Ord. 16, r. 11, see THE ANNUAL PRACTICE.

Cases referred to:

- (1) *Vasseur v. Krupp* (1878), 9 Ch.D. 351; 39 L.T. 437; 27 W.R. 176; 22 Sol. Jo. 702, C.A.; Digest (Practice) 912, 4543.
- (2) *Apollinaris Co. v. Wilson* (1886), 31 Ch.D. 632; 55 L.J.Ch. 665; 54 L.T. 478; 34 W.R. 537; 2 T.L.R. 355, C.A.; Digest (Practice) 911, 4538.

Also referred to in argument:

*Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; Digest (Practice) 430, 1253.

*Wilson v. Church* (1878), 9 Ch.D. 552; 39 L.T. 413; 26 W.R. 735; Digest (Practice) 418, 1150.

*Edison and Swan United Electric Light Co. v. Holland* (1889), 41 Ch.D. 28; 58 L.J.Ch. 524; 61 L.T. 32; 37 W.R. 699; 5 T.L.R. 294; 6 R.P.C. 243, C.A.; Digest (Pleading) 120, 1078.

- A** *May v. Newton* (1887), 34 Ch.D. 347; 56 L.J.Ch. 313; 56 L.T. 140; 35 W.R. 363; Digest (Practice) 421, 1178.
- Jacques v. Harrison* (1884), 12 Q.B.D. 165; 53 L.J.Q.B. 137; 50 L.T. 246; 32 W.R. 470, C.A.; 35 Digest 403, 1445.
- Molloy v. Kilby* (1880), 15 Ch.D. 162; 29 W.R. 127, C.A.; 40 Digest (Repl.) 459, 442.

**B** **Appeal** from an order of the Vice-Chancellor of the County Palatine of Lancaster, in an action brought by the plaintiff, C. C. Moser, the registered owner of a patent for improvements in gig mills employed in the finishing of woven fabrics, against the defendant, E. Marsden, claiming an injunction restraining the defendant from using a gig mill which the plaintiff alleged was an infringement of his patent.

**C** The defendant had purchased the machine of Auguste Montforts, who manufactured it in Prussia, under a patent which he had obtained in that country. On hearing of this action, Montforts communicated with the defendant, and offered to defend the action and to indemnify the defendant. The defendant was willing to bring in Montforts under the third-party practice, but refused to allow him to defend the action, and threatened that unless Montforts indemnified him he would not defend the action, but would make such terms with the plaintiff as he should be advised. Montforts then applied by way of motion to the Vice-Chancellor of the County Palatine for an order that he should be added as a co-defendant to the action. The application was made under Ord. 16, r. 10, of the Palatine Court, which was the same as Ord. 16, r. 11, of the Rules of the Supreme Court. The Vice-Chancellor made the order asked for, and from this decision the plaintiff appealed.

*Pankhurst (Moulton, Q.C., with him) for the plaintiff.*

*Hopkinson and Astbury for the defendant.*

**LINDLEY, L.J.**—This is an appeal from an order of the Vice-Chancellor of the County Palatine of Lancaster, by which he has directed in an action in the Palatine Court that Montforts should be added as a defendant on his own application. The action is an ordinary action to restrain an alleged infringement of the plaintiff's patent by the defendant Marsden, by using a machine which was made abroad by Montforts, who says he has a patent for it in Germany. The order has been made under the rule of the Palatine Court which is identical with Ord. 16, r. 11, of the Rules of the High Court.

**G** The question at issue between the plaintiff and the defendant Marsden, as far as they two are alone concerned, can be worked out without anyone else being brought in to take part in the action. There may be a score of persons like Marsden using this particular machine, but there is no law or equity to oblige the plaintiff to sue all of them. Therefore it is clear that it cannot be said that the case comes within that part of the rule which provides that the court may order the names of any parties, whether plaintiffs or defendants, "who ought to have been joined," to be added. In no sense can it be said that Montforts ought to have been joined as a party to this action. But reliance is placed on the following words of the rule which provide for adding the names of parties ["whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."] But what is the question involved in this action? The question, and the only question, is, whether what Marsden is doing is an infringement of the plaintiff's patent. In order properly to understand the rule we must look at the whole of it. It begins by saying, ["No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties."] That is the key to the whole section. If the court cannot decide the question without the presence of other parties the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

In the Court of Chancery actions were common enough in which one person represented and acted on behalf of many, and if any one of the many could satisfy the court that the person appointed to represent them did not adequately represent the interests of the class, it was a reason for putting someone else in his place. It was said that the rule goes further, but can it be reasonably extended beyond this? Can it be said that the rule prevents the plaintiff from proceeding against the defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The counsel for the applicant grounded his argument on the allegation that Montforts' interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant; but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant? No case has been cited that goes so far as that; the nearest to the present case are *Vavasour v. Krupp* (1) and *Apollinaris Co. v. Wilson* (2). But in both those cases the proceedings affected the property of persons not before the court. I can understand the application of the rule where the property of a third party is affected. He may well say, "I am not to be deprived of my property in my absence." But this case does not come up to that. In my opinion the Vice-Chancellor has construed the rule too widely. The case does not come under the rule at all; it is not a question of discretion, but of jurisdiction, and I think the order must be discharged.

**KAY, L.J.**—I entirely concur in the judgment which has been delivered, but out of respect to the Vice-Chancellor I wish to add a few words as to the grounds on which I differ from him. He has extended the rule in question to a case which it was not intended to cover. The action is brought against Marsden personally, and any judgment which he may obtain will not affect Montforts directly, but only incidentally. But he says it will affect him because the machine was made under his patent, so that in the action against Marsden the value of Montforts' patent comes in question, and although the judgment in this action would not bind him and could not be pleaded in any action against him or anyone else except Marsden, yet it will frighten people from buying his machines, and it therefore will affect him, if not directly, yet indirectly and commercially, and therefore that he ought to be let in to defend the action. I know of no case which goes to that extent. The class of cases where the property of the third party was affected are on a different principle. The result on the construction contended for would be, that not only persons directly affected, and who would be bound by the judgment in the action, would be within the rule, but any person who might think he would be affected indirectly might insist upon being made a party; and not only so, but if it appeared to the judge that any person would be indirectly affected, it would be his duty of his own accord to make him a party. Take the case of an action for infringement of a trade mark: there may be a good many persons doing the same thing as the defendant; could it be intended that all of them should have a right to insist on being made parties? No doubt the judgment in the present case may indirectly affect Montforts' patent, but the answer to that is, that, whether it would affect it or not, this rule does not apply to such a case. Montforts says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that. With all deference to the Vice-Chancellor, I do not think the rule applies to this case.

Solicitors: *Pritchard, Englefield & Co.*, for *Sampson & Price*, Manchester; *E. Robinson Walker*, Manchester.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]



A

## CHALMERS v. CHALMERS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), December 21, 1892]

[Reported 68 L.T. 28; 1 R. 504]

B *Variation of Settlement*—"Settlement"—*Absolute assignment of property by wife to husband during marriage.*

*Divorce—Maintenance of wife—Order to husband to secure to wife value of property assigned by her to him during marriage.*

During the marriage a wife assigned to her husband absolutely certain property subject to mortgages. Subsequently, the wife obtained a decree dissolving the marriage, and she thereupon petitioned for variation of the assignment as a post-nuptial settlement, namely, for an order that the husband should re-assign the property to her. She also petitioned for maintenance.

C **Held:** the assignment was not a "settlement" within the meaning of s. 5 of the Matrimonial Causes Act, 1859 [now s. 25 of the Matrimonial Causes Act, 1950], but on the petition for maintenance the court would order

D the husband to secure to the wife, as maintenance, the value of the property she had assigned to him subject to the outstanding mortgages thereon.

**Notes.** The Matrimonial Causes Act, 1859, has been repealed. For s. 5 of that Act see now s. 25 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 412).

E Approved: *Hubbard (otherwise Rogers) v. Hubbard*, [1900-3] All E.R.Rep. 342. Considered: *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 771; *Halpern v. Halpern*, [1951] 1 All E.R. 315. Referred to: *Bosworthwick v. Bosworthwick*, [1926] All E.R.Rep. 198; *Brown v. Brown*, [1936] 2 All E.R. 1616; *Hindley v. Hindley*, [1957] 2 All E.R. 653; *Prescott v. Fellowes*, [1958] 3 All E.R. 55.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq.

F Cases referred to in argument:

*Stone v. Stone and Brownrigg* (1864), 3 Sw. & Tr. 372; 33 L.J.P.M. & A. 95; 10 L.T. 140; 12 W.R. 1088; 164 E.R. 1319; 27 Digest (Repl) 638, 6005.

*Worsley v. Worsley and Wignall* (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.

G *Jump v. Jump* (1883), 8 P.D. 159; 52 L.J.P. 71; 31 W.R. 956; 27 Digest (Repl.) 245, 1982.

*Re Vansittart, Ex parte Brown*, post; [1893] 1 Q.B. 181; 62 L.J.Q.B. 277; 67 L.T. 592; 57 J.P. 132; 41 W.R. 32; 9 T.L.R. 14; 37 Sol. Jo. 12; 9 Morr. 280; 5 R. 38; 5 Digest (Repl.) 899, 7477.

H **Motion** by the petitioner, Julia Chalmers, who had obtained a decree dissolving her marriage, for variation of an alleged post-nuptial settlement, or, in the alternative, for an allowance by way of permanent maintenance.

On Aug. 22, 1871, when living with her husband, the petitioner executed, in his favour, an absolute assignment of certain property, subject to mortgages. This assignment she now wished to have varied by an order on the respondent that he should re-assign the property to her, and she was willing to accept such re-assignment, subject to all valid charges thereon, instead of any allowance for maintenance. The registrar reported in favour of this proposition, in the event of the court being of opinion that the assignment was a "settlement" within the terms of s. 5 of the Matrimonial Causes Act, 1859.

*Bayford, Q.C.* (Brook Little with him), for the petitioner.

*Priestley* for the respondent.

**SIR FRANCIS JEUNE, P.**—I cannot hold the assignment by the wife of this property to be a "settlement" within the words of s. 5. A settlement means

the settlement of property subsisting between husband and wife, and the Act gives power to alter or vary it when, and only when, the relation of husband and wife has ceased to subsist. The power to dispose of it absolutely does not seem to be the test. In this case, while, as I have said, I should have great difficulty in holding that this assignment by the wife was a "settlement," I feel no hesitation upon the alternative point; and, therefore, upon the second petition now before me, I order that the respondent secure to the petitioner, as maintenance, the value of the property in question, subject to the mortgages outstanding thereon.

Solicitors : *Steadman; Van Praagh, Sims & Co.; W. F. Stokes.*

[*Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

## LONDON ASSOCIATION OF SHIPOWNERS AND BROKERS, LTD. AND ANOTHER *v.* LONDON AND INDIA DOCKS JOINT COMMITTEE AND ANOTHER

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), May 21, 27, 28, July 22, 1892]

[Reported [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 8 T.L.R. 717; 7 Asp.M.L.C. 195; 2 R. 23]

*Corporation—Powers—Limitation—Prohibition of more extensive rights possessed by corporation as owner of property.*

Where the legislature has expressly conferred on a corporation powers which the corporation, as the owner of property, could have exercised without any express authority the powers expressly given must be treated either as superfluous or as purposely inserted in order to define—i.e., to limit—the right conferred and as implying a prohibition against the exercise of the more extensive rights which the corporation might have by virtue of its ownership of property.

*Corporation—Byelaw—Defined—Regulation made by corporation to bind, not only corporation, its officers and servants, but members of the public.*

A byelaw made by a corporation regarding the use of its property is not an agreement between the corporation and those persons who wish to use the property. It is a law binding on all persons to whom it applies, whether they agree to be bound or not. All regulations made by a corporate body and intended to bind, not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "byelaws" whether they be valid or invalid in point of law, for the term "byelaw" is not restricted to that which is valid in point of law.

*Practice—Parties—Plaintiff—Locus standi—Trade protection association—Registration as company—No ownership of property.*

An association, registered as a limited company and formed to protect the interests of its members, had no property of its own. The individual members owned the property which the association was designed to protect.

**Held:** the association had no locus standi to bring an action in its own name as agent for the members.

**Notes.** Considered: *Guaranty Trust of New York v. Hannay & Co.*, [1914-15] All E.R.Rep. 24; *Re Clay, Clay v. Booth*, [1918-19] All E.R.Rep. 94; *British*

- A** *Trawlers Federation, Ltd. v. London and North Eastern Rail. Co.*, [1933] 2 K.B. 14; *A.-G. v. Leicester Corpn.*, [1943] 1 All E.R. 146; *J. H. Pigott & Son v. Docks and Inland Waterways Executive*, [1953] 1 All E.R. 22. Referred to: *Barracrough v. Brown*, [1897] A.C. 615; *Smith v. Cardiff Corpn.*, [1955] 1 All E.R. 113.

- B** As to a corporation's power to make byelaws and powers generally, see 9 HALSBURY'S LAWS (3rd Edn.) 41-46, 59 et seq.; and for cases see 13 DIGEST (Repl.) 237 et seq., 263 et seq. As to plaintiffs in actions, see 30 HALSBURY'S LAWS (3rd Edn.) 310 et seq.; and for cases see DIGEST (Practice) 415-420.

Cases referred to in argument:

- C** *Burder v. Veley* (1840), 12 Ad. & El. 233; Arn. & H. 175; 4 Per. & Dav. 452; 9 L.J.Q.B. 267; 4 J.P. 379, 394; 4 Jur. 382; 113 E.R. 801; affirmed sub nom. *Veley v. Burder* (1841), 12 Ad. & El. 265; 4 Per. & Dav. 475; Arn. & H. 194; 10 L.J.Ex. 592; 5 J.P. 401; 5 Jur. 1013; 113 E.R. 813, Ex. Ch.; 16 Digest (Repl.) 416, 2181.
- Pinchin v. London and Blackwall Rail. Co.* (1854), 5 De G.M. & G. 851; 3 Eq. Rep. 433; 24 L.J.Ch. 417; 24 L.T.O.S. 196; 18 J.P. 822; 1 Jur.N.S. 241; 3 W.R. 125; 43 E.R. 1101, L.C. & L.J.J.; 28 Digest (Repl.) 755, 102.
- D** *Doherty v. Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 26 W.R. 513, H.L.; 28 Digest (Repl.) 740, 14.
- Sutton v. South Eastern Rail. Co.* (1865), L.R. 1 Exch. 32; 4 H. & C. 325; 35 L.J.Ex. 38; 13 L.T. 438; 11 Jur.N.S. 935; 14 W.R. 130; 8 Digest (Repl.) 199, 1262.
- E** *Dun River Navigation Co. v. North Midland Rail. Co.* (1838), 1 Ry. & Can. Cas. 135; 2 Jur. 1076, L.C.; 11 Digest (Repl.) 185, 522.
- A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 30 W.R. 916; 16 Digest (Repl.) 542, 3828.
- Spencer v. London and Birmingham Rail. Co.* (1836), 8 Sim. 193; 1 Ry. & Can. Cas. 159; 7 L.J.Ch. 281; 59 E.R. 77; 28 Digest (Repl.) 876, 1032.

- F** **Appeal** from a decision of A. L. SMITH, J., in an action for a declaration and injunction.

- The plaintiffs, the London Association of Shipowners and Brokers, Ltd., and the Peninsular and Oriental Steam Navigation Co., by their statement of claim, said that the second defendants, the London and St. Katharine Dock Co., were, under certain Acts of Parliament, the owners of certain docks, and that the
- G** defendants, the London and India Docks Joint Committee, were at all material times the responsible managers of the defendants' undertaking; that the plaintiffs, the London Association of Shipowners and Brokers, Ltd., was a company incorporated under the Companies' Acts, 1862 to 1890, with the object, among others, of protecting shipping and maritime interests, especially in regard to the regulation, management, customs, and usages of the port of London, and of the
- H** docks, warehouses, wharves, and Custom House therein; that the association and all the members thereof were largely interested in ships using the defendants' undertaking, in particular the plaintiffs, the Peninsular and Oriental Steam Navigation Co., being the owners of a large number of ships habitually using the defendants' undertaking. The plaintiffs alleged that in December, 1890, the defendants issued regulations, dated Jan. 1, 1891, with which owners of ships
- I** using the defendants' undertaking were required to comply, and which applied to all vessels entering the docks of the defendants' undertaking after Feb. 1, 1891, and that those regulations had not been confirmed in manner prescribed by the statutes regulating the defendants' undertaking, and were invalid and void, but that the defendants still required shipowners using their docks to comply with such regulations, and insisted that they were binding upon such shipowners. The plaintiffs, accordingly, brought this action against the defendants, claiming (i) a declaration that the regulations were invalid until confirmed in the manner prescribed by the Harbours, Docks, and Piers Clauses Act, 1847; and (ii) an



injunction restraining the defendants until such confirmation from enforcing the regulations. On Feb. 20, 22, and 23, 1892, the action came on for trial with witnesses before A. L. SMITH, J., who gave judgment for the defendants. The plaintiffs appealed. A

*The Attorney-General (Sir Richard Webster, Q.C.), Gorell Barnes, Q.C., Chadwyck-Healey, Q.C., and Scrutton for the plaintiffs.*

*Sir Charles Russell, Q.C., Finlay, Q.C., Neville, Q.C., Hollams, and G. S. Barnes for the defendants.* B

*Cur. adv. vult.*

July 22, 1892. The following judgments were read.

**LINDLEY, L.J.**—This is an appeal by the plaintiffs from a judgment of A. L. SMITH, J., dismissing the plaintiffs' action with costs. The object of the action and of the appeal is to obtain a declaration to the effect that a new code of regulations made by the defendants, and dated Jan. 1, 1892, is invalid, and in excess of the defendants' statutory powers. The plaintiffs also seek to obtain an injunction to give effect to such declaration; but their counsel stated that they would be content with a declaration and liberty to apply, and that an injunction was a matter of comparatively small importance. The defendants maintain that their so-called regulations are not, and cannot fairly be taken to be, rules binding on anyone who does not agree to observe them. The defendants further contend that, even if the public have a right to complain of the regulations as made by the defendants in excess of their statutory powers, yet that the plaintiffs do not represent the public, and suffer no special damage, and are not entitled to maintain the action. Such being the general nature of the controversy, it becomes necessary to consider (i) The true nature of the regulations which have given rise to this controversy; (ii) The authority of the defendants to make them; (iii) Their legality or illegality; (iv) The position of the plaintiffs and their right to maintain an action in respect of them. C D E

(i) As to the nature of the regulations themselves. They are contained in a pamphlet. I will not stop to read that pamphlet; most of it is important. F The title page is this: "London and India Docks Joint Committee. Rates on Shipping." There follows "Using the [various] docks;" then

"The attention of captains of vessels is especially directed to the regulations regarding fires, lights, and smoking, as well as to the penalty for any breach thereof."

Then follow five pages headed "Dues and Rent on Shipping." Then come a number of paragraphs headed "Discharge of Vessels," and numbered 1 to 18; some of these impose rates and charges, others do not. These eighteen paragraphs are followed by some more paragraphs with various headings and imposing charges. Then come some regulations headed "Labour in Docks." Then come these words: G

"Under authority given by Acts of Parliament the schedule of rates is subject to revision from time to time." H

Last of all there are printed in large letters "By order, Dock House, 109, Leadenhall Street, E.C." It is impossible to read this new code, and especially the paragraphs 1 to 18, without coming to the conclusion that the defendants who issued the code intended its contents to be understood, and that those who would read them would understand them, or the bulk of them, at any rate, as rules or orders to be obeyed, and as imposing charges which must be paid apart from any agreement to that effect. No one reading the code would regard the regulations and charges simply as terms offered for acceptance by those who might use the docks to which the code relates. There is nothing optional in the wording of paragraph No. 1: "Shipowners will be required to comply with the following regulations, etc., etc.," and the same imperative tone runs through the whole. I am not now discussing the reasonableness or unreasonableness of the regulations or of the charges; their character in that respect does not affect I

A their authoritative tone. I cannot regard them as anything short of rules or orders and charges emanating from, and imposed by, the defendants, and made by them in the exercise of some authority claimed by them under their statutory powers.

(ii) I pass, therefore, to the consideration of the authority of the defendants to make such regulations and charges. The defendants, the London and St. Katharine Dock Co., are merely the owners of the docks. The regulations and charges are made and imposed by the defendants, the London and India Docks Joint Committee. This joint committee is a corporate body created by the London and St. Katharine, and East and West India Docks Act, 1888, for the purpose of working eight large docks in London as one undertaking: see the preamble and ss. 4, 9, and 10. The powers of the joint committee are enumerated in s. 31, and are shortly the same as those which were previously vested in the London and St. Katharine Dock Co. and the East and West India Dock Co. respectively. These dock companies were, and indeed continue to be, the owners of the docks alluded to, some of the docks belonging to one company and some to the other. The dock which is more particularly in question in this action is the Royal Albert Dock, belonging to the London and St. Katharine Dock Co. Whatever regulations this company could have made for the use of that dock can now be made by the joint committee. Section 57 authorises the committee to make the same tonnage rates on vessels using the docks of the London and St. Katharine Dock Co. as the East and West India Dock Co. were empowered by s. 25 of their Act of 1882 to make.

The power of the defendants to make regulations for the use of the Royal Albert Dock and of the other docks belonging to the London and St. Katharine Dock Co. must be sought for in that company's special Act of 1864 (27 & 28 Vict., c. clxxviii), and in the General Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated in it. Under these two Acts the public have certain rights to use the docks, including the wharfs, quays, and warehouses, and the company are empowered to make byelaws and regulations and charges for their use. The rights of the public to use the docks, including the wharfs, quays, and warehouses, all of which, it must be borne in mind, belong to the company, are conferred by s. 2 and 33 of the general Act. Section 2 is the definition clause, and by it

“the expression ‘the harbour, dock, or pier’ shall mean the harbour, dock, or pier, and the works connected therewith by the special Act authorised to be constructed.”

G These works, I apprehend, include the quays, wharfs, and warehouses, all of which are constructed under the powers of the special Acts, and are essential to the use of the harbours, docks, and piers more especially mentioned in them. This was certainly the case with the warehouses constructed under the powers of the Victoria (London) Docks Act, 1853 (16 & 17 Vict., c. cxxxi), s. 28, which is set out in Sched. 4 to the special Act of 1864 (p. 2396 of the Queen's printers' copy). Moreover, the expressions “the London Docks,” “the St. Katharine Docks,” and the “Victoria Docks,” are expressly declared by s. 5 of the special Act of 1864 to mean and to include warehouses, wharfs, and quays; and it is very difficult to read that Act and the general Act together without attributing the same meaning to the word “dock” which constantly occurs in both.

I Section 33 of the general Act of 1847 entitles the public to use the harbour, dock, and pier as defined in s. 2 for shipping and unshipping goods and embarking and landing passengers; but this right of user is subject to the payment of the rates made payable by the general and special Acts, and is subject to the other provisions thereof, i.e., of both Acts. These other provisions include those specially relating to warehouses as well as those relating to byelaws and regulations, all of which will be examined presently. The special Act is silent as regards the rights of the public, except that by certain former Acts referred to in Sched. 4, and not repealed, the docks of the company are to be deemed to be situate in

and part of the port of London, and that the rights and privileges which belong to that port extend to these docks; and the company's quays and wharfs are made legal quays and wharfs within the same port: see 9 Geo. 4, c. cxvi, ss. 112, 113, p. 2368; 6 Geo. 4, c. cv, ss. 92, 93, p. 2389; 16 & 17 Vict., c. cxxx, s. 49, p. 2397. A

The powers of the company to regulate the use of the docks, quays, and warehouses and to make charges for their use depend partly on the fact that the company is the owner of them and partly on the fact that the company's rights as owner are largely governed by special provisions rendered necessary for the protection of the public. Subject, however, to the restrictions expressly or impliedly imposed by statute, the company can exercise the ordinary rights which are incidental to the ownership of their docks, quays, and warehouses. As owner the company could make any regulations it might think proper for the use of its property. It could charge what it liked, and could shut its docks altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define—i.e., limit—the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes, and authorised to acquire land for such purposes, cannot, I think, admit of any doubt. B

Bearing this observation in mind, let us see what powers are expressly conferred upon the company by statute. It will be found necessary to distinguish the power of imposing rates and charges from the power to make regulations or byelaws, and it will be convenient to consider the last power first. The general Act of 1847 expressly enables the company to lease for not more than three years, or grant the use or occupation of its warehouses, buildings, wharves, yards, cranes, machines, and other conveniences, on such terms as shall be agreed upon between the company and the persons taking the same (s. 23). This section is a clear instance, not of an enabling, but of a restrictive, clause. It is necessary, not to enable the company to make agreements with respect to the use of its own property, but to enable it to derogate from the rights which the public would otherwise have over that property. Section 23 limits the rights which the public could otherwise claim under s. 33, and enables the company to set apart for the exclusive use of an individual part of the property which the public would otherwise have a right to use. The power conferred by s. 23 cannot, however, be properly used to force any person to come to terms with the company for the use of any property which the public has a right to use on terms applicable to all persons alike. The clauses relating to the powers of the harbour master, and various offences by persons using the docks, etc., may be passed over as irrelevant to the present inquiry. Section 83 enables the company to make byelaws under its common seal for a great variety of purposes, which may be summarised as for the use of its docks and property. Penalties may or may not be imposed for infringement of the byelaws (s. 84), but no byelaws (except such as relate solely to the company or their officers or servants) have effect unless confirmed as required by s. 85. Moreover, notices have to be given before they are confirmed (ss. 86, 87), and when confirmed they have to be published as directed by the Act (s. 88). When duly made, confirmed, and published, the byelaws become binding on all parties (s. 89), and they can only be altered by other byelaws similarly made and confirmed. C

This power of making byelaws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it. A byelaw is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations D



A made by a corporate body, and intended to bind, not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "byelaws," whether they be valid or invalid in point of law, for the term "byelaw" is not restricted to that which is valid in point of law. The exception in ss. 83 and 85 warrants the use of the word byelaw in the sense of a regulation binding only on the company, its officers and servants; but these same sections show that a byelaw in this more limited sense can be made and unmade at the will of the company, and requires no confirmation and publication. This double use of the word byelaw is apt to create confusion, and is, perhaps, to be accounted for by a desire to make use of one term for all regulations for a breach of which penalties may be imposed under s. 84. The company's special Act of 1864 (27 & 28 Vict., c. clxxviii) also contains a power to make byelaws (see s. 113). This is a more detailed power than that conferred by the general Act, and relates not only to the use of the docks, but also to the management and conduct of the business and affairs of the company, to the management of its warehouses, and various other matters for which, however, fresh power was hardly necessary, considering that the general Act was incorporated in the special Act. The special Act is silent as to the mode of making byelaws; they must therefore be made as directed by the general Act.

B Section 99 of the special Act directs the company, in accordance with and subject to its regulations in that behalf, to afford to merchants and others entitled to or having charge of any goods deposited in or upon any of the warehouses, sheds, wharfs, quays, or premises of the company proper, and sufficient access to the goods so deposited. The use of the word regulations in this section is perplexing. The byelaw section enables the company to make byelaws to the same effect as any regulations which can be made under this section, and I am by no means clear that by regulations in s. 99 are meant anything different from byelaws. The object of the section is not to enable the company to make regulations, but to compel the company to afford proper access to goods on their premises subject to proper regulations. The power to make such regulations must be sought for elsewhere. They must necessarily affect merchants and other persons besides the officers and servants of the company, and I can find no power to make regulations as distinguished from byelaws for the conduct of any persons other than the company, its officers and servants. Even regulations for the conduct of the company's officers and servants are called "byelaws" by the general Act, although they do not require confirmation or publication. Assuming, however, that s. 99 refers to some regulations which are not byelaws, they are confined by this section to the access to goods on the property of the company. By no legitimate process of construction or reference can s. 29 be stretched so far as to justify such rules and regulations as are in controversy in this action.

C The only remaining sections to which it is necessary to allude are those which relate to the power of levying tonnage and other rates on ships and goods. The general Act of 1847 does not contain any clause authorising the imposition of rates, but it contains several (viz., ss. 25 to 50) relating to the payment and collection of such as may be authorised by special Acts. The most important of these are ss. 30, 46, and 47. Section 30 enables companies to vary their rates provided they do not exceed the maximum sums mentioned in the special Acts, and provided all persons are charged alike; s. 46 provides for the settlement of disputes by justices; s. 47 provides for the publication of tables of the rates payable. The authority for imposing tonnage rates on ships entering the docks of the defendants is conferred by s. 27 of the special Act of 1888 (51 & 52 Vict., c. clxiii), which apparently replaces s. 132 of the special Act of 1864. The section relating to rates on goods is s. 134 of the last-mentioned Act; and this section authorises the company to levy rates on goods brought into, or landed or deposited within, or delivered or shipped from the docks and works for and in respect of their wharfage, unshipping, landing, re-landing, piling, housing, weighing, cooping, sampling, unpling, unhousing, watching, shipping, loading,

and delivering, and generally in respect of any work to be performed in respect of the goods. Tables of these rates are to be made and printed and published as directed by the section. The tonnage rates on ships, and the import and export rates on goods, must not exceed the maximum amounts fixed by statute (see in addition the sections in the general Act of 1847, already noticed, s. 57 of the Act of 1888, and the provision in s. 134 of the Act of 1864); but the only limit to the other rates is that they must be reasonable (see s. 134 of the Act of 1864). It is to be observed that the power to make rates is distinct from and in addition to the power to make byelaws. Byelaws are not necessary for the imposition of rates, nor, indeed, do the byelaw sections authorise their imposition. The rates may be varied from time to time.

(iii) Having ascertained the powers of the joint committee, it remains to consider the legality or illegality of the provisions of the new code. First, I will take the rates and charges by themselves. The tonnage and other rates on ships are not disputed, and may be passed over. The rates mentioned in regs. 2 and 3 are not rates on goods within the meaning of s. 134 of the Act of 1864; nor can they be imposed by authority under s. 23 of the general Act of 1847, which relates to letting on terms to be agreed upon. The rates in 2 and 3 can only be defended, if at all, on grounds which will be further considered presently. The rate of 1s. 6d. per ton in reg. 10 is not authorised by s. 134 of the Act of 1864, for that section applies to rates payable to the dock company, and not to rates payable by it. The rates mentioned in regs. 13, 14, 15, 17, and 18, are not quarrelled with, although other parts of some of these regulations are. The regulations contained in the code are not binding as orders, rules, regulations, or laws. Imperative in form, they bind no one to obedience. They are not, and do not purport to be, byelaws; but no other orders, rules, or regulations made by the defendants can be binding simply as orders, rules, or regulations. They may, of course, be expressly or impliedly assented to, and so become binding by agreement. But an agreement is one thing; a regulation which has to be obeyed whether assented to or not is quite another thing, and these regulations can only be regarded as binding on those persons who in fact assent to them and agree to conform to them. It is said that there never have been any byelaws for the regulation of the docks. That is, however, to be accounted for by the fact that until the new code came into force the dock authorities themselves did all the work in the docks except loading outgoing ships. Under those circumstances no one cared to test the legality of the regulations. When, however, the practice was changed and the shipowners unloaded their own ships, and when the dock authorities sought to force them to do a great deal more than discharge their own cargoes, regulations which previously had produced no inconvenience became galling, and their legality was naturally questioned, and, being questioned, must be decided.

The great dispute turns on reg. 2, and the terms on which shipowners are entitled to have berths appropriated to their ships. I can find nothing in the statutes relating to these docks which entitles any shipowner to demand that a particular berth shall be kept for him; nor is there anything which entitles the dock company to make any special charge for such a convenience if granted. Under these circumstances, if the convenience has been enjoyed and a dispute arises about the terms of payment, a court of law must decide in each particular case—first, whether the shipowner who has had a berth kept for him has agreed to pay the rate demanded; and, secondly, if not, then what is a reasonable price for the accommodation which he has enjoyed. This is the view contended for by the defendants, and so far they are right. For similar reasons the defendants are right as to all those regulations which refer to special accommodation and facilities, viz., 4, 13, 14, 15, 17, 18. The real truth is, that shipowners who want special accommodation cannot force the defendants to give it them, even on payment of reasonable compensation. Special accommodation must be made the subject of special agreement. Regulation 2 contains the pecuniary terms

**A** on which the defendants are willing to give the accommodation; the other terms are in the other regulations. If the plaintiffs will not assent to those terms the defendants can refuse the special accommodation. The effect of this no doubt may be to drive the plaintiffs to other docks in other ports where more favourable terms can be made, if any such can be found. The only safeguard against this is the defendants' own view of their own interests.

**B** Regulation 3 is also quarrelled with, but it is not open to the remarks made on reg. 2, for reg. 3 does not apply to cases in which exceptional facilities are afforded. The first part of reg. 3 is unobjectionable; it is a mere notice that the dock master's orders as to berths must be obeyed. The second part, however, is not warranted by any statutory enactment. It is an attempt by the defendants to force shipowners to pay for what they do not want, and to compel them to

**C** hire quay and shed space in order to do work formerly done by the dock company, and which the shipowners object to have forced on them. This must be taken in conjunction with regs. 9 and 10, which purport to bind all shipowners, and not only those who desire special accommodation. For reasons already given, I am of opinion that these regulations can only be made binding by being passed and confirmed as byelaws, although, of course, those persons

**D** who choose to agree to them may do so, and may thus become bound by them. The same remark applies to all the other regulations not confined to special accommodation and special facilities which the dock company are not bound to afford, i.e., to all the regulations except Nos. 2, 4, 13, 14, 15, 17, and 18, which do relate only to special accommodation and facilities. The general Act of 1847 contains a s. 22 binding the company to supply cranes and labourers

**E** to work them; but reg. 14 applies to specially large cranes, and not to such as the company is bound to supply under the section to which I have referred.

(iv) I come now to the last head, viz., the position of the plaintiffs and their right to maintain this action. The London Association of Shipowners and Brokers, Ltd., is a trade protection society. It has no ships or goods of its own. Its members have, and it really sues on their behalf; but the society itself is only

**F** their agent, and this is not a case in which an agent can sue in his own name. This society, therefore, has no locus standi. This objection is purely technical, for any one of the members of the society can sue on behalf of himself and other shipowners in the same interest, and an action so constituted would be free from objection in point of form. Liberty to amend might probably have been obtained if applied for in time. It is too late, however, now to amend in this

**G** respect. The other plaintiffs are the Peninsular and Oriental Steam Navigation Co., an incorporated company owning a large fleet of steamers using the defendants' docks. The Peninsular and Oriental Co., if aggrieved by the defendants' regulations, has a clear locus standi as plaintiff in an action brought to have its grievances redressed. At the same time, the Peninsular and Oriental Co. is not like the Attorney-General, and is not entitled to sue on behalf of the public for the

**H** purpose of preventing the defendants from exceeding their statutory powers irrespective of any particular injury to any particular individual. The Peninsular and Oriental Co. must show that it is itself aggrieved before it is entitled to any declaration or relief in an action brought by itself. Had this action been an information by the Attorney-General there would be no difficulty in declaring the regulations complained of not to be binding on the public and in granting

**I** an injunction to restrain the joint committee from enforcing them, for I regard the new code as an imposition on the public. The difficulty in the way of the Peninsular and Oriental Co. maintaining this action is as follows. The Peninsular and Oriental Co. always, in fact, requires berths to be appropriated to its ships, and the Peninsular and Oriental Co. is not concerned with and is not affected by regulations which relate to the owners of ships not having fixed discharging berths. As regards appropriated berths, the terms on which they can be had in future must be settled by agreement, and the company has nothing to complain of in point of law. And as to the past, the company must pay



either the sum demanded, or a reasonable sum as may be determined in one or more actions brought for determining that particular question in the case of each ship to which a discharging berth has in fact been appropriated. On these grounds it is contended that no right of the Peninsular and Oriental Co. has been infringed, and that this action is not maintainable by the Peninsular and Oriental Co. The only answer to this contention is as follows. It is true that the Peninsular and Oriental Co. always has required berths to be appropriated to its ships, and will in future find it very inconvenient not to have such berths; but the company is entitled to have unappropriated berths unfettered by illegal restrictions, and is entitled to exercise its option to have such berths or to have appropriated berths on terms which may be agreed upon. The joint committee has deprived the company of its rights in this respect, and offers the company an alternative which the joint committee has no right to insist upon, and consequently the Peninsular and Oriental Co. is aggrieved by the alternative presented to it, because, if it could have unappropriated berths subject only to proper byelaws, it might prefer them, with all their inconveniences, to appropriated berths on the terms insisted on by the joint committee. This argument would, in my opinion, be a sufficient answer to the technical objection that the Peninsular and Oriental Co. has no sufficient interest in the suit if the Peninsular and Oriental Co. did in truth want unappropriated berths, but it does not. The company is not claiming the option suggested, and does not care to have it. The Peninsular and Oriental Co. claims appropriated berths on terms which the joint committee will not concede. The Peninsular and Oriental Co. has, in fact, failed to establish its alleged rights, and the order appealed from must, therefore, stand. But the joint committee has rendered it necessary, or, if not necessary, at least expedient, that the rights of the Peninsular and Oriental Co., on the one side, and those of the joint committee, on the other, should be ascertained and declared. This can be done under R.S.C., Ord. 25, r. 5 [which provides that no proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby], and under the peculiar circumstances of this case, and having regard to the contentions raised on both sides, the proper order on the appeal will be to declare that the regulations of the London and India Docks Joint Committee, contained in the printed exhibit H. W. W. 3, and therein numbered 1 to 18, and also the regulations therein contained, and headed "Labour in the Docks," not having been made and confirmed as byelaws, are not binding on the plaintiffs, the Peninsular and Oriental Steam Navigation Co., save so far, if at all, as the said company may have agreed or may agree to be bound by the same, and to declare that the said company is not entitled to have berths appropriated to its ships, nor to have other special accommodation or conveniences except upon such terms as may be agreed upon between the company and the aforesaid joint committee. With this declaration the appeal must be dismissed, but without costs.

**BOWEN, L.J., and KAY, L.J., concurred.**

*Appeal dismissed.*

Solicitors: *Renshaw, Kekewich & Co.; Turner & Hacon.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

# Re THOMAS. WOOD v. THOMAS

[CHANCERY DIVISION (Kekewich, J.), July 15, 1891]

[Reported [1891] 3 Ch. 482; 60 L.J.Ch. 781; 65 L.T. 142;  
40 W.R. 75]

*Will—Apportionment—Tenant for life and remainderman—Effect of trust for conversion with power to postpone such conversion—Distinct gift of income pending conversion—Tenant for life entitled to whole income from investments unconverted—Exclusion of rule in Howe v. Dartmouth.*

By his will a testator gave his residuary personal estate and effects to trustees upon trust to convert the same and invest the proceeds of sale as therein mentioned, with power to retain any securities existing at the time of his death during such period as they should think fit, and continued as follows: "I declare that my trustees shall stand possessed of the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects hereinbefore bequeathed and the income thereof," in trust to pay the income to certain tenants for life with remainders over. At the time of the testator's death part of his personal estate consisted of American railway bonds repayable at par at a fixed date, standing at a considerable premium in the market, and bearing interest at 6 per cent. The trustees exercised their discretion in retaining these bonds unconverted. On a summons, asking, among other things, how the income therefrom ought to be applied,

**Held:** on the true construction of the will there was a distinct gift of the income of whatever investments the trustees should hold for the time being, including the income of securities which in their discretion they retained, and, therefore, the tenants for life were entitled to the whole of the income from the bonds.

*Re Sheldon, Nixon v. Sheldon* (1) (1888), 39 Ch.D. 50, and *Green v. Britten* (2) (1863), 1 De G.J. & Sm. 649, applied.

**Notes.** Considered: *Hope v. D'Hédouville*, [1893] 2 Ch. 361. Distinguished: *Re Whitehead, Peacock v. Lucas*, post; [1894] 1 Ch. 678. Considered: *Re Chaytor, Chaytor v. Horn*, [1904-7] All E.R.Rep. 230. Followed: *Re Godfree, Godfree v. Godfree*, [1914] 2 Ch. 110. Considered: *Re Parry, Brown v. Parry*, [1946] 2 All E.R. 412. Referred to: *Re Bates, Hodgson v. Bates*, [1904-7] All E.R.Rep. 450; *Re Fisher, Harris v. Fisher*, [1943] Ch. 377.

As to the rule in *Howe v. Dartmouth*, see 16 HALSBURY'S LAWS (3rd Edn.) 381-384; and for cases see 44 DIGEST 208.

Cases referred to:

- (1) *Re Sheldon, Nixon v. Sheldon* (1888), 39 Ch.D. 50; 58 L.J.Ch. 25; 59 L.T. 133; 37 W.R. 26; 44 Digest 208, 364.
- (2) *Green v. Britten* (1863), 1 De G.J. & Sm. 649; 46 E.R. 257, L.J.J.; 44 Digest 339, 1687.
- (3) *Brown v. Gellatly* (1867), 2 Ch. App. 751; 17 L.T. 131; 15 W.R. 1188, L.J.; 43 Digest 619, 596.
- (4) *Porter v. Baddeley* (1877), 5 Ch.D. 542; 44 Digest 207, 361.
- (5) *Howe v. Earl of Dartmouth, Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.

Also referred to in argument:

- Simpson v. Lester* (1858), 33 L.T.O.S. 6; 4 Jur.N.S. 1269; 44 Digest 201, 306.  
*Re Llewellyn's Trusts* (1861), 29 Beav. 171; 54 E.R. 592; 44 Digest 199, 283.  
*Gray v. Siggers* (1880), 15 Ch.D. 74; 49 L.J.Ch. 819; 29 W.R. 13; 44 Digest 207, 362.

**Adjourned Summons** to determine whether life tenants under the will of George Wood were entitled to the whole of the income produced by bonds retained by the trustees in the exercise of their discretion, or whether they were merely entitled to interest at 4 per cent. on the capitalised value of the bonds. A

By his will, made May 29, 1886, George Wood, after appointing Thomas Travers Wood, William Edward Davidson, and Richard Macaulay Thomas executors and trustees of his will, and after making certain specific bequests, bequeathed all his moneys and securities for money, shares in public companies or in ships, and all other his personal estate and effects whatsoever and wheresoever not thereinbefore specifically bequeathed, unto his said trustees, upon trust that they should receive, collect, and get in all the said residuary personal estate and effects thereinbefore bequeathed, and should at such time or times, and in such manner as they should think fit, sell, dispose of, and convert into money such part thereof as should not consist of money or of some or one of the stocks, funds, and securities thereinafter authorised as investments, or which they should think proper to retain. C  
And he declared that, notwithstanding anything thereinbefore contained, it should be lawful for his said trustees in their absolute discretion to retain any securities or property which should belong to him at his decease, and in the state of investment or security in which the same should then be, for such period or periods as they should think fit, without being answerable for any loss which might be occasioned thereby. D

He further declared that his trustees should out of the moneys which should arise from the sale, disposition, and conversion thereinbefore directed, and the moneys which should belong to him at his decease, in the first place pay off all his debts, funeral and testamentary expenses, and should lay out and invest the residue in or upon any of the public stocks or funds, or Government securities of the United Kingdom or the Empire of India, or of any British colony or dependency, or upon real securities in England or Wales, but not elsewhere, or in or upon the mortgages, bonds, debentures, or debenture guaranteed, or preference stock or shares of any corporation, company, or public body in the United Kingdom, with power from time to time at the discretion of his trustees to vary such investments and also the investments of any stocks, funds, shares, or securities which should belong to him at his decease, and be retained unconverted into or for others of any nature thereby authorised. And he declared that his trustees should stand possessed of the stocks, funds, shares, and securities for the time being, constituting or representing the residuary personal estate and effects thereinbefore bequeathed and of the income thereof, upon trust to divide the said stocks, funds, shares, and securities into six equal parts or shares, and to pay the income of such parts or shares to certain persons for life as therein mentioned, and subject thereto he directed his trustees to stand possessed of all the stocks, funds, shares, and securities constituting or representing the residuary estate and effects thereinbefore bequeathed upon trust for his nephews and nieces in equal shares per capita. E  
F  
G

The testator died on Sept. 4, 1890. At the time of his death the testator possessed certain American railway bonds, redeemable at par at a fixed date, which were then, and at the date of the summons, at a premium in the market and bore interest at 6 per cent. The trustees had exercised their discretion in retaining these bonds unconverted. This was a summons taken out by two of the trustees of the will, asking among other things whether the tenants for life were entitled to receive the income of the bonds, or as the remaindermen claimed only 4 per cent. on their capitalised value in accordance with *Brown v. Gellatly* (3). H  
I

*Vernon Smith* for the trustees.

*Upjohn* for two tenants for life.

*Christopher James* for defendants in the same interest.

*George Henderson* for tenants for life in remainder.

*Ashworth James* for the remaindermen.



- A **KEKEWICH, J.** I am not prepared to hold that where there is direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life and afterwards for remaindermen, that the power of retention necessarily gives the tenant for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion. I believe that to so hold would be
- B against the law as laid down in many cases and many textbooks. It would be against the practice of the conveyancers, who, I believe, have invariably provided for the rents and profits of property given in trust for sale being paid to the tenant for life where that was intended, and I think that no such doctrine receives any support from the decision of NORTH, J., in *Re Sheldon, Nixon v. Sheldon* (1), or of LORD CAIRNS in *Brown v. Gellatly* (3). I do not think either NORTH, J., or LORD
- C CAIRNS intended to decide or did decide any abstract doctrine of the kind.

- But I have no doubt that one looks out with an expectant eye for a direction that the tenant for life shall receive the income when one sees an express direction to the trustees to retain securities and any indication of the testator's intention that they shall retain indefinitely for so long as they may think fit. On the other
- D hand, I do not think that any judge has intended to hold that it is inconsistent with a settlement on certain persons for life and afterwards to others in remainder to hold that the income may, by reasonably plain words, be given in specie, and I do not think *Porter v. Baddeley* (4) really has any application to a case like the present, because there there was no trust for conversion, and the remarks of the Vice-Chancellor dealt with the facts in the absence of the trust for conversion, and referred to investment in terminable annuities, securities of a wasting character
- E coming within the rule which is known as the rule in *Howe v. Earl of Dartmouth* (5) and other rules applicable to the administration of personal estate.

- In this particular instance it seems to me that, now that I have had the advantage of hearing the authorities cited and the arguments on the construction of the will, that this case is an example of the cases to which *Re Sheldon, Nixon v. Sheldon* (1), and also *Green v. Britten* (2), to which I called the attention of
- F counsel for two tenants for life as being conveniently compared with it, belong. There TURNER, L.J., came to the conclusion from the words of the particular will, and I think I must consider that NORTH, J., in *Re Sheldon, Nixon v. Sheldon* (1) also came to the conclusion on the words of the particular will, no doubt looking, as I have ventured to say, with an expectant eye for the direction, and finding it without much difficulty.

- G I have no difficulty in finding it here. The testator directs his trustees to convert everything, a direction as absolute as it is possible to conceive, and then he gives an equally absolute discretion to his trustees to retain securities. The argument of counsel for two tenants for life is, that the securities which are retained come within the authorised securities, and that view is countenanced and supported by the language of LORD CAIRNS in *Brown v. Gellatly* (3). But I do not think that
- H that will carry you far enough; I think you must find a direction that the tenant for life shall enjoy in specie. The mere fact that it is authorised is not, standing alone, sufficient. But what the testator does here is this: having directed conversion, having directed payment of his funeral and testamentary expenses and investment, and having also sanctioned retention at the discretion of the trustees he says,

- I "I declare that my trustees shall stand possessed of the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects hereinbefore bequeathed, and of the income thereof."

Of what are they to stand possessed? Of the stocks, funds, shares, and securities not only which they have converted, but surely also of those which they retain. Otherwise the retained securities are not dealt with at all. There seems to me to be no alternative. Either he here is declaring trusts of the stocks, funds, shares, and securities which for the time being are retained and which, therefore, for the

time being, constitute or represent a portion of the personal estate, or, if they are not, there is no gift here of those retained securities at all. It seems to me here in this particular instance, when one comes to look into it, that it is the test of good drafting; it bears that test surely and well, and there is a distinct gift of the income of what the trustees hold for the time being, including that which in their discretion they retain. A

Solicitors: *Bell, Brodrick & Gray; Burton, Yeates, Hart & Burton.* B

[Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.]

## COX v. COX

[COURT OF APPEAL (Lindley, A. L. Smith and Davey, L.JJ.), November 29, 1893] D

[Reported 70 L.T. 200]

*Divorce—Conduct conducing—Husband's petition for divorce on ground of wife's adultery—Husband's flirtations with other women.*

If a wife, in answer to her husband's petition for divorce on the ground of her adultery, pleads flirtations by the husband with other women as conduct conducing to her adultery, the court will not strike out the pleading if the evidence which may be given in support could justify a judge in declining to grant relief. E

Where a wife alleged that during a period of five years her husband had paid marked attention to an unmarried woman; that she (the wife) had remonstrated with him, but that he had told her he could not give up his intimacy with this woman; that he had invited her to his house and corresponded with her notwithstanding the wife's repeated objections and remonstrances; that he had made presents to her and had absented himself from the wife's society in order to enjoy the society of this woman; and that he had frequently told his wife that he had been fascinated by this woman and would have run away with her if she had consented. The wife further alleged that the husband had also paid marked attention to another woman, had refused to give up his intimacy with her notwithstanding the wife's objections and remonstrances, and had been guilty of acts of undue familiarity, putting his arm round this woman's waist and allowing her to sit on his knee. F

**Held:** these allegations ought not to be struck out. G

**Notes.** The Matrimonial Causes Act, 1857, s. 31, has been replaced by the Matrimonial Causes Act, 1950, s. 4. H

Distinguished: *Brown v. Brown*, [1956] 2 All E.R. 1. Referred to: *Jenkins v. Jenkins*, [1956] 2 All E.R. 596.

As to conduct conducing to adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 309; as to striking out particulars, see *ibid.* 337. For cases see 27 DIGEST (Repl.) 423. For the Matrimonial Causes Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 394. I

Cases referred to:

- (1) *Cunnington v. Cunningham and Noble* (1859), 1 Sw. & Tr. 475; 28 L.J.P. & M. 101; 34 L.T.O.S. 45; 8 W.R. 3; 164 E.R. 820; 27 Digest (Repl.) 424, 3550.
- (2) *St. Paul v. St. Paul and Farquhar* (1869), L.R. 1 P. & D. 739; 38 L.J.P. & M. 57; 21 L.T. 108; 17 W.R. 1111; 27 Digest (Repl.) 423, 3534.

A Also referred to in argument :

*Baylis v. Baylis, Teevan and Cooper* (1867), L.R. 1 P. & D. 395; 36 L.J.P. & M. 89, 130; 16 L.T. 613; 15 W.R. 1092; 27 Digest (Repl.) 425, 3560.

*Barnes v. Barnes and Grimwade* (1867), L.R. 1 P. & D. 505; 37 L.J.P. & M. 4; 17 L.T. 268; 16 W.R. 281; 27 Digest (Repl.) 394, 3243.

*Dering v. Dering and Blakeley* (1868), L.R. 1 P. & D. 531; 37 L.J.P. & M. 52; 19 L.T. 48; 16 W.R. 1176; 27 Digest (Repl.) 587, 5475.

*Duplany v. Duplany*, [1892] P. 53; 61 L.J.P. 49; 66 L.T. 267; 8 T.L.R. 169; 27 Digest (Repl.) 446, 3778.

C **Interlocutory Appeal** by the husband, the petitioner, from the decision of the President (SIR FRANCIS JEUNE) by which he allowed an appeal by the wife from an order of the registrar who had ordered that certain paragraphs of her defence should be struck out.

The husband petitioned for a divorce on the grounds of adultery. The wife denied the adultery charged against her, alleged condonation of the adultery (if any), and further pleaded, in addition to several counter-charges of adultery which she made against her husband,

D “3. That in and since the year 1887 the petitioner has paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him, he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house and corresponded with her, notwithstanding the respondent’s repeated objections and remonstrances, and has made her presents, and that he has absented himself from the respondent’s society in order to enjoy the society of the said lady, and he frequently told the respondent that he has been fascinated by the said lady, and that he would have run away with her if she had consented.

E 4. That in and since the year 1890 the petitioner has paid marked attention to another lady, and has refused to give up his intimacy with her, notwithstanding the respondent’s objections and remonstrances, and that he has been guilty of acts of undue familiarity with the said lady.

F 5. That the petitioner, by his wilful neglect and misconduct, as set forth in paragraphs 3 and 4 of this answer, has condoned to the adultery (if any) of the respondent.”

Particulars of paras. 3 and 4 respectively were given, as follows :

G “The name of the unmarried lady was Miss A., and the flirtation extended from the year 1887 to the filing of the petition.

H The name of the unmarried lady was Miss B., and the flirtation extended from Nov. 12, 1892, to the filing of the petition, and the act of familiarity spoken to consisted of the petitioner putting his arm round her waist, and she sitting on his knee, at . . . in the month of December, 1892, and his arm round her waist on Jan. 2.”

The registrar struck out the paragraphs, but, upon appeal to the judge in chambers, they were ordered to be restored. On Nov. 13, 1893, the petitioner moved before the President by way of appeal from the order made in chambers, and the President dismissed the appeal. From this decision the petitioner appealed.

I *Sir Edward Clarke, Q.C.*, and *Kisch* for the petitioner.  
*Lockwood, Q.C.*, and *Searle* for the respondent.

**LINDLEY, L.J.**—This is an application to strike out certain paragraphs from a wife’s defence, and from the particulars given at the instigation or request of the husband, and the question is whether we can go, or ought to go to the length of ordering the passages to be summarily struck out. The question is a curious one, because s. 31 of the Matrimonial Causes Act, 1857, not only states certain grounds of defence to petitions for divorce, but it states that, although there may



be no defence, circumstances may exist which, in the discretion of the judge who tries the case, may induce him not to grant a divorce. Therefore, we have not to consider ordinary pleadings with which we are all familiar, both at common law and equity, pleading facts which do not admit questions of degree or discretion; but we have to consider a case in which degree is everything, and in which the discretion turns upon the degree, and we are asked to strike out passages which state in a concise form that which the wife alleges against her husband. In proof of these very concise statements evidence may be given clothing the skeleton with flesh and blood, and produce a picture which may justify a judge in declining to grant relief. If that is so, it is impossible to say that we ought to strike them out. To do that now would be, to my mind, to adjudicate the case upon a wrong standard. It would be to adjudicate upon a question of degree, not upon the facts proved, but upon the short concise statement of them. I think it would be wrong; and without expressing any further opinion upon the case I think that the view of the learned President was right, who said in effect: "I shall not strike these paragraphs out. Let me see the picture complete, then I will exercise my discretion." I think that was quite right.

**A. L. SMITH, L.J.**—As to these three paragraphs in this defence, if we could see that in no conceivable view they could serve any purpose, then I should agree they ought to be struck out. But I have read and re-read the paragraphs, and I cannot bring myself to that conclusion.

I agree with the law stated by senior counsel for the petitioner and with the authorities he produced, beginning with *Cunnington v. Cunningham and Noble* (1), and finishing up with *St. Paul v. St. Paul and Farquhar* (2) before LORD PENZANCE to which I will call attention in a moment. I take it to be settled that wilful neglect which has conduced to the adultery is neglect towards the other party which has conduced to the adultery. That is the meaning of *Cunnington v. Cunningham and Noble* (1), which was a case in which a man involuntarily got ten years' penal servitude, which was said to have conduced to the adultery, but it was held that would not do.

Without referring to the intermediate cases, I will simply refer to the judgment of LORD PENZANCE in *St. Paul v. St. Paul and Farquhar* (2), in which case, in my judgment, he lays down the law very concisely (L.R. 1 P. & D. at p. 743):

"Further it is only fair to the wife herself to permit her to come to the court and say, 'Notwithstanding that I have sinned, my sins really have been brought about, or very much helped forward, by the carelessness, neglect, and indifference of my husband.' That is a matter which clearly ought to be taken into consideration in favour even of a guilty wife."

Further on he lays it down that wilful neglect or default must mean wilful neglect or default concurring to the adultery.

I ask myself on reading these paragraphs: "Is there no case which can be made of neglect by the husband of the wife which conduced or might have conduced to the adultery?" I cannot say "No." Junior counsel for the petitioner has tried to fritter it away, and talked as if this was only a flirtation, and that a statement made by a husband to a wife that he would run away with a lady is made in the nature of a joke. I do not read this paragraph in such light. It begins: "That in and since the year 1887," and when I add that to the particulars it must read, "In and since the year 1887 down to the date of the petition," which was Jan. 13, 1893, that is five or six years,

"the petitioner has paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house and corresponded with her, notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has

A absented himself [I read that as meaning during that period] from the respondent's society in order to enjoy the society of the said lady; and he frequently told the respondent that he was fascinated by the said lady, and that he would have run away with her if she had consented."

B I ask myself, if all these facts are proved, and if this skeleton, as LINDLEY, L.J., called it, were filled up with flesh and blood, is it absolutely impossible that those facts could have conduced to the adultery? I do not say whether they might or not, but it seems to me it is a case which the respondent is entitled to make against the petitioner. It may come to nothing, for all I know, but it ought not to be struck out at this period of the inquiry.

C DAVEY, L.J.—I agree.

*Appeal dismissed.*

Solicitors: *Greenwood & Greenwood; Wontner & Sons.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

D

## SEALE-HAYNE v. JODRELL AND OTHERS

E [HOUSE OF LORDS (Lord Herschell, Lord Macnaghten, Lord Field and Lord Hannen), May 5, 8, 1891]

[Reported [1891] A.C. 304; 61 L.J.Ch. 70; 65 L.T. 57]

Will—"Relatives"—*Relatives by affinity—Illegitimate relatives.*

Will—"Named persons"—*Gift to persons previously "named"—Persons designated, but not by Christian or surname included.*

F A testator by his will gave bequests to named persons described as his "cousins" and "nieces," some of the bequests being absolute and others being to these persons for life and after their deaths to their children. He directed his residuary estate "to be equally divided among such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." Some of the persons described as "cousins" were the children of an illegitimate brother and sister of the testator's mother, and the persons described as his "nieces" were in fact his wife's nieces.

G Held: the words "relatives before named" included (i) relatives by affinity; (ii) illegitimate relatives; (iii) persons merely described as "the children" of legatees mentioned by name, even though not themselves named by their Christian and surnames.

II Notes. Applied: *In the Goods of Ashton*, [1892] P. 83. Considered: *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565. Applied: *Re Jeans, Upton v. Jeans* (1895), 13 R. 627. Considered: *Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208; *Re Wood, Wood v. Wood*, [1902] 2 Ch. 542; *Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138. Applied: *Re Corsellis, Freeborn v. Napper*, [1906] 2 Ch. 316. Considered: *Re Ridge, Hancock v. Dutton*, [1933] All E.R.Rep. 449; *Re Davidson, National Provincial Bank, Ltd. v. Davidson*, [1949] 2 All E.R. 551. Referred to: *Re Gue, Smith v. Gue*, [1892] W.N. 132; *Re Lowe, Danily v. Platt* (1892), 61 L.J.Ch. 415; *Re Stone, Baker v. Stone* (1895), 12 R. 415; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Re Kiddle, Gent v. Kiddle* (1905), 92 L.T. 724; *Re Green, Bath v. Cannon*, [1914] 1 Ch. 134; *Re Helliwell, Pickles v. Helliwell*, [1916] 2 Ch. 580; *Re Winn, Burgess v. Winn*, [1916-17] All E.R.Rep. 758; *Re Daoust, Dobell v. Dobell*, [1944] 1 All E.R. 443.

As to gifts to illegitimate relations, see 39 HALSBURY'S LAWS (3rd Edn.) 1070; as to designation by name, see *ibid.* 1008; as to the principles of construction of wills generally, see *ibid.* 973 et seq. For cases see 44 DIGEST 561, 821. A

**Appeal** by Charles Seale-Hayne from a decision of the Court of Appeal (LORD HALSBURY, L.C., LINDLEY and BOWEN, L.JJ.), reported 44 Ch.D. 590, reversing in part a decision of STIRLING, J., reported 61 L.T. 677.

The question arose upon the construction of the will of the late Sir E. Jodrell, Bart. By his will dated Mar. 23, 1868, the testator appointed his wife and two of his friends to be his executrix and executors, and bequeathed to each of his two acting executors (not reckoning his wife as one) a legacy of £1,000. By cl. 3 he made certain bequests in favour of his wife, and by cl. 4 he gave his plate, pictures, and articles of vertu to his executors and trustees upon trust to permit his wife to have the use of the same during her life, and after her death he directed the same to be sold, the proceeds to form part of his residuary estate, but the portraits of her and himself, instead of being sold, were to be given "to such one of my relatives as shall then be in possession of my family estates." Clauses 6 to 13 contained specific bequests. He bequeathed by cl. 6 to B

"my cousin Richard Jennings the marble bust of my grandfather . . . and at his demise I bequeath the same to the person or persons who shall then be or constitute his heir-at-law;" C

and by cl. 12

"to my cousin the Rev. Charles P. P. Jodrell, another of my single gold chains to be selected by my executors." D

By cll. 14 and 15 he gave to his executors his general personal estate, and the proceeds of sale of any real or leasehold estate of which he might have power to dispose at his death (which he gave to his executors upon trust for sale) upon trust, after payment of debts, funeral and testamentary expenses and legacies for his wife during her life, and after her death he directed his trustees to sell and convert the same into money, and out of the proceeds to set apart and pay the several legacies or sums of money specified in the twenty following paragraphs of his will, with a direction to marshal such proceeds so that charitable legacies should be paid out of pure personalty. E

Then came the following bequests, viz.: a bequest to "such one or more of the children of my late cousin Major Edward Jodrell other than his eldest son" as should be living at the testator's wife's death and attain twenty-one; a bequest in favour of the children of "my cousin Mary Bishop" for life, and after her death for her children surviving her and his wife and attaining twenty-one; a bequest in favour of "my said cousin Richard Jennings," and his wife during their lives, and after the death of the survivor for their children surviving them and his wife, and attaining twenty-one; a bequest in favour of "my cousin Louisa Buller" for her life, and after her death for Charles Seale-Hayne if he should survive her and the testator's wife; a bequest in trust for "my niece Emily Higgins" if she should survive his wife and attain twenty-one; a bequest in favour of "my two nieces Mary Champagné and Blanche Champagné" if they should respectively survive his wife and attain twenty-one; a bequest upon trust for "my cousin Major George King" for life, and after his death for his children who should survive him and the testator's wife and attain twenty-one; a bequest upon trust for "my cousin Georgiana Forde" for life, and after her death for such of her children as should survive her and his wife and attain twenty-one; a bequest upon trust for "my cousin Emily MacDonell" for life, and after her death for such of her children as should survive her and his wife and attain twenty-one. Then followed bequests to a goddaughter of the testator, and to several charities, and then cl. 37 was as follows: F

"As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided among G



A such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained, shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females for their separate use respectively, and without power of anticipation."

B By a first codicil, dated Mar. 11, 1871, the testator revoked the bequest by his will made in favour of his nieces Mary Champagné and Blanche Champagné, and directed that such bequest should form part of the residue disposed of by the 37th clause of his will.

C By a fifth codicil, dated July 26, 1882, the testator appointed the plaintiffs Alfred Jodrell and R. E. Jennings executors of his will. He gave Alfred Jodrell a legacy of £1,000, giving as his reason for not giving him more that he would be the next baronet and receive a large income under the will of the testator's father. He was the eldest son of the testator's cousin Major Edward Jodrell, living at the testator's death, an elder brother having died in March, 1882. He then revoked the bequest by his will made upon trust for his niece Emily Higgins, and directed that the sum bequeathed should

D "fall into and be applied as part of my residuary estate, and shall be invested accordingly, and the dividends and income arising from such investment shall be paid to my wife during her life."

Clause 10 of the codicil, after reciting the revocation by the first codicil of the bequest in favour of his nieces Mary and Blanche Champagné, and the revocation of the bequest upon trust for his niece Emily Higgins, proceeded as follows :

E "Now I hereby direct and declare it to be my intention that neither of my above-named three nieces shall be entitled to participate in the division of my residuary estate as directed by the 37th clause of my will, and I hereby expressly exclude them from coming under the provisions of such clause."

The testator's widow died on Mar. 1, 1888.

F On Mar. 13, 1888, the originating summons was issued, and on the 29th an order was made directing inquiries, and, among others, an inquiry what persons named in the first thirty-six clauses of the will were relatives of the testator.

G By his certificate, dated Mar. 15, 1889, the chief clerk found that Charles Seale-Hayne was a first cousin once removed of the testator, and that Louisa Buller died in 1879 in the lifetime of the testator; also that the testator's cousin Rev. Charles P. P. Jodrell died in 1875. He also found that Major George King, Georgiana Forde, and Emily MacDonell, referred to in the will as cousins by the testator, were not in fact legitimately related to the testator, but were the legitimate descendants of persons who, along with the testator's mother, were the natural children of one Caroline Morison. These three persons were all dead. The other persons named in the will as cousins of the testator were legally his cousins. The persons named as nieces were the nieces of his wife.

H The position may, therefore, be summarised as follows. Excluding the persons who merely received a life interest under the will on the ground that they did not receive a "vested transmissible interest," there were only five persons who in a broad sense might be described as relatives who were mentioned nominatim under the will, namely the Rev. Charles P. P. Jodrell, Charles Seale-Hayne, Emily Higgins, Mary Champagné and Blanche Champagné, all of whom were the legitimate relatives of the testator or his wife. Of these, the Rev. Charles P. P. Jodrell died in the testator's lifetime and before the fifth codicil was made, Mary Champagné and Blanche Champagné were excluded by the first codicil, and Emily Higgins by the fifth codicil, leaving only Charles Seal-Hayne, and it was argued that if the testator intended, when making the fifth codicil, to give the whole of the residue to him, it was inappropriate in cl. 10 of this codicil to refer to the "division" of his residuary estate.

I The summons was adjourned into court, and came before STIRLING, J., who held (61 L.T. 677) that "transmissible" meant "capable of transmission" after death,

and, consequently, persons who took merely life interests under the will were excluded from participation in the residue; and "relatives hereinbefore named" meant "legitimate relatives hereinbefore mentioned nominatim, if not by all their names, by some at least," and, therefore, the whole of the residue went to Charles Seale-Hayne who was the only person who, under the existing circumstances, answered to the description of "relative" contained in the residuary gift.

There was no appeal from that part of the decision by which STIRLING, J., held that the persons merely taking a life interest were excluded. Several of the persons interested appealed against the remainder of the decision, and the Court of Appeal allowed the appeal, holding that under the gift to "relatives before named" persons were entitled to take even though they were relatives by affinity and not consanguinity and even though by illegitimate relationship and even though they were described merely as "the children" of legatees named in the will, and not themselves mentioned nominatim.

From this decision, Charles Seale-Hayne appealed.

*Rigby, Q.C., and C. James* for the appellants.

*Lyttleton Chubb* for the trustees.

*Moulton, Q.C. (Trevelyan and Swinfen Eady with him), Crackanthorpe, Q.C. (Sir H. Davey, Q.C., Hadley and Rashleigh with him)* for various respondents.

**LORD HERSCHELL.**—Two questions arise upon the construction of the residuary clause of the will of the testator in this case, namely, what interpretation is to be put upon the word "relatives," and what is the meaning to be attributed to the expression "my relatives hereinbefore named."

I will deal with these questions in the order in which I have mentioned them. It is, of course, not open to dispute that the word "relatives" according to its natural interpretation, if there were nothing to show that another meaning was to be attributed to it, would not include those who were what may be termed natural blood relations, but whose parents or grandparents were not born in wedlock, and who, therefore, were not in the eye of the law related to the testator. But it is not disputed that the testator having in the provisions of his will, indicated whom he considers to be "relatives" in the sense in which he is speaking of relatives, or members of his family, you are entitled to look at those other provisions in order to interpret the word "relatives" as used in this part of his will.

In the previous part of the will the testator has spoken of persons who were not legitimately related to him, but as regards whom there existed this blood relationship, as his "cousins." He has indicated, therefore, clearly that in his view they were his relatives, that they were being so regarded by him at the time when he made his will; and obviously, of course, when having mentioned these cousins, he mentions their children, he was viewing them also in the light of relations, and it was in that light as expressly specified and designated by him that he was intending to give them benefit under his will. It appears to me, therefore, impossible to entertain any doubt in the present case, speaking for myself, that the testator here, when in the subsequent part of his will he speaks of his relatives and refers to them as relatives whom he has benefited under the provisions of his will, is including in that term of "relatives" those whom he has shown by the expressions to be found in other parts of his will that he was then regarding as relatives.

But then it is said that he has confined his bounty under this residuary clause to the "relatives hereinbefore named," that it is to say, according to the interpretation which your Lordships are asked to put upon the words hereinbefore mentioned by name. It cannot be denied that the word "named," although its primary signification may be "mentioned by name," is also used, and used in no unnatural sense as synonymous with "specified" or "mentioned;" and I do not think that there is any hard-and-fast rule to be laid down, that in constructing a will you are always to give to any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context

A and the whole provisions of the document which you have to construe, appears to be the sense in which the testator has used it.

I confess that for my own part, reading the will alone without regard to the considerations derived from the codicil, the impression produced is, that the testator did not intend, by using the language "hereinbefore named," to confine the words "such of my relatives hereinbefore named," to those relatives of whom he B had mentioned the Christian name and the surname. It is not easy to give reasons for such an interpretation. It is difficult to say more than that that is the effect which the perusal of the words in this will produces upon one's mind. But what certainly weighs with me is this, that the testator, I think, in this residuary clause intended to lay stress, not on the word "named" in the words "hereinbefore named," but that what he intended to lay stress upon was this, that it was not C all the relatives who had been made the objects of his bounty in the earlier part of the will whom he intended to share in this residue, but only those relatives the objects of his bounty who should take a vested transmissible interest. I think that is what he is intending by the expressions which he is using in this residuary clause; and I do not think, as I have said before, that the emphasis was intended to be upon the "relatives hereinbefore named," but upon "such of my relatives D hereinbefore named as shall become entitled to a vested transmissible interest." It may be that the words "hereinbefore named" were inserted inasmuch as some of the persons benefited, whom he describes as related to him, were not, strictly speaking, relatives. It may be that the words "such of my relatives hereinbefore named" were intended to indicate that the persons whom he had spoken of as "relatives" in the earlier part of the will, though not strictly his relatives, were E persons who, if they complied with the conditions, were intended by him to take the benefit.

I think I should have arrived at that conclusion merely upon a perusal of the terms of the will. But when one comes to the fifth codicil and considers that the testator had then before him and under his consideration the residuary clause of this will, if he was drawing this distinction between persons described and persons F named, and if that distinction was one of the cardinal points of his will, and he must be taken to have had present to his mind who were the persons he had named; when he has them thus before him, and is minded to make it clear that certain persons, namely three of his nieces, were not to take benefits under this residuary clause, it is to me really inconceivable that if he had been using the words "relatives hereinbefore named" in the sense contended for he should have framed the G fifth codicil in the manner in which he has done, because, by cl. 10 of the fifth codicil he excludes those three persons from participating in the division of his residuary estate, as directed by cl. 37. At that time, if the contention of the appellant be well founded, there was only one person entitled under that residuary clause; there would, therefore, be no question of division at all, and the simple and natural course to have adopted, if the testator had so understood and intended H the provisions of the residuary clause, would have been this, merely to provide by a clause in this codicil that the residuary estate should go to this single individual, to whom alone it was then in his contemplation that it should go. It appears to me that that would have been a much more natural course to have taken, and one which it is difficult to understand his not taking rather than putting in this clause in the codicil.

I It appears to me, therefore, that if one takes such assistance as one gets from that circumstance, the inference to be derived from the execution of that codicil, it fortifies that which I own is the conclusion which I should probably otherwise have arrived at, that the true interpretation has been put upon this will by the court below, and, therefore, this appeal ought to be dismissed.

**LORD MACNAGHTEN.**—I agree with your Lordships and the Court of Appeal, that this is a plain case. The testator's will certainly appears to have been drawn by a lawyer. But the expression which has given rise to the present argument



is not a technical one; and the question, as it seems to me, is whether that expression is to be treated as an exercise in cryptography or to be understood in the sense which would I think be naturally attached to it by an educated person of common intelligence, not being either hypercritical or disposed to look for a hidden meaning in ordinary language. A

The testator directs the division of his residuary estate after his wife's death in the following terms: B

"Among such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property."

In the earlier part of the will the testator had made bequests to certain beneficiaries, named in his will and described as connected with him in certain degrees of relationship. To some he gave an absolute interest, to others a life interest only with remainder to such of their children as should attain twenty-one, and survive the immediate tenant for life as well as testator's widow. I cannot doubt that of these persons, including the children I have referred to, all who became entitled to a vested transmissible interest come under the description of "my relations hereinbefore named," and that whether they were or were not relatives in the eye of the law, and whether they were named in the earlier part of the will separately and individually, or named by reference to their parentage, being described as children of persons separately and individually named. To hold otherwise would, I think, be to defeat the obvious intention of the testator by over-refinement and straining after precision more apparent, perhaps, than real. C D

I think the matter is sufficiently clear on the face of the will, looking to the residuary clause and the scheme of distribution of part of the testator's estate which precedes it. But it is certainly satisfactory to find, when you come to the fifth codicil, that the testator himself, having regard to the state of his family at the time, must have attached the same meaning to his residuary gift which commends itself to your Lordships. E

**LORD FIELD.**—I am also of opinion that the judgment of the court below is correct, and ought to be affirmed. The question for your Lordships' consideration depends upon the true construction to be given to cl. 37 of the testator's will. The testator has, before arriving at that clause, made various bequests to different classes of persons. Some of them are to strangers, with whom we at present have nothing to do, and some of them are mere personal presents to persons whom he has described as his relations; and a third class of them are to the children of persons whom he has named as relations also. F G

The question to be decided is whom did the testator intend to benefit by cl. 37 of the will? The first words in the clause, seem to me, to have a very strong governing influence in the decision of this case, because the testator says: H

"As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided among such of my relatives hereinbefore named."

That will having been made in 1868, by the fifth codicil, which he executed in 1882, the testator again uses words pointing to the circumstance that the estate which he is disposing of is the subject of division. It, therefore, seems to me quite clear or reasonably clear that the testator was certainly benefiting more than one person by this residuary devise—otherwise no effect would be given to the words "equally divided" in the will or "division" in the codicil, which would be a violation of one of the principal rules of construction. Further, it appears that at the time of the making of the will there were, I think, five persons to whom there had been previous bequests, but by the time of the execution of the codicil those bequests had either been revoked or the persons benefited by them had died. The result of that, therefore, was that only one person, the appellant, was held entitled to the benefit of this residuary estate, which seems to me again contrary to the intention of the testator. I

**A** The estate, therefore, being one which had to be divided between more than one person, who were the persons whom the testator intended to benefit? He intended to benefit first of all such of the persons whom he had named before as were his relatives. Then comes the question: What persons had he named before as relatives? On that it seems to me reasonably clear that the word "relatives" there is not to be construed in the strict primary sense, because the testator himself has

**B** described persons who were not in that sense relations as being "relatives." I think, therefore, that the word "relatives" is not to be construed in the primary sense, and the secondary sense is the one in which, from the terms of the will itself, I consider the testator intended it to be used.

There comes a third question, which is as to the expression "relatives hereinbefore named." What relatives has he hereinbefore named? The testator has

**C** named a great many persons, some of them not being his relatives at all; some of them he has named as relatives, calling them by name; some as cousins; and some (the principal portion) as the children of cousins, or the children of nieces. As I have observed before, he gives the names of those persons in the will, and, therefore, I confess I cannot myself see the smallest doubt or difficulty (really there is none) in identifying them. Again, it seems to me, that the primary

**D** meaning of the word "named" here is not that in which the testator uses it, but that he uses it in the larger sense as including children, or descendants of those whom he has named.

**LORD HANNEN.**—It is clear that the testator in his will called persons who were not legitimately connected with him his "cousins," that is, he treated them as relatives. This affords us a guide as to what he means when he speaks of his

**E** "relatives" in the residuary clause. Secondly, he divides his residue among his "relatives hereinbefore named" who may fulfil certain conditions, and he repeats this provision by confirmation in a codicil at a time when in the events which had happened there would be only one person to whom the residue would go if "named" means described by Christian or surname. Seeing that his attention, when making

**F** his fifth codicil, was necessarily directed to the point who would take under the residuary clause, I think it unreasonable to suppose that he meant to leave one person to take under a provision which directed a division among several. This (as it appears to me) unreasonable conclusion is avoided by interpreting the word "named" in one of its recognised meanings as "designated," and I therefore adopt that interpretation. I think the judgment appealed from should be affirmed.

**G** *Appeal dismissed.*

Solicitors: *Druces & Attlee; Satchell & Chapple; Wilham, Lambert & Roskell; Hasties; Walker & Whitfield; Wadeson & Malleson.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

A

## THE GLENDARROCH

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), February 9, 1894]

[Reported [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344;  
10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686]

B

*Shipping—Bill of lading—Damage to cargo—Exception of perils of the sea—No exception of negligence—Damage due to peril of sea—Burden of proof as to negligence.*

C

The plaintiffs shipped a cargo of cement in the defendants's ship under a bill of lading which contained the usual exceptions including that of perils of the sea, but which omitted an exception of negligence. The ship was stranded on the journey and the cargo was damaged. In an action brought by the plaintiffs for damage to the cargo,

D

**Held:** as the damage was apparently caused by a peril of the sea, the burden of showing that the defendants were not entitled to the benefit of that exception because of their negligence lay on the plaintiffs.

*Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (1) (1887), 12 App. Cas. 503, considered.

E

**Notes.** Considered: *Ashton & Co. v. London and North Western Railway*, [1918] 2 K.B. 488. Applied: *Rowett, Leakey & Co. v. Scottish Provident Institution*, [1927] 1 Ch. 55. Considered: *The Stranna*, [1937] 2 All E.R. 383. Referred to: *Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1914] 1 K.B. 419; *Munro, Brice & Co. v. War Risks Association*, [1916-17] All E.R.Rep. 981; *Matheos (Owners) v. Louis Dreyfus & Co.*, [1925] All E.R.Rep. 422; *Stoney v. Eastbourne R.D.C.*, [1927] 1 Ch. 367; *Goodwin, Ferreira & Co., Ltd. v. Lamport and Holt, Ltd.*, [1929] All E.R.Rep. 623; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.*, *The Kingswood*, [1941] 2 All E.R. 165; *Reardon Smith Line, Ltd. v. Minister of Agriculture*, [1959] 3 All E.R. 434.

F

As to exceptions relieving the shipowner, see 35 HALSBURY'S LAWS (3rd Edn.) 288 et seq.; and for cases see 41 DIGEST 414 et seq.

Cases referred to :

- (1) *Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 41 Digest 414, 2573.
- (2) *Grill v. General Iron Screw Collier Co.* (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar.L.C. 77, Ex. Ch.; 41 Digest 422, 2647.
- (3) *Czech v. General Steam Navigation Co.* (1867), L.R. 3 C.P. 14; 37 L.J.C.P. 3; 17 L.T. 246; 16 W.R. 130; 3 Mar.L.C. 5; 41 Digest 425, 2667.
- (4) *Craig and Rose v. Delargy* (1879), 6 R. (Ct. of Sess.) 1269; 16 Sc.L.R. 750; 41 Digest 424, 2664iii.
- (5) *Williams v. Dobbie* (1884), 11 R. (Ct. of Sess.) 982; 21 Sc.L.R. 667; 41 Digest 498, q.
- (6) *Taylor v. Liverpool and Great Western Steam Co.* (1874), L.R. 9 Q.B. 546; 43 L.J.Q.B. 205; 30 L.T. 714; 22 W.R. 752; 2 Asp.M.L.C. 275; 41 Digest 420, 2638.
- (7) *P. and O. Steam Navigation Co. v. Shand* (1865), 3 Moo.P.C.C.N.S. 272; 6 New Rep. 387; 12 L.T. 808; 11 Jur.N.S. 771; 13 W.R. 1049; 2 Mar.L.C. 244; 16 E.R. 103, P.C.; 11 Digest (Repl.) 431, 771.
- (8) *Wyld v. Pickford* (1841), 8 M. & W. 443; 10 L.J.Ex. 382; 151 E.R. 1113; 8 Digest (Repl.) 15, 73.
- (9) *Phillips v. Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, 2664.

G

H

I



**A** **Appeal** from a decision of SIR FRANCIS JEUNE, P., in an action in which the plaintiffs, Messrs. J. C. Johnson & Co. and H. F. Currie & Co., sought to recover from the defendants, Messrs. Wainwright Brothers & Co., the sum of £387 16s. 1d., being the value of 2,100 sacks of cement damaged by water while being conveyed by the steamship *Glendarroch* from London to Liverpool in March, 1893.

**B** The defendants had contracted to take the *Glendarroch* from London to Liverpool at their own risk, for repairs, and the plaintiffs' cement was taken on board as cargo, but primarily for purposes of ballast. In the course of her voyage the *Glendarroch* stranded in Cardigan Bay, and the plaintiffs' cement was damaged by water, and rendered useless.

**C** The plaintiffs sued the defendants as common carriers, but the defendants, while admitting that the goods were lost before the bills of lading were completed, contended that they were received on terms that it was agreed should be embodied in the bills of lading, which included the usual exceptions with regard to perils of the sea and a negligence clause. The plaintiffs did not allege negligence in their pleadings, but they were taken by the President as amended in that respect. He found that the goods were carried under the bills of lading alleged by the defendants, but that the alleged negligence clause had not been made out. He considered **D** himself bound by the dictum of LORD HERSCHELL in *The Xantho* (1) (12 App. Cas. at p. 512), and laid it down that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading; that is, a peril not occasioned by the negligence of the defendant. Counsel for the defendants then declined to carry the case any further, contending that it would shift a burden on the defendants which really rested on the plaintiffs, and judgment **E** was accordingly entered for an agreed sum of £335. The defendants appealed.

*Walton, Q.C.*, and *W. F. Taylor* for the defendants.

*Sir Walter Phillimore* and *J. A. Hamilton* for the plaintiffs.

**LORD ESHER, M.R.**—The contract being one on the ordinary terms of a bill of lading, the facts suggested are these, that the goods are shipped on these terms, **F** and that the defendant undertakes to deliver the goods at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading. The exception relied upon by the defendants here is that the goods were lost or damaged by the peril of the sea, and upon that it is alleged that even though that be true, yet that peril of the sea and that loss by peril of the sea was the result of negligent navigation on the part of the defendants' **G** sailors. It is the law that if that be made out the defendants have no defence, and the plaintiffs are entitled to succeed, and the real question is—how is that to be made out, if it can be made out? It is to be decided according to the practice of the law courts, and the question is, how is that result to be arrived at? The terms of the bill of lading as they stand on paper are, "except the loss be from perils of the sea." But then it is said that, nevertheless, if the perils of the **H** sea are produced by the negligence of the defendants' seamen, then that loss cannot be relied on by the defendants. How can that be unless there be an irresistible inference that such exception does exist in the contract, though it is not written in it? Therefore it must be read into it as if it were in it. Hence we must try and see whether this stipulation as to negligence must be written in, or be considered as written in.

**I** The liabilities of shipowners under a bill of lading are in that part which precedes the exceptions. Is this stipulation about the loss being the result of the negligence of the shipowners' servants, although within the terms of the exception to be written in before the exceptions or not? The first thing that strikes one is that in that part of the contract it is not wanted. It is immaterial. Before you come to the exceptions the liability of the shipowner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no negligence whatever he would be liable. It cannot be,

therefore, that you ought to write in this irresistible inference in that part of the contract. It is not wanted there; therefore you must write it into that part which contains the exceptions. A

When you come to the exceptions, among others there is the exception of perils of the sea. There are no words which say "Perils of the sea not caused by the negligence of the captain or crew". You have got to read those words in by a necessary inference. How can you read them in? You have got the plain words, in their ordinary sense, that the shipowner is relieved if the loss is a loss by perils of the sea in the ordinary sense of the word. But then you have to read in the other. You can only read it in, in my opinion, as an exception upon the exceptions. You must read in "Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the captain or sailors of the owner." That being so, I think that, according to the ordinary course of practice, each party would have to prove the part of the matter which lies upon him. The plaintiff would have to prove the contract and the non-delivery. If he leaves that in doubt, of course he fails. The defendant's answer is, "Yes, but my case was brought within the exception, within its ordinary meaning." That lies upon him. Then the plaintiff has a right to say there are exceptional circumstances—viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiff to make out that second exception. B C D

Let us see whether that seems to have been the view of the older lawyers who had to deal with these disputes as to bills of lading. The old system of pleading, so far as it is a logical exercise carried into practice, was this, that the pleading should follow the burden of proof, so as to show distinctly which part of the transaction lay upon each person to prove. There was a declaration, which showed what the plaintiff had to prove in the first instance. There was the plea, which was prepared to show what the defendant was prepared to prove in answer to that; there was the replication, which admitted the plea was sufficient answer to the plaintiff unless he could answer it. But the replication might answer the plea so as to reinforce the declaration, and show that, by reason of what was in the replication, the plea had become, although *prima facie* an answer, not a sufficient one, and that the declaration was restored. That was the system and the logical system of the old pleading, for the purpose of the conduct of the trial, to show how the evidence and the proof was to be regulated. The declaration stated the bill of lading, and relying on the first and substantive part of the bill of lading alleged non-delivery. That was all the declaration came to state, and strictly speaking, I am of opinion that the declaration could not properly have stated anything about negligence, because negligence was immaterial. It was what the old pleaders called "leaping before you came to the stile," and a pleader was not called upon to answer that which at that time and at that moment was an immaterial allegation. Therefore the declaration was as I say. That showed what the plaintiff had to prove in the first instance, and the moment he did prove what was in his declaration, that was his case. Then came the defendant, and he had to answer that case. Then the plea is stated: "It is true that that is the contract, but the non-delivery was the result of a peril of the sea." He followed, therefore, the terms of the exception construed in their ordinary sense, that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it showed it was no part of the proof which the defendant was bound to give. E F G H I

Then you have a long succession of cases, all setting out a replication, and that replication in the given case is: "Yes, it is true there was a loss by perils of the sea within the *prima facie* exception, but that was brought about by the negligence

A of your servants, i.e., by your captain and crew." The replication was there for the purpose of showing what the plaintiff had to prove. He could not depart from his declaration, but if he could support it by showing that the exception was not satisfied because there had been this negligence, then the case in the end was for the plaintiff. That being so, it seems to me that the course of pleading is as strong as it could be in favour of, what I think, the true construction of the contract

B shows, and the principles upon which such a construction was to be acted upon in the trial of the case when it came to be tried.

That being the state of things, is there any case to the contrary of that constant course of pleading, and of that result of the principle of construction of a bill of lading? I know of none, but I think there are cases which distinctly show that the course of pleading did give the right view of the different shiftings of the burden

C of proof. I think that *Grill v. General Iron Screw Collier Co.* (2) is distinct on the point, and so also is *Czech v. General Steam Navigation Co.* (3). I think that the two Scottish cases of *Craig and Rose v. Delargy* (4) and *Williams v. Dobbie* (5) are as distinct and clear to the very point as cases can be. I therefore think that, unless there is something which will justify us in setting aside what I think is the principle of conduct arising from the true construction of the contract, and the universal mode of treating trials up to this time, that which is said in MR. CARVER'S

D book on CARRIAGE OF GOODS BY SEA (2nd Edn.) p. 89, which is the result of a very careful consideration of the cases, is correct, viz., that, if the loss apparently falls within the exception, the burden of showing that the shipowner is not entitled to the benefit of the exception on the ground of negligence is upon the person so contending. MR. CARVER cites those cases in support of the proposition. Of course

E the proposition in his book is not to be treated as authority, but I adopt that statement of the law, and I think it is right.

But it is said that a suggestion on a decision or an opinion of the greatest weight has been given to the contrary of what I think is the principle of conduct, and has been the universal practice in the conduct of trials for years and years. That is the opinion which is said to have been given by LORD HERSCHELL in *The Xantho* (1).

F I need hardly say that I have the greatest respect and regard for the legal opinion of LORD HERSCHELL in any mercantile case. I have reason to have that great respect, but reading what he said in *The Xantho* (1), I am of opinion that he positively declined to give an opinion. People may say that, looking through or into his words, they may see a tendency of his mind, but that is not an opinion. The tendency of his mind when he refuses to give an opinion is not in my judgment

G any opinion at all. I therefore do not for the time feel hampered by a supposed view of LORD HERSCHELL, which I feel, if the case ever goes before him for decision, and if he had that idea passing through his mind, he will not act upon. I think, therefore, that the law is clear that the burden of proving this negligence lies upon the plaintiff.

If that be true, what is the result of this case? When the first part of the trial

H was over, counsel for the plaintiffs proceeded to open his case. Naturally he opened with, "The goods were put on board the ship," which really was not a subject of dispute, and "The goods were not delivered." That was not a subject in dispute. There he might have stopped. He had proved his prima facie case, but knowing that the ship had really been stranded on the rocks and broken into, and the cargo destroyed, he naturally saw that there was a loss by perils of the sea in the

I ordinary sense of the term, and he therefore began to prepare the mind of the judge before the time, doing that which, if he had been an old pleader, would have been jumping before he came to the stile. He began to open that which he would have to prove on a replication that the perils of the sea had been caused by the negligence of the defendants' sailors. He might have taken that to be the real issue of the case, and then have opened the negligence which he alleged, and if he had evidence of it put in his evidence. But it is too soon; it is meeting the defendant before the defendant has made any case. He puts in the answers to the interrogatories, which immediately show that there has been a loss by perils of



the sea in the ordinary sense, and I think that showed evidence, perhaps strong **A** evidence, that that was the result of negligent navigation.

But he was not content. I know what the refinement of his mind is, and he seems not to have been content to rely on that, because he would not risk his client's case upon that, and he endeavoured to get from the judge a ruling which made the whole of that immaterial. He endeavoured to get from the judge a ruling before the judge was bound to give it, on what would be the ultimate **B** question in the trial. He quoted *The Xantho* (1), and endeavoured to get from the judge a ruling that the burden of proof which lay upon the defendant was that he must not only prove loss by perils of the sea, but must prove that that was not the result of the negligence of his captain and crew. He obtained that ruling of the judge at that time. Counsel for the defendants at that time had not said he had nothing to answer. He had not said he would not call evidence. It was **C** after the plaintiffs' counsel had obtained that ruling of the judge, which to my mind would increase the obligation on the defendants' counsel, and put upon him the necessity of far stronger evidence than if that ruling did not exist, that the defendants' counsel said :

"After that ruling it is of no use for me to answer this specific allegation which you have made that my going out of my course and being out of my course was negligence."

If the defendants had shown that their being in Cardigan Bay was not the result of careless navigation and not keeping their course outside of Cardigan Bay, but that they had sufficient reason for going into Cardigan Bay, which would take away any real suggestion of its being carelessness to be in Cardigan Bay, that would not do. They must go on to prove that if they were in Cardigan Bay there was no negligence which conduced to the running on the rocks. It seems to me that the burden of proof thus laid upon them was greater than the law justified. Counsel for the defendants said, "No, I cannot undertake that burden. That is your ruling, and I must go to the Court of Appeal as you have made that ruling, and ask whether it is right or whether it is wrong, so as to enable me to continue my part of the trial, if there is to be a new trial." In my opinion the defendants were bound to come here in order to get that view of the court, and their counsel succeeded in convincing me that the learned judge has misconstrued that which was suggested to him as the authority of LORD HERSCHELL, and that he has given a ruling which was not according to law. I think, therefore, that as upon the point of the appeal the defendants have succeeded, they ought to have the costs of the appeal; but I also think that there seems to have been considerable misfortune in the mode in which the trial was conducted, and as the result, about which I give no opinion, is yet to be determined, I think there must be a new trial, and that under the circumstances the costs of the first trial must abide the event of the second. **E**

**LOPES, L.J.**—The question raised in this case is a somewhat difficult one, and the question is a question of onus of proof. As a general rule it may be said that the burden of proof lies on the person who affirms a particular thing. It appears to me in this case that the burden of proving that a loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of relying on the excepted cause lies on the person who set up that contention. That, in this case, would be the plaintiffs, who are the shippers. I think that is not only the result of the authorities, but of the pleadings before the Judicature Acts. **H**

The cases which have been referred to are: *Grill v. General Iron Screw Collier Co.* (2); *Czech v. General Steam Navigation Co.* (3); *Taylor v. Liverpool and Great Western Steam Co.* (6); *P. and O. Steamship Co. v. Shand* (7); and *Wyld v. Pickford* (8). These cases make good what I have stated with regard to the onus of **I**

A proof, namely, that where peril of the sea is set up it is sufficient for the defendants to prove the peril relied on, and he need not go on to show that that was really not caused by him, but if the plaintiffs say that it was, then they must set it up in their replication and must prove it. I have not heard a single case except one which I think is not an authority at all, which in any way negatives that proposition.

B But it is said there is a contrary opinion expressed by LORD HERSCHELL in *The Xantho* (1). He said (12 App. Cas. at p. 512):

C "Much argument was addressed to your Lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus, and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view."

D It is perfectly clear, therefore, that he does not intend to decide that point. He goes on to say:

"I certainly must not be understood as deciding that the mere proof of loss by collision, under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate the defendants."

E That is the passage which is relied upon. Probably I think, reading it strictly, it might be said that if the learned Lord had an inclination of opinion at all it was in favour of that opinion which is put forward by the defendants' counsel; but the materiality of the whole passage is that it is not decided at all, and is left for further decision. Therefore, to put an extra-judicial dictum of that kind against a practice which has existed for a vast number of years would be most undesirable, and would be contrary to all precedents.

F In the result, therefore, I come to the conclusion that the learned President was misdirecting himself. The President says:

G "I think LORD HERSCHELL was rather inclined to the view that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading, that is, a peril of the sea not occasioned by the negligence of the defendant."

H The learned judge so ruled, and was invited so to rule by counsel for the plaintiffs. Counsel for the defendants then said he left the case as it was. I think that is a clear misdirection by the learned judge, and such a misdirection as before the Judicature Acts would have necessitated a new trial. But under Ord. 39, r. 6, new trials are not granted unless there is some substantial wrong or miscarriage of justice. Speaking for myself, I do not hesitate to say that this is the matter in the case which has given me considerable trouble, but I am not prepared to say that a miscarriage of justice may not have occurred, for it makes all the difference where the onus of proof is held to be. I cannot, therefore, say that some injustice, or at any rate some substantial wrong, may not have been occasioned I to the defendants by the erroneous action which I consider the learned judge took in regard to this case.

DAVEY, L.J.—I am of opinion that counsel for the defendants has successfully shown what the form of pleading was when there were pleadings in matters of this description, namely, that negligence must either be alleged in the declaration or else be specially replied. It may be doubted whether it would require to be set out in the declaration, but in either case it was a matter which must be alleged and proved by the plaintiffs. The forms of pleading were not a mere

technicality, but were framed in the manner in which they were so as to carry A  
out what is really a matter of substance, and, as the Master of the Rolls has  
clearly explained, that was the burden of proof followed and shifted from time to  
time, according to the matters alleged to have been pleaded. Nobody ever heard of  
a plea such as that in *Phillips v. Clark* (9) being demurred on, but if counsel for  
the defendants was right in saying that the burden of proof was on them, then  
he ought to have alleged it in his plea, and a plea merely stating one of the B  
excepted perils which did not go on to negative any suggestion of negligence would  
have been insufficient. I think the point is clearly put by PARKE, B., in *Wyld v.*  
*Pickford* (8). That seems to me to bear out exactly what has been said, as also  
do the subsequent cases of *Grill v. General Iron Screw Collier Co.* (2) and *P. and O.*  
*Steam Navigation Co. v. Shand* (7). The judgment of WILLES, J., in *Grill v.*  
*General Iron Screw Collier Co.* (2) appears to show that perils of the sea are C  
excepted, but that there is an implied contract by the shipowner that he will carry  
with care and caution, and his breach of that contract prevents him availing  
himself of the perils of the sea.

As to *Taylor v. Liverpool and Great Western Steam Co.* (6) the present case  
is distinguished from that case, which turned entirely upon the construction of the  
word "thieves" in the exception in the bill of lading, and the court came to the D  
conclusion that the word "thieves" meant only as a matter of construction persons  
outside the vessel. That being so, of course the defendant had to bring himself  
within the excepted perils, and if that was not one of the excepted perils properly  
considered by the court, he did not bring himself within the excepted perils.  
Therefore, I think that case cannot be relied upon.

I confess I have great doubt whether counsel for the defendants had anything in E  
substance to complain of, because there was evidence raising a prima facie case of  
negligence, and the learned judge might, it is admitted, have said to him, "There  
is a prima facie case of negligence raised by the plaintiff for you to answer,"  
and he would have put in his evidence in answer to that. If the learned judge  
had taken that course, there could not have been, so far as I can see, anything  
to complain of. There are some subsequent words by the plaintiffs' counsel, F  
after the learned judge decided the point—words which warn counsel for the  
defendants about the interrogatories and the evidence produced from the lighthouse;  
but these words were subsequent to the very clear judgment delivered by the  
learned President, and the defendants' counsel had announced the course which on  
that judgment he intended to take. I think that observation of counsel for the  
defendants, though perhaps kindly meant, is not sufficient to alter or qualify the G  
effect of the finding of the learned judge. It is to be further observed that the learned  
judge seems never to have found as the basis of his judgment that there  
was negligence in fact, but to have given judgment for the plaintiffs on the ground  
that it was the defendants' business to negative negligence, and that he had not  
done so. On consideration it seems to me difficult to say that the defendants might  
not be prejudiced by the way in which the case was decided, because the evidence H  
might have been so evenly balanced, or the witnesses on one side or the other  
might not have been thoroughly believed, that the ultimate decision might finally  
turn on the question on whom the burden of proof lay. On these grounds I agree  
with the judgment which the Master of the Rolls has given.

Solicitors: *Waltons, Johnson, Bubb & Whatton*; *Norris, Allens & Chapman*,  
for *J. M. Quiggin*, Liverpool.

[Reported by B. CRUMP, Esq., Barrister-at-Law.] I



## HICK v. RAYMOND AND REID

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Morris and Lord Field), November 29, December 2, 16, 1892]

[Reported [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175;  
41 W.R. 384; 9 T.L.R. 141; 37 Sol. Jo. 145;  
7 Asp.M.L.C. 233; 1 R. 125]

*Contract—Performance—Time for performance—Carriage of goods by sea—Discharge—Reasonable time—"Reasonable"—Circumstances at time of performance to be considered.*

When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. In determining whether or not more than a reasonable time was occupied the circumstances which actually existed at the time of performance must be considered, not the ordinary circumstances which would normally attend the performance. The rule is of universal application, and it applies to contracts for the carriage of goods by sea as to other contracts.

Accordingly, where goods consigned to the respondents were shipped on board a ship of the appellant under bills of lading which contained no stipulation as to the time within which the respondents were to discharge the cargo, the ship duly arrived at her port of discharge, and the unloading was commenced, but before it was completed a strike by the dock labourers took place so that the completion of the unloading was delayed for a considerable time,

**Held:** in view of the circumstances existing at the port at the time of the discharge the respondents were not liable for the delay.

**Notes.** Considered and Applied: *Carlton Steamship Co. v. Castle Mail Packets Co.*, [1898] A.C. 486. Considered: *Lyle Shipping Co. v. Cardiff Corpn.*, [1900] 2 Q.B. 638. Applied: *Maclay v. Bakers and Spiller* (1900), 16 T.L.R. 401. Considered: *Hulthen v. Stewart*, [1902] 2 K.B. 199. Applied: *Sims v. Midland Rail. Co.*, [1913] 1 K.B. 103. Considered: *Verelst's Administratrix v. Motor Union Insurance Co.*, [1925] 2 K.B. 137; *Anastasia Steamship Owners v. Ugleexport Charkow* (1933), 149 L.T. 342; *Dampskibsselskabet Heimdal v. Russian Wood Agency, Ltd.* (1933), 149 L.T. 342; *Hartwells of Oxford, Ltd. v. British Motor Trade Association*, [1950] 2 All E.R. 705. Referred to: *Ropner v. Stoaite Hosegood & Co.* (1905), 92 L.T. 328; *Akt. Hekla v. Bryson, Jameson & Co.* (1908), 100 L.T. 155; *Langham Steamship Co. v. Gallagher* (1911), 12 Asp.M.L.C. 109; *Van Liewen v. Hollis Bros. & Co., Ltd., The Lizzie*, [1918-19] All E.R.Rep. 930; *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] All E.R.Rep. 427; *Stewart v. Rank* (1920), 36 T.L.R. 728; *Transoceanica Soc. Italiana Di Navigazione v. Shipton*, [1923] 1 K.B. 31; *Stag Line, Ltd. v. Foscolo Mungo & Co.*, [1931] All E.R.Rep. 666; *Akties Steam v. Arcos, Ltd., Akties Brunsgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *Charles Richards, Ltd. v. Oppenheim*, [1950] 1 All E.R. 420.

As to the time of performance of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 163-167; and for cases see 12 DIGEST (Repl.) 343 et seq. As to the time for the discharge of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 457-465; and for cases see 41 DIGEST 539 et seq.

Cases referred to:

- (1) *Postlethwaite v. Freeland* (1879), 4 Ex.D. 155; 48 L.J.Ex. 353; 40 L.T. 601; 27 W.R. 568; 4 Asp.M.L.C. 129, C.A.; affirmed (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp.M.L.C. 302, H.L.; 41 Digest 539, 3666.

- (2) *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; 19 L.T. 634; 19 W.R. 634; 17 W.R. 282; 3 Mar.L.C. 190; affirmed (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 12 Digest (Repl.) 439, 3348.
- (3) *Taylor v. Great Northern Rail. Co.* (1866), L.R. 1 C.P. 385; sub nom. *Great Northern Rail. Co. v. Taylor*, Har. & Ruth. 471; 35 L.J.C.P. 210; 14 L.T. 363; 12 Jur.N.S. 372; 14 W.R. 639; 8 Digest (Repl.) 26, 154.
- (4) *Wright v. New Zealand Shipping Co., Ltd.* (1878), 4 Ex.D. 165, n.; 40 L.T. 413; 4 Asp.M.L.C. 118, C.A.; 41 Digest 545, 3726.
- (5) *Burmester v. Hodgson* (1810), 2 Camp. 488; 170 E.R. 1228, N.P.; 41 Digest 548, 3754.
- (6) *Rogers v. Hunter* (1827), 2 C. & P. 601; Mood. & M. 63; 172 E.R. 273, N.P.; 41 Digest 540, 3673.
- (7) *Hall v. Wright* (1858), E.B. & E. 746; 27 L.J.Q.B. 345; 31 L.T.O.S. 297; 5 Jur.N.S. 62; reversed (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 27 Digest (Repl.) 31, 84.
- (8) *Cross v. Beard*, 26 N.Y. 85.

**Appeal** by the plaintiff in the action from a decision of the Court of Appeal (LINDLEY, FRY and LOPES, L.JJ.), reported [1892] 2 Q.B. 626, in so far as it reversed a judgment of MATHEW, J., at the trial of the action without a jury.

*Finlay, Q.C., Robson, Q.C., and Holman* for the appellant.

*Sir Richard Webster, Q.C., Bucknill, Q.C., and Leck* for the respondents.

Their Lordships took time for consideration.

Dec. 16, 1892. The following opinions were read.

**LORD HERSCHELL, L.C.**—This action was brought by the appellant, who is a shipowner, against the respondents, who were consignees and holders of the bills of lading of a cargo carried on board the plaintiff's steamship *Derwentdale*, to recover damages for the detention of the vessel during her discharge at the port of London.

By the bills of lading the cargo was to be delivered in good order and condition "at the port of London." On Aug. 14, 1889, the vessel arrived in the Millwall Dock, and was reported to the Custom House. The discharge of the wheat, of which the cargo consisted, commenced on Aug. 16. On Aug. 20, a strike of dock labourers began in the port of London, and some of the labourers engaged in the discharge of the *Derwentdale* then ceased to work. A few days later the strike became general, and no work was done in the discharge of the vessel until Sept. 16, when it was recommenced, and finished on the 18th. Evidence was given that, apart from the strike, the discharge of the vessel would have been completed in six days. The dock company were employed by the respondents to discharge the vessel. Only the trimming of the cargo was to be the work of the shipowner, otherwise the entire obligation to discharge the vessel rested on the consignees.

At the commencement of the trial, in the course of the discussion which took place whether the case should be heard with or without a jury, certain admissions were made by the learned counsel, and I think it well to state at the outset what I take to be the facts, either proved or admitted. I think it must be taken that, throughout the whole of the time during which the discharge ceased, and the dock company were unable to supply labour to effect it, it was not possible for the respondents either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way. If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them, and it would have

A been no answer to a charge that they had failed to fulfil their obligation to say that the circumstances had rendered it impossible for them to do so. The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles, the obligation of the respondents was that they should take discharge of the cargo within a reasonable time.

B The question is: Has the plaintiff proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied. The appellant's contention is that, inasmuch as the obligation to take discharge of the cargo and to provide the necessary labour for that purpose rested upon the respondents, the test is what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labour, they must be responsible if the discharge is delayed beyond that period. The respondents, on the other hand, contend that the question is not what time would have been necessary, or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

D There appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances," say the learned counsel for the appellant. E But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that, in so far as it lasted beyond the ordinary period, the delay F caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo had been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. G When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee.

I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge and those in which the question what is a reasonable time has had to be answered when analogous observations H were under consideration, is distinctly in favour of the view taken by the court below. In *Postlethwaite v. Freeland* (1) the law was stated by LORD SELBOURNE, L.C., thus:

I "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is, as was said by BLACKBURN, J., in *Ford v. Cotesworth* (2), a reasonable time under the circumstances."

In the same case LORD BLACKBURN clearly indicated that this view of the law was, in his opinion, correct and in accordance with the current of previous authority; and he not only quoted with approval the law laid down in *Taylor v. Great Northern Rail. Co.* (3), that "a reasonable time" meant what was reasonable under the circumstances as distinguished from "the ordinary time," which it had been contended was the same thing as a reasonable time, but stated that,



in his opinion, the law so laid down was applicable to the case then under consideration. A

It is true that, in *Postlethwaite v. Freeland* (1), the point which has now to be determined did not directly arise, inasmuch as in that case the charterparty contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, and I cannot agree with what appears to have been the view of LORD BLACKBURN, that this was necessarily the same as the implied obligation to discharge within a reasonable time. In that case it was proved that the mode of discharge customary in the port was by means of a warp and lighters, and that these were under the absolute control of a company to which the government authorities had transferred all their powers, and that the company allowed vessels the use of the warp and lighters in turn. The result was that, owing to the presence of a considerable number of ships, the turn of the appellant's vessel did not come for a considerable time. It appears to me that, under those circumstances, the judgment was inevitable that the cargo had been discharged with all despatch according to the custom of the port, and also that *Postlethwaite v. Freeland* (1) cannot be taken as a decision concluding the question arising on this appeal. The dicta are undoubtedly of great weight, and I concur with the result at which LORD BLACKBURN arrived, that so far as there was prior authority it pointed in the direction of the view adopted in the present case by the Court of Appeal. B C D

LORD BLACKBURN excepted *Wright v. New Zealand Shipping Co.* (4), regarding the decision there as conflicting with that of the Court of Appeal in *Postlethwaite v. Freeland* (1). It is to be observed that THESIGER, L.J., who had been a party to the judgment in *Wright v. New Zealand Shipping Co.* (4), was also a party to the decision in *Postlethwaite v. Freeland* (1) in the Court of Appeal. He manifestly did not intend to lay down the law differently in the two cases, nor do I think there is any necessary conflict between them, although, no doubt, expressions are to be found in the judgments in *Wright v. New Zealand Shipping Co.* (4) which favour the contention of the appellant in the present case. COTTON, L.J., in his judgment in that case, in terms says that he will not attempt to lay down an exhaustive rule, but will speak chiefly with reference to the case then before the court. The facts there were that the cargo was to be delivered into lighters alongside, or at the wharf, as charterers' agents might direct, no time being fixed within which the discharge was to take place. At the port of discharge there were only two firms of lightermen for discharging cargoes, one of which worked solely for the defendants, the charterers, and the captain was compelled to employ that firm alone to discharge the vessel. At the time when the vessel arrived the port was unusually crowded by a "rush" of vessels, and about twenty vessels were lying there, of which one half either belonged to or were chartered by the defendants. The number of lighters was small, and it was proved that after the arrival of the vessel preference in discharging cargoes was shown to vessels with "round" charters. E F G H

The learned judge who tried the case, in summing-up, told the jury that they were to take into consideration the circumstance that the port was full of vessels, but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels, or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial. It will thus be seen that the circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier and so have avoided the delay which took I

A place. Under these circumstances I think the decision was perfectly right, and a new trial properly granted.

In my opinion the cases referred to by the appellant's counsel in which it has been held that there was a breach of the obligation on the part of a charterer to supply a cargo do not involve the assertion of any doctrine in conflict with that which has been laid down in the present case by the Court of Appeal.

B For these reasons, my Lords, I am of opinion that the judgment of the court below was correct, and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

**LORD WATSON.**—Although the question raised in this appeal is submitted for the first time to the determination of an English court, the principles which must govern its decision are as old as the law of contract. When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of universal application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably. In the face of the admission given by him at the trial, it is in vain for the appellant to suggest that the delay which occurred in unloading the *Derwentdale's* cargo, was owing to causes under the respondents' control, or to their failure to do anything which could possibly or reasonably have been done in order to avoid that delay.

In that state of the law and of the facts, it is, in my opinion, impossible that the appellant can prevail, unless he is able to show that the rule as administered in the case of other contracts is subject, when the contract is constituted by bill of lading, to the singular exception that the owner of the goods must be held to have acted unreasonably, and to be liable for the delay, whenever the operation of unloading is stopped by an unforeseen obstacle which he did nothing to create and is powerless to remove. A proposition of that character requires some authority to support it, but none has been produced. In none of the cases cited at the Bar does it appear to me that the point now raised was present to the minds of the learned judges. But it is sufficient for the purposes of this appeal, that, while nothing was said in any of them which lends the least countenance to the proposition maintained by the appellant, much was said pointing in an opposite direction. These cases, in so far as they were founded on by the appellant as authorities in his favour, have been carefully examined in the opinion just delivered by my noble and learned friend, to whose reasons for affirming the judgment of the Court of Appeal I have nothing to add.

H **LORD ASHBOURNE.**—The question raised in this appeal is important, and is up to this not covered by any express authority. Having regard to the admissions of the parties, the sole question is: Who is to bear the loss caused by the strike? Who is to bear the risk of the strike, assuming each party to be innocent, that each party did what he could, and that the happening of the strike was entirely beyond and outside the control of either?

I The contract not naming any time for unloading, the obligation of the defendants was to unload within the time implied by law, that is, a reasonable time. What is the meaning of this expression, "reasonable time"? It is obvious that "reasonable" cannot mean a definite and fixed time. It would not be "reasonable" if it was not sufficiently elastic to allow the consideration of circumstances which all reason would require to be taken into account. The appellant, accordingly, admits that the consignee has a right to have all ordinary circumstances taken into account, but insists that all extraordinary circumstances are to be excluded

from consideration. Is this distinction sound, and does it rest upon any real principle? If the consignee does all he can, is not his conduct reasonable? If by circumstances absolutely outside his control he can do nothing, is his inaction unreasonable? If it is reasonable to consider some circumstances outside his control in favour of the consignee, why are not all circumstances in the events which actually happen, and he cannot control, also to be taken into account? In considering how to ascertain "reasonable time," must not the question come in whether the consignee, in the circumstances which eventuated, acted unreasonably? If throughout the consignee acted reasonably, if he did all he could, if he omitted nothing that he should have done, why should all the circumstances be arbitrarily divided into ordinary and extraordinary for the purpose of putting a narrow and artificial meaning upon the words "reasonable time?" Unless *lex cogit ad impossibilia*, I think, when the parties have used a form of contract which names no day, and leaves the discharge of the cargo to be made within the reasonable time implied by law, that reasonable time should be ascertained by a consideration of all circumstances which eventually happen, and are outside the control of the consignee.

It is somewhat strange that this important question has not heretofore been clearly and finally settled by direct authority, and it is manifest, from the arguments addressed to your Lordships, that the decisions in somewhat similar cases are conflicting, and the opinions of eminent judges would appear not to harmonise. The particular point involved in this appeal has never, I believe, been expressly discussed or decided, although the decisions which have been referred to deal with topics and considerations most apposite to the case before your Lordships. *Ford v. Cotesworth* (2) is worthy of attention. The contract was silent as to time, and, therefore, the freighter was bound to unload within a reasonable time. Owing to threats of bombardment the cargo could not be landed in the usual time, and it was held that the charterer was not liable for the delivery. *COCKBURN, C.J.*, in his summing-up, said:

"There would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port, or whether any extraordinary circumstances that prevented the unloading might be taken into account."

The questions left to the jury were whether, looking to the ordinary state of things at the port, there was any unreasonable delay; whether, looking to the extraordinary circumstances, there was any unreasonable delay; whether there was any delay caused by political circumstances over which the consignees had no control; whether there was any delay caused by the default of the consignees; and the jury were asked contingently to assess the damages for the time during which the ship was kept at her berth doing nothing by the action of the government of the place and the threats of bombardment. The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the damages if any were to be allowed.

The plaintiff applied to the Queen's Bench to enter the verdict for him; and that court held that the contract implied by law was that each party would use reasonable diligence in performing their part of the delivery, which, by the custom of the port, fell upon him, and that there was no implied contract that the discharge should be performed in the time usually taken at the port. *BLACKBURN, J.*, in pronouncing the judgment of the court, said (L.R. 4 Q.B. at pp. 136, 137:

"We are aware of no authority for saying that the law implies a contract to discharge in the usual time, except what is said in *Burmester v. Hodgson* (5), in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. That such was the opinion of *LORD TENTERDEN, C.J.*, appears to be implied from his ruling



A in *Rogers v. Hunter* (6) as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls."

B The Exchequer Chamber also, on appeal, upheld the verdict for the defendant. MARTIN, B., in giving judgment, said (L.R. 5 Q.B. at p. 548):

"I am not aware of any case which goes to impose by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by *vis major*."

C Ten years later, in 1878, came *Wright v. New Zealand Shipping Co.* (4) which has been so much relied on by the appellant. There the charterparty was silent as to time, and, therefore, it was implied that the ship should be unloaded within a reasonable time. BRAMWELL, L.J., said that "a reasonable time for doing an act is a time within which it may be done by a person working reasonably," and THESIGER, L.J., said "a reasonable time means a reasonable time under ordinary circumstances." This decision is naturally relied on by the appellant, although it was not intended in that case to lay down any general rule, and the circumstances were not at all outside the control of the defendants. *Postlethwaite v. Freeland* (1) is most important in consequence of many of the dicta, although the precise point involved in this case did not actually arise. The EARL OF SELBORNE, L.C., in his opinion in the House of Lords, said:

E "If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is, as was said by BLACKBURN, J., in *Ford v. Cotesworth* (2), 'a reasonable time under all the circumstances'."

F LORD BLACKBURN'S own judgment in this case is the strongest decision in favour of the contention relied on by the respondents, and presents the topics against the appellant's contention with great force.

G These cases and others cited during the argument show that there is a conflict of judicial opinion on the question involved; but, in my opinion, the preponderance of authority and reasoning is against the appellant. Besides, the authorities by way of analogy (as forcibly pointed out by FRY, L.J.) are also against the appellant, and in favour of the view that reasonable time must be determined by reference to the actual events which occur. In *Taylor v. Great Northern Rail. Co.* (3) it was held that a common carrier was only bound to carry within a reasonable time, looking at all the circumstances of the case. ERLE, C.J., says plainly: "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions." *Hall v. Wright* (7) also shows an effort to apply a liberal construction of "reasonable time" in an action of breach of promise of marriage, and the American case of *Cross v. Beard* (8), decided thirty years ago, shows that a breach in a canal and a storm on a lake were taken into account in measuring what was reasonable time.

H But it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events he can stipulate for it expressly. It is, no doubt, hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of

future contracts, and prevent the possibility of misunderstanding or surprise. A  
On the grounds that I have referred to, I think the judgment of the Court of  
Appeal should be affirmed. **LORD MORRIS** has requested me to say that he  
concurs in the conclusion at which your Lordships have unanimously arrived.

**LORD FIELD.**—I concur.

*Appeal dismissed.* B

Solicitors : *Downing, Holman & Co.; Lowless & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## Re DAVIES. DAVIES v. DAVIES

[CHANCERY DIVISION (North, J.), June 30, 1892]

[Reported [1892] 3 Ch. 63; 61 L.J.Ch. 595; 67 L.T. 548;  
41 W.R. 13; 8 T.L.R. 673; 36 Sol. Jo. 627]

*Insurance—Life assurance—Policy—Provisions for application of proceeds—Proceeds not included in bequest of residue.*

A policy of life assurance was effected by the testator with a society whose rules provided that on the death of the assured the policy moneys should be paid to the person nominated by the assured to receive them, and, if there were no such nominee, to his assigns under any disposition or charge made by him by deed or will expressly referring to the sum assured or to sums due on assurance generally. If there were no such disposition, the policy moneys were to be paid to the widow of the assured, if any, and, if none, to the children of the assured living at his death in equal shares. The testator never made any nomination, disposition or charge affecting the policy, but by his will he bequeathed his residuary estate on trust for sale and conversion, and to hold the proceeds on trust for his three daughters and the widow and children of a deceased son in equal shares. The three daughters of the testator survived him.

**Held:** the provisions contained in the policy were valid, and the proceeds did not pass as part of the testator's residuary estate, but belonged to his three daughters.

**Notes.** Referred to: *Re Greene, Greene v. Greene*, [1949] 1 All E.R. 167.

As to powers of appointment, see 30 HALSBURY'S LAWS (3rd Edn.) 206 et seq.; and for cases see 37 DIGEST 384 et seq. For the Wills Act, 1837, s. 27, see 26 HALSBURY'S STATUTES (2nd Edn.) 1347. H

Cases referred to:

- (1) *Phillips v. Cayley* (1889), 43 Ch.D. 222; 59 L.J.Ch. 177; 62 L.T. 86; 38 W.R. 241; 6 T.L.R. 128, C.A.; 37 Digest 445, 487.
- (2) *Re Flavell, Murray v. Flavell* (1883), 25 Ch.D. 89; 53 L.J.Ch. 185; 49 L.T. 690; 32 W.R. 102, C.A.; 44 Digest 185, 132. I
- (3) *Ashby v. Costin* (1888), 21 Q.B.D. 401; 57 L.J.Q.B. 491; 59 L.T. 224; 53 J.P. 69; 37 W.R. 140, D.C.; 25 Digest (Repl.) 332, 179.

**Special Case** stated under R.S.C., Ord. 34.

On Mar. 9, 1847, the Rev. Edward Davies, the testator, effected a policy on his life with the Clergy Mutual Assurance Society for £500. The rules of the society as to assurances in class D, to which the assurance in question belonged, provided that any member of the society should have power to nominate any person or

A persons his, her, or their executors, administrators, or assigns, to receive any sum which should have been assured by such member, and for the registration with the society of such nominations, and for the priority in certain cases of the assigns over the nominees of the assured, and contained the following provision :

B “And in case there shall not be any nomination duly registered existing in respect of the sum assured when due, or so far as no such nomination shall extend, such sum shall be paid to the assigns, if any, of the assurer, so far as the claim of such assigns shall extend, in every case where such claims shall have arisen under any disposition or charge made by the assurer specifically affecting such sum or any part thereof, either by express reference thereto, or by reference generally to sums due upon assurances, whether such disposition or charge shall have been made by deed, will, or codicil, or by any other instrument in writing. And in case there shall not be any nomination duly registered, nor any such disposition or charge as aforesaid, existing in respect of the sum assured when due, or, so far as no such nomination and no such disposition or charge shall extend, such sum shall be paid to the widow of the assured if the assurer be male, or if the assurer be female or being a male shall not leave a widow, then to the child or children of the assurer living at his or her death, if more than one in equal shares . . . , and if there shall be no such child, . . . if the assurer shall be a male . . . to the executors, administrators, or assigns of the assurer.”

E The testator never made any nomination, disposition or charge affecting the policy except so far as the disposition of the residue of his estate by his will operated as such a disposition. By his will, dated Oct. 4, 1889, the testator, after exercising certain powers of appointment contained in his marriage settlement, gave all the residue of his real and personal estate to trustees on trust to sell and convert and pay one equal fourth part of the proceeds to each of his three daughters named in his will, and to retain the remaining fourth part of such proceeds on trust for the widow of a son who had died in his lifetime during her life, and after her death for her children. The will contained no reference to the policy in the F Clergy Mutual Assurance Society, or to sums assured generally. The testator survived his wife, and died on July 25, 1890, having kept up the policy till his death, and leaving him surviving the three daughters named in his will, and the widow and infant children also named therein of the son who died in the testator's lifetime.

G The plaintiffs in the Special Case were the testator's three daughters and the defendants were the widow of his deceased son and her three infant children. The question for the opinion of the court was whether the moneys received under the policy of assurance constituted part of the residuary estate of the testator, or whether the plaintiffs were solely entitled thereto.

H *Eve* for the plaintiffs.  
*Bardswell* for the defendants.

I **NORTH, J.**—In my opinion, there can be no doubt about this case. I think that it is covered by authority, if authority were needed. [His LORDSHIP stated the facts, including the provisions of the policy and the rules, and continued:] The testator did not make any nominations in his lifetime. If he had not left any child surviving him, the proceeds of the policy would, in my opinion, have been his property. He could have disposed of them as he pleased, and they would have passed under his will. But he had made a contract, which, I think, was perfectly legal, that the proceeds should go to his surviving children if he did not divert the same from them in a mode which he might have adopted, but which he did not adopt. It is said that this contract is illegal and void on the ground of public policy, because the effect of it is to withdraw the fund from paying his debts. I do not see that it does so. He might have sold the policy in his lifetime. He might have bequeathed it by his will to his executors; or, by the use of apt



words in his will, he might have rendered the proceeds of the policy available for the payment of his debts. There is, therefore, nothing in the contract contrary to public policy. And, moreover, if there had been anything illegal as regards creditors, it must be remembered that the present claim is set up, not by creditors of the testator, but by persons who derive their title under his will. As against persons who claim under the will the contract must be effectual. A

In my opinion, *Phillips v. Cayley* (1) is a distinct authority that such a limitation of the testator's power of appointing by will is perfectly legal. It is valid as regards persons claiming under the will. But I think that it would also be valid as against the creditors of the assured on the principle on which *Re Flavell, Murray v. Flavell* (2) was decided. *Ashby v. Costin* (3) is completely adverse to the contention of the defendants. I can see no difference between the death of an assured intestate as to the policy of insurance and his death leaving a will by which he does not exercise the only power which he has of disposing of the proceeds of the policy. Here the testator did not insert in his will words which he might have inserted, and which would have operated to pass the proceeds of the policy. I do not entirely assent to the language used by CAVE, J., in *Ashby v. Costin* (3) that the money was not the property of the assured; he had a contingent interest which would have become absolute on the happening of a certain event, which, however, did not happen. B C D

In the events which did happen, the testator's three daughters are entitled to the policy money by virtue of special contract between him and the assurance company. He might have defeated their claim in a particular way, but he has not done so.

Solicitors: *Shaw, Tremellen & Kirkman; Bourne & Belfield.* E

[Reported by J. R. BROOKE, ESQ., Barrister-at-Law.]

## REID v. WILSON AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.J.J.), November 29, 30, December 1, 1894] F

[Reported [1895] 1 Q.B. 315; 64 L.J.M.C. 60; 71 L.T. 739;  
59 J.P. 516; 43 W.R. 161; 11 T.L.R. 88; 39 Sol. Jo. 94;  
18 Cox, C.C. 56; 19 R. 94]

*Sunday—Entertainment—“Keeper” of house—“Person managing or conducting . . . entertainment—Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s.1, s.2.* G

By s. 1 of the Sunday Observance Act, 1780: “. . . any house, room or other place which shall be opened or used for public entertainment or amusement . . . upon any part of . . . Sunday, and to which persons shall be admitted by the payment of money . . . shall be deemed a disorderly house or place; and the keeper of such house, room or place shall forfeit the sum of £200 for every day that such house, room or place shall be opened or used as aforesaid on the Lord's Day . . . and the person managing or conducting such entertainment or amusement on the Lord's Day, or acting as master of the ceremonies there, or as . . . chairman of any such meeting for public debate . . . shall likewise for every such offence forfeit the sum of £100 . . .” By s. 2, any person who shall appear, act or behave himself as master, or as the person having the care, government or management of any such house, etc., H I

A shall be deemed to be the keeper thereof, and be liable to be sued or prosecuted, notwithstanding that he be not in fact the real owner or keeper thereof.

B A hall, which belonged to a company in liquidation, was let by the solicitor of the liquidator, as his agent, to a society for the purpose of giving Sunday lectures to which the public was admitted on payment of small sums. A licence for music and dancing on weekdays in respect of the hall had been obtained by the solicitor in his own name. At the trial of an action under the Act of 1780 against the solicitor and two other persons who had each acted as chairman at one of the lectures, introducing the lecturer and then leaving the platform, the jury found that the lectures were entertainments or amusements within the meaning of s. 1 of the Act.

C **Held:** the solicitor was not the "keeper" of the hall nor were the other two persons "managing or conducting" the entertainment within the meaning of the Act, and, therefore, they were not liable to the penalties imposed by the Act.

**Notes.** Distinguished: *Houghton-le Touzel v. Mecca, Ltd.*, [1950] 1 All E.R. 638.

D As to Sunday entertainments, see 37 HALSBURY'S LAWS (3rd Edn.) 9 et seq.; and for cases see 15 DIGEST (Repl.) 909 et seq. For the Sunday Observance Act, 1780, ss. 1, 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 560, 561.

**Appeal** by the plaintiff from a decision of MATHEW, J., on further consideration after trial with a jury in Middlesex. The facts are set out in the headnote.

*Sir Richard Webster, Q.C.*, and *C. M. Chapman* for the plaintiff.

*Robson, Q.C.*, and *Corrie Grant* for the defendants.

E **LORD ESHER, M.R.**—I have no doubt at all what our decision ought to be. The Sunday Observance Act, 1780, which is a penal Act, ought to be construed strictly and applied strictly. The first question is whether the defendant Wilson was the "keeper" of this hall within the meaning of s. 1 of the Act. The jury found that what took place was an "entertainment" within the meaning of the F Act. We have, therefore, to see whether the defendant Wilson was the keeper of this hall which was to be deemed to be a disorderly house.

G He had been the secretary of the company which owned the hall, and, if the company had continued to exist, the company and not he would have been the letter of the hall. After the company went into liquidation the defendant Wilson ceased to be the secretary, and he did not become secretary under the liquidator, because the liquidator did not so appoint him. He was a solicitor, and appears to have assisted and advised the liquidator, he let the hall to the Leeds Sunday Lecture Society on behalf of the liquidator. Even if he had himself let the hall, he would not have been the "keeper" of the hall; not even if he had let it for the very purpose of giving an "entertainment," or in such a way that the tenant might use it for the illegal purpose. In such cases the tenant is the H keeper of the hall. Therefore, the defendant Wilson was in no sense the "keeper" of the hall. He had a licence for music and dancing in the hall, in order that he might be able to use it for that purpose on days other than Sunday, but that fact is quite immaterial.

I Then did he "appear, act, or behave himself as master," or "as the person having the care, government, or management" of the hall so as to be deemed to be the keeper thereof within s. 2 of the Act? I think not, for he did nothing more than let the hall. The case against him, therefore, entirely fails.

As to the other defendants, Ward and King. Ward was made the chairman of the meeting, that is, of the audience, but, as such, he had no power to arrange, alter or interfere with the entertainment. Even if he had power to prevent disorderly conduct, that was no part of the entertainment. He was, therefore, in no sense the person "managing" or conducting such entertainment or amusement, or acting as master of the ceremonies so as to be liable to a penalty under the Act. The same observations apply to King, who was chairman at the second

lecture. The plaintiff has proceeded against the wrong persons, and his appeal must be dismissed. A

**LOPES, L.J.**—I am of the same opinion. The Sunday Observance Act, 1780, is a penal statute, and it is a well-established rule that, in proceedings under such statutes, the persons proceeded against must be clearly brought within the description given by the statute of persons who are liable to the penalty. First, as to the defendant Wilson, it is said that he is liable, because he was the “keeper” of the hall. In my opinion, he only let the hall as the agent of the liquidator of the company which was in liquidation. If Wilson were liable, any house agent who let a house which was used for an entertainment of this kind would be liable. The lecture for which this hall was let might have been as dull as anything could possibly be; and Wilson did not know what the nature of the lecture would be. Then it is said that the other two defendants are liable as the persons “managing or conducting such entertainment or amusement.” They were the chairmen only, and, in my opinion, had nothing to do with the entertainment. The entertainment was in the hands of others, and the chairmen could not control the entertainment in any way. The Leeds Sunday Lecture Society controlled the entertainment. These defendants are not within the statute, and cannot be made liable to penalties. B  
C  
D

**RIGBY, L.J.**—I am of the same opinion. There was not sufficient proved against the defendant Wilson. In such an action as this, the plaintiff must prove conclusively that the case comes within the statute. As to the other defendants, everything was disproved in their case. They were not managing or conducting the entertainment at all. The appeal fails, and must be dismissed. E

*Appeal dismissed.*

Solicitors: *Desborough, Son & Prichard; Darley & Cumberland*, for *E. & H. Wilson*, Leeds.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*] F

## CLARKE v. RAMUZ G

[COURT OF APPEAL (Lord Coleridge, C.J., Bowen and Kay, L.JJ.), July 7, 1891]

[Reported [1891] 2 Q.B. 456; 60 L.J.Q.B. 679; 65 L.T. 657;  
56 J.P. 5; 7 T.L.R. 626]

*Sale of Land—Vendor in possession—Duty of vendor—Damage to land by trespasser—Completion of contract by purchaser in ignorance of damage—Purchaser's right to claim compensation from vendor.* H

Where a vendor of land remains in possession of it until completion and payment of the purchase-money, he is in the position of a trustee for the purchaser to use reasonable care to keep the land in a reasonable state of preservation.

A vendor of land remained in possession of it after the contract of sale had been entered into and while he was in possession, a stranger removed large quantities of soil from the land without the knowledge or authority of either the vendor or the purchaser. After completion had taken place and the purchase-money had been paid, the purchaser claimed compensation from the vendor. I

**Held:** the action was maintainable, notwithstanding that the land had been conveyed to the purchaser.

*Phillips v. Silvester* (1) (1872), 8 Ch. App. 173, followed.



**A Notes.** Considered: *Leppington v. Freeman* (1891), 66 L.T. 357. Distinguished: *Greswolde-Williams v. Barneby* (1900), 83 L.T. 708. Considered: *Cumberland Consolidated Holdings, Ltd. v. Ireland*, [1946] 1 All E.R. 284. Applied: *Phillips v. Lamdin*, [1949] 1 All E.R. 770. Referred to: *Re Wilson and Stephen's Contract* (1894), 43 W.R. 23.

**B** As to rights and duties of parties on the sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 290 et seq.; and for cases see 40 DIGEST (Repl.) 191 et seq.

Cases referred to:

(1) *Phillips v. Silvester* (1872), 8 Ch. App. 173; 42 L.J.Ch. 225; 27 L.T. 840; 21 W.R. 179, L.C.; 40 Digest (Repl.) 197, 1595.

(2) *Earl of Egmont v. Smith, Smith v. Earl of Egmont* (1877), 6 Ch.D. 469; 46 L.J.Ch. 356; 40 Digest (Repl.) 197, 1600.

**C** (3) *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch.D. 390; 56 L.J.Ch. 840; 57 L.T. 179; 40 Digest (Repl.) 200, 1623.

Also referred to in argument:

*Rayner v. Preston* (1881), 18 Ch.D. 1; 50 L.J.Ch. 472; 44 L.T. 787; 45 J.P. 829; 29 W.R. 547, C.A.; 40 Digest (Repl.) 191, 1539.

**D** *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; 26 L.J.Ch. 566; 29 L.T.O.S. 274; 3 Jur.N.S. 924; 5 W.R. 617; 53 E.R. 226; 40 Digest (Repl.) 201, 1629.

*Bos v. Helsham* (1866), L.R. 2 Exch. 72; 15 L.T. 481; sub nom. *Boss v. Helsham*, 4 H. & C. 642; 36 L.J.Ex. 20; 15 W.R. 259; 40 Digest (Repl.) 107, 822.

*Binks v. Lord Rokeby* (1818), 2 Swan. 222; 36 E.R. 600, L.C.; 40 Digest (Repl.) 184, 1035.

**E** *Joliffe v. Baker* (1883), 11 Q.B.D. 255; 48 L.T. 966; 47 J.P. 678; 52 L.J.Q.B. 609; 32 W.R. 59; 40 Digest (Repl.) 109, 846.

*Palmer v. Johnson* (1884), 13 Q.B.D. 351; 53 L.J.Q.B. 348; 51 L.T. 211; 33 W.R. 36, C.A.; 40 Digest (Repl.) 111, 856.

**Application** by the defendant for judgment or for a new trial.

**F** The plaintiff, the purchaser of the fee simple of a plot of land at Southend, brought an action against the defendant, the vendor, for wrongfully allowing one Jackson to remove from it several hundred cartloads of soil while it was in the defendant's possession. The contract of sale entered into between the plaintiff and defendant on Aug. 2, 1889, provided that the sale should be completed on Aug. 12, 1889, but the conveyance was not executed till Oct. 21, on which day the plaintiff paid the balance of the purchase money. The defendant remained in possession of the land from the date of the contract of sale until Oct. 21. In September, 1889, Jackson removed from the piece of land several hundreds of cartloads of soil, neither the plaintiff nor defendant having given him any authority to do so, nor being aware at the time of the execution of the conveyance to the plaintiff that any soil had been taken away from the land. Some time after the conveyance had been executed, the plaintiff discovered that the soil had been taken away, and he thereupon commenced the present action.

**H** At the trial before GRANTHAM, J., the jury found a verdict for the plaintiff, and the learned judge gave judgment for him accordingly.

*Lumley Smith, Q.C.*, and *R. M. Bray* for the defendant.

*Jelf, Q.C.*, and *Stewart-Smith* for the plaintiff.

**I** **LORD COLERIDGE, C.J.**—The point which we have now to decide in this case is whether this action will lie. The plaintiff's claim appears to me to rest on the rule that, in the case of a contract for the purchase and sale of land, the vendor remaining in possession between the time of the contract and the execution of the conveyance is in the position of a trustee for the purchaser, and, as such, has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to keep the property in a reasonable state of preservation, and, so far as

may be, as it was when the contract was made. Of course, if the vendor remains in possession for a long time and deterioration of the property takes place, other considerations may come in; but that is not the case here, where the injury complained of is the removal of the soil by a stranger. A

*Phillips v. Silvester* (1) is stated by MR. DART in his book on VENDORS AND PURCHASERS (6th Edn.), p. 734, to have been disapproved of by SIR GEORGE JESSEL, M.R., but the doctrine that the vendor in possession is, under such circumstances, a trustee for the purchaser was afterwards entirely acquiesced in by him in *Earl of Egmont v. Smith* (2). *Phillips v. Silvester* (1) is a decision in which we not only agree, but which is binding on us. It lays down in clear terms that there is such a duty as I have mentioned incumbent on a vendor in possession after a contract for sale. If so, it is clear that in the present case, there has been a breach of it, because the defendant has taken no care of the property. C It was argued for him that no care was, under the circumstances, a reasonable care, but that argument cannot possibly be supported. Then it was contended that the execution of the conveyance put an end to any remedy for the breach of trust. If the purchaser had known what had happened, it might possibly have been argued that his taking the conveyance without making any claim was evidence of a waiver of his rights; but, since neither the plaintiff nor defendant here knew anything about what had happened, I cannot see any ground whatever for this contention. D It appears to me to be clear on principle and on the authority of the decision in *Phillips v. Silvester* (1), followed as it has been by SIR GEORGE JESSEL, M.R., in *Earl of Egmont v. Smith* (2) and by KEKEWICH, J., in *Royal Bristol Permanent Building Society v. Bomash* (3), that this action is maintainable, and the application must be dismissed. E

**BOWEN, L.J.**—I am of the same opinion. It is clear that a vendor remaining in possession of the property after a contract for sale, as the defendant did, is bound to take some care to preserve it, and here the defendant took none. It was argued for him that this case was like those where it was a question of allowing compensation under the contract in respect of misdescription of property, and matters of that kind, and that, when the conveyance was executed, there was an end of all remedy for the breach of trust. F It is true that the execution of the conveyance puts an end to all contractual obligations which are intended to be satisfied by the execution. But that doctrine does not apply to cases where the contractual obligation is of such a kind that it cannot be supposed to have been the intention of the parties that it should be extinguished by the conveyance. G Can it be said that the breach of an obligation arising between the making of the contract and the conveyance was intended to be satisfied by the execution of the conveyance? That must depend on circumstances. One circumstance that must be material is whether the breach of duty in question was known to the parties. If it was not, as in the present case, it is impossible to suppose that they intended the conveyance to operate as a waiver or release.

**KAY, L.J.**—I agree. In this case, the purchaser has not got the whole of what he contracted to buy. If that has happened through no fault of his own, it would seem to be good sense that he should be able to say that he has not got it, and, therefore, that he claims compensation. If the vendor could show that it was the purchaser's fault that he had not got what he bargained for, that might be a good answer. But, in the present case, the plaintiff says that he knew nothing about what was happening, and that it was the fault of the defendant. H The fact was that, after the contract and before completion, someone removed a large quantity of the soil, and the defendant not only did not prevent such removal, but took no care to prevent it. I cannot doubt that that amounts to negligence on the part of the defendant when I consider what the position of a vendor, situated as this vendor was, has been held to be by the decisions. *Phillips v. Silvester* (1) and *Earl of Egmont v. Smith* (2) clearly establish the proposition that, for some purposes a vendor in possession after a contract for I

**A** the sale of land is in the position of a trustee for the purchaser. He has certain duties towards the purchaser, one of which is—I am only putting into my own words what the decided cases have established—to take reasonable care that the property is not deteriorated before completion, and while it is in his possession as such trustee. Here no such care was taken, and, therefore, there was a breach of the duty owed by the defendant to the plaintiff.

**B** It was also argued strenuously that, although the parties at the time knew nothing about what had happened, the fact of the plaintiff's having taken a conveyance of the land deprives him of any remedy. The proposition must be that, though he had a remedy before he took the conveyance, yet, because he took the conveyance without asserting his rights, he lost his remedy. I could understand that, if he took the conveyance with his eyes open, knowing what

**C** the state of the property was at the time, and did not make any claim; such conduct might—I do not say it would, but it might be argued that it would—amount to a waiver of his right. But that is not the present case; here the plaintiff knew nothing about what had happened. I cannot see any reason why, under these circumstances, the conveyance should deprive him of the right which he had previously, but of which he was ignorant, and, therefore, could not have intended to waive. No authority has been cited in support of the proposition

**D** contended for, and I am glad to think that there is none.

Another point argued was that this removal of soil happened after the time fixed for completion, and that there was a difference as regards the duty of the vendor towards the purchaser between the time before and the time after the date fixed for completion. Certain dicta were referred to for the purpose of showing

**E** this. But this was a contract under which it was plainly not the intention of either party that the purchaser should have possession until the completion took place, and the purchase-money was paid. It is rare for a contract for the sale of land to give the purchaser the right to possession before completion, and whenever it is intended, it is always expressed most explicitly. There is nothing in the terms of this contract which would give a right to possession before

**F** completion and payment of the purchase-money. Under these circumstances, it seems to me that there is no difference in this case, so far as the duty of the defendant is concerned, between the time before and the time after the date fixed for completion, and that his duty was as described until the purchase was completed. For these reasons, it appears to me that the action is maintainable.

**G** *Application refused.*

Solicitors: *W. N. M. Scutts; Charles R. Taylor.*

[*Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.*]



## WOOD v. WOOD

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), April 15, 22, 1891]

[Reported [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 7 T.L.R. 463]

*Divorce—Maintenance of wife—Permanent maintenance—Insertion in order of dum sola et casta clause—Matters to be considered.*

When an order is made by the Divorce Court granting permanent maintenance to a wife, there is no rule that the *dum sola et casta* clause ought to be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The court must in each case determine what is reasonable, taking the following circumstances into account: (i) the conduct of the parties, (ii) their position in life, their ages, and their respective means, (iii) the amount of the provision actually made, (iv) the existence or non-existence of children, and who is to have the care and custody of them, and (v) any other circumstances which may be important in the particular case.

**Notes.** The Matrimonial Causes Act, 1866, has been repealed. For s. 1 of that Act, see now the Matrimonial Causes Act, 1950, ss. 19, 20 and 22.

Considered: *Saunders v. Saunders and Beck* (1893), 69 L.T. 498; *Kettlewell v. Kettlewell*, [1898] P. 138; *Hall v. Hall* (1914), 111 L.T. 403. Explained: *Dean v. Dean*, [1923] P. 172. Applied: *Restall v. Restall*, [1930] All E.R.Rep. 372. Considered: *Perkins v. Perkins*, [1938] 3 All E.R. 116. Applied: *Kirke v. Kirke*, [1961] 3 All E.R. 1059. Referred to: *Horniman v. Horniman*, [1933] All E.R.Rep. 790; *Duchesne v. Duchesne*, [1950] 2 All E.R. 784.

As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 611 et seq. For the Matrimonial Causes Act, 1950, ss. 19, 20 and 22, see 29 HALSBURY'S STATUTES (2nd Edn.) 407 et seq.;

Cases referred to in argument:

*Fisher v. Fisher* (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 8 Jur.N.S. 103; 10 W.R. 122; 164 E.R. 1055; 27 Digest (Repl.) 613, 5740.

*Sidney v. Sidney* (1865), 4 Sw. & Tr. 178; 34 L.J.P.M. & A. 122; 12 L.T. 826; 11 Jur.N.S. 815; 164 E.R. 1485; on appeal (1866), L.R. 1 P. & D. 78; (1867), 36 L.J.P. & M. 73, H.L.; 27 Digest (Repl.) 618, 5773.

*Gladstone v. Gladstone* (1876), 1 P.D. 442; 45 L.J.P. 82; 35 L.T. 380; 24 W.R. 739; 27 Digest (Repl.) 625, 5844.

*Hart v. Hart* (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 27 Digest (Repl.) 539, 4871.

*Medley v. Medley* (1882), 7 P.D. 122; 51 L.J.P. 74; 47 L.T. 556; 30 W.R. 937, C.A.; 27 Digest (Repl.) 628, 5895.

*Harrison v. Harrison* (1887), 12 P.D. 130, 145; 56 L.J.P. 76; 57 L.T. 119; 35 W.R. 703; 27 Digest (Repl.) 632, 5930.

*Lister v. Lister* (1889), 14 P.D. 175; affirmed, 15 P.D. 4; 62 L.T. 90; 38 W.R. 81; 6 T.L.R. 51, C.A.; 27 Digest (Repl.) 626, 5862.

*Lander v. Lander*, [1891] P. 161; 60 L.J.P. 65; 64 L.T. 120; 55 J.P. 152; 39 W.R. 416; 27 Digest (Repl.) 625, 5849.

**Appeal** by the wife from an order of JEUNE, J., dated Mar. 24, 1891.

On Jan. 2, 1884, the petitioner, then a spinster, aged twenty-four, married the respondent, aged twenty-five; there was no issue of the marriage. On Aug. 6, 1890, a decree nisi was made, on the grounds of the adultery and cruelty of the husband. The decree was made absolute on Feb. 17, 1891. The parties were agreed that there should be an order for permanent maintenance at the rate of £60 a year. It was contended, on the part of the husband, that he was entitled to have a *dum sola et casta* clause inserted in the order. The wife objected to this as not usual. Both parties admitted that the court could order the insertion of the clause, but the wife said that it lay on the husband to show some special reason

**A** why it should be inserted, while the husband said it lay on the wife to show some special reason for its non-insertion. Neither counsel for the wife nor for the husband suggested any special reason for departing from the ordinary practice, and each of them relied on the ordinary practice as being in his favour. The registrar in his report referred to the following cases as bearing on the question: *Fisher v. Fisher*; *Sidney v. Sidney*; *Gladstone v. Gladstone*; *Hart v. Hart*; *Medley v. Medley*; *Harrison v. Harrison*; *Lister v. Lister*, and continued: From these cases, I think it appears to have formerly been the ordinary practice to make the guilty husband provide maintenance for his wife only while she was chaste and unmarried. The later cases show, however, a tendency to alter this, and I think that the court does not now impose on the wife's right to maintenance the condition *dum sola et casta*, unless there are some special circumstances requiring it. I submit to the court, therefore, that, in the present case, the order should be made without any such condition. I should, perhaps, point out that, though both counsel decline to rely on any special circumstances, the smallness of the amount payable to the wife in this case is, I think, a circumstance in favour of the wife's contention, rather than that of the husband's."

**D** JEUNE, J., confirmed the registrar's report except as to the *dum sola et casta* clause, which he was of the opinion ought to be inserted.

*T. Terrell* for the wife.

*Bayford, Q.C.*, and *Barnard* for the husband.

*Cur. adv. vult.*

**LINDLEY, L.J.**, stated the facts, and continued: The court has a discretion both as to the amount to be paid and as to the time for which, and the conditions on which, the payment shall continue. The court has constantly disclaimed a right to fetter the exercise by any judge of a discretion by Act of Parliament vested in him; but where a judge, in coming to a decision in a particular case, has apparently been guided by some supposed rule which this court thinks erroneous, or has overlooked some material fact, this court has not shrunk from acting on its own view, and reversing the decision in question. The court, in truth, cannot act otherwise without abandoning its functions as a court of re-hearing and of appeal. In this case, it appears to us that JEUNE, J., has proceeded on the assumption that the *dum sola et casta* clause ought to be inserted, unless there is some reason to the contrary. In our opinion, there is no rule to this effect, nor is there any rule that the clause ought to be omitted unless there is some reason for inserting it. There is no rule one way or the other, nor ought there to be any; each case ought to depend on its own circumstances.

**G** The jurisdiction is given to the court by the Matrimonial Causes Act, 1866, the preamble of which contains a recital that, by s. 32 of the Matrimonial Causes Act, 1857, it was enacted that

**H** "The court may, on pronouncing any decree for a dissolution of marriage, order that the husband shall to the satisfaction of the court secure to the wife such gross or annual sum of money as to the court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties. And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives."

**I** Then it is enacted, by s. 1, that

"In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable: Provided always, that if the husband shall afterwards from any cause

become unable to make such payments it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order, wholly or in part, as to the court may seem fit."

What is reasonable for the maintenance and support of the wife for the joint lives of the husband and wife is, therefore, what has in each case to be ascertained. The circumstances which have to be taken into account are (i) the conduct of the parties; (ii) their position in life and their ages and their respective means; (iii) the amount of the provision actually made; (iv) the existence or non-existence of children, and who is to have the care and custody of them; (v) any other circumstances which may be important in any particular case.

In the case now before the court, there are no children, and no particular circumstances in addition to those which fall under the first three heads. We have, therefore, only to consider those heads. As regards the conduct of the parties, the wife was the petitioner, and nothing is, or can be, said against her. The misconduct of her husband drove her to seek for a divorce. This is very material in considering whether the words *dum casta* should be inserted, for, although on the one hand, as forcibly pointed out by JEUNE, J., it is unjust to make an allowance cease on marriage, and not on illicit intercourse, yet, on the other hand, it is an insult to any woman of spotless character to provide against the contingency of her sinking so low as to render such a provision necessary. This view of the question is quite as important as the other.

As regards the position of the parties and their respective means, much must turn on those matters. The least that a man ought to do for the maintenance and support of his wife, when he so disregards his own duties to his wife as to drive her from home without any fault on her part, and practically force her to obtain a divorce, is to do what he can, consistently with his means, to maintain her in reasonable comfort, having regard to her age, health and position in society. Both the amount which he ought to allow her, and the duration of such allowance, ought to be fixed with reference to this consideration. The amount of her property, if any, ought obviously to be taken into consideration. If, as in this case, the husband's means are such that he can only allow his wife a bare subsistence, and she has nothing, it seems to us unjust to her that even this subsistence money should cease merely because she may marry again. The continuance of the allowance may conduce very materially to her marrying, and to her future comfort and happiness. On the other hand, justice to him does not, in our opinion, require the cessation of so small an allowance on her marrying again. Under the circumstances, therefore, of this case, viz., the innocence of the wife, the misconduct of the husband, the fact that the wife has no property, and the smallness of the allowance made to her—it appears to us that the clause *dum sola et casta vixerit* should be struck out. The husband must pay the costs of the wife's application and of the appeal.

**BOWEN** and **KAY, L.JJ.**, concurred.

*Appeal allowed.*

Solicitors: *J. Banks Pittman; Joseph Pearce.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]



**R. v. LONDON COUNTY COUNCIL. Ex Parte AKKERSDYK.  
Ex Parte FERMENTIA**

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and A. L. Smith, J.), December 7, 16, 1891]

[Reported [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168;  
56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175]

*Licence—Music and dancing—Hearing by county council of application for renewal of licence—Bias—Presence of councillors opposing application by counsel.*

The London County Council delegated to a committee of their body the hearing of applications for music and dancing licences. The committee by a majority recommended that two applications for the renewal of licences for public-houses should not be granted. The applicants thereupon applied to the county council for the licences. At the hearing before the county council certain members of the committee who had voted against the granting of the licences instructed counsel to appear for them before the county council and oppose the applications. Those councillors were also present at the hearing, but they did not vote. The council by a majority refused the applications.

**Held:** in determining the applications the county council were acting judicially and were bound by the ordinary principles of justice in deciding questions which came before them for judicial decision; accordingly, the presence of those members of the council at the hearing who had instructed counsel to oppose the applications vitiated the proceedings, and rules for writs of mandamus to hear and determine the applications according to law would be made absolute.

**Notes.** Applied: *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, ante p. 429. Considered: *R. v. L.C.C., Re Empire Theatre* (1894), 71 L.T. 638. Distinguished: *R. v. Howard, etc., Farnham Licensing Justices* (1902), 71 L.J.K.B. 754. Considered: *From United Breweries Co., Ltd. v. Bath Justices*, [1926] All E.R.Rep. 576; *Cooper v. Wilson*, [1937] 2 All E.R. 726; *Kilduff v. Wilson, Coventry v. Wilson*, [1939] 1 All E.R. 429. Referred to: *R. v. Budden, etc., Kent Licensing Justices* (1896), 60 J.P. 166; *R. v. London Justices, Ex parte Kerfoot* (1896), 45 W.R. 58; *Murray v. Epsom Local Board*, [1897] 1 Ch. 35.

As to county council meetings, see 24 HALSBURY'S LAWS (3rd Edn.) 458 et seq.; and for cases see 33 DIGEST 103 et seq. For the Local Government Act, 1888, see 14 HALSBURY'S STATUTES (2nd Edn.) 171 et seq.

Cases referred to:

- (1) *R. v. Hertfordshire Justices* (1845), 6 Q.B. 753; 1 New Mag. Cas. 183; 1 New Sess. Cas. 470; 14 L.J.M.C. 73; 4 L.T.O.S. 291; 9 J.P. 198; 9 Jur. 424; 115 E.R. 284; 33 Digest 289, 45.
- (2) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, 51.
- (3) *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.
- (4) *R. v. Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R. v. Harrison*, 24 W.R. 392; 33 Digest 294, 100.
- (5) *R. v. Great Yarmouth Justices* (1882), 8 Q.B.D. 525; 51 L.J.M.C. 39; 46 J.P. 518; 30 W.R. 460, D.C.; 33 Digest 292, 81.

Also referred to in argument:

*R. v. Handsley* (1881), 8 Q.B.D. 383; 30 W.R. 368; sub nom. *R. v. Handsley, etc. Burnley Justices, Ex parte King*, 61 L.J.M.C. 137; 46 J.P. 119, D.C.; 33 Digest 297, 125.

- R. v. Farrant* (1887), 20 Q.B.D. 58; 57 L.J.M.C. 17; 57 L.T. 880; 52 J.P. 116; 36 W.R. 184; sub nom. *R. v. Taunton Corpn.*, 4 T.L.R. 87, D.C.; 33 Digest 289, 52. **A**
- R. v. Kent Justices* (1880), 44 J.P. 298; 33 Digest 301, 154.
- R. v. Cumberland Justices, Ex parte Waiting* (1881), 8 Q.B.D. 369; 51 L.J.Q.B. 142; 46 J.P. 7; 30 W.R. 178, D.C.; 30 Digest (Repl.) 27, 177.
- R. v. O'Grady* (1857), 7 Cox, C.C. 247. **B**
- Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L.Cas. 759; 8 State Tr.N.S. 85; 19 L.T.O.S. 317; 17 Jur. 73; 10 E.R. 301, 315, H.L.; 38 Digest (Repl.) 104, 742.
- Ex parte La Mert* (1863), 4 B. & S. 582; 3 New Rep. 120; 33 L.J.Q.B. 69; 9 L.T. 410; 12 W.R. 201; 122 E.R. 578; 34 Digest 544, 25.
- R. v. Allan* (1864), 4 B. & S. 915; 33 L.J.M.C. 98; 10 Jur.N.S. 796; 122 E.R. 702; sub nom. *R. v. Hodgson*, 3 New Rep. 503; 9 L.T. 761; 28 J.P. 484; 12 W.R. 423; 33 Digest 298, 128. **C**
- R. v. Cheltenham Comrs.* (1841), 1 Q.B. 467; 1 Gal. & Dav. 167; 10 L.J.M.C. 99; 5 Jur. 867; 113 E.R. 1211; 33 Digest 291, 72.
- Wakefield Local Board of Health v. West Riding and Grimsby Rail. Co.* (1865), L.R. 1 Q.B. 84; 6 B. & S. 794; 35 L.J.M.C. 69; 13 L.T. 590; 30 J.P. 20; 12 Jur.N.S. 160; 14 W.R. 100; 10 Cox, C.C. 162; 122 E.R. 1386; 33 Digest 301, 157. **D**
- R. v. Milledge* (1879), 4 Q.B.D. 332; 40 L.T. 748; 27 W.R. 659; sub nom. *R. v. Weymouth Justices*, 48 L.J.M.C. 139; 43 J.P. 606, D.C.; 33 Digest 297, 118.
- Ex parte Partridge* (1887), 19 Q.B.D. 467; 52 J.P. 40; 36 W.R. 442; sub nom. *R. v. General Council of Medical Education and Registration of United Kingdom*, 56 L.J.Q.B. 609; 3 T.L.R. 817, C.A.; 34 Digest 561, 203. **E**
- Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 34 Digest 544, 28.

#### **Rules Nisi for writs of mandamus.**

In *R. v. London County Council, Ex parte Akkersdyk*, a rule nisi had been obtained, on the application of John Akkersdyk, calling on the London County Council to show cause why a writ of mandamus should not issue commanding the council to hear and determine according to law an application by Akkersdyk for a licence for music and dancing in respect of his premises, the Angel and Crown public-house. A similar rule nisi had been obtained in *R. v. London County Council, Ex parte Fermentia*, by Fermentia, in respect of an application made by him for a similar licence in respect of his premises, the Rose and Crown public-house, of which he was landlord. In both cases a rule nisi had also been obtained for a certiorari to bring up and quash the resolution of the county council refusing the licences. **G**

*Poland, Q.C.* (Avory with him), for the London County Council to show cause against the rules. **H**

*Finlay, Q.C.* (Grain with him), in support of the rules.

*Cur. adv. vult.*

Dec. 16, 1891. **A. L. SMITH, J.**, read the following judgment of the court.—In this case, John Akkersdyk obtained a rule nisi calling on the London County Council to show cause why a writ of mandamus should not issue commanding the council to hear and determine his application for a licence for music and dancing in respect of his premises, the Angel and Crown public-house, in the Liberty of the Tower, and also why a writ of certiorari should not issue to bring up a resolution of the council refusing such licence. The real question we have to determine is, whether the London County Council have heard and determined Akkersdyk's application according to law. If yes, then the rule must be discharged; aliter if they have not. **I**

A For many years prior to the passing of the Local Government Act, 1888, which created county councils, Akkersdyk had applied for and obtained from the county justices sitting in quarter sessions a music and dancing licence for his premises. By this Act (s. 3) the administrative business of quarter sessions in respect of the licensing of houses for music and dancing was transferred to the county council. The council were not authorised to administer an oath, or to perform any judicial  
B business, or otherwise act as justices of the peace (s. 78). By s. 28, the council had power to delegate to a committee, with or without restrictions or conditions, any powers or duties transferred to them. After this Act was passed, the county council continued to grant renewals of the licence to Akkersdyk, and last year required structural and other alterations to be executed, amounting to £1,000, at the same time informing him that the execution of such works would not give  
C him any right to a subsequent renewal. Akkersdyk executed the works according to the requisition of the architect of the council.

On Oct. 1, 1891, Akkersdyk again applied to the licensing committee of the county council sitting at Clerkenwell for a renewal of his licence. After some evidence had been heard, he was informed by the chairman that the majority of the committee were not satisfied as to the house, and that they could not recommend  
D the council to grant the renewal, but that it was open to him to appeal to the London County Council, who would sit on Oct. 23, 1891. Akkersdyk accordingly appeared by counsel before the county council sitting in licensing sessions at Spring Gardens.

It is erroneous to say that this was an appeal. It was no such thing. It was an original hearing by the London County Council of the applicant's application for  
E what is called a renewal of the music and dancing licence, the council having before them the report of their committee of what they had done at Clerkenwell. Akkersdyk, by his counsel, protested against the decision of the committee, and insisted that nothing had been proved against him to disentitle him to a renewal of the licence. At this time, Mr. M'Dougall, Mr. Beachcroft, and Mr. Leon, three of the committee who had voted against Akkersdyk at Clerkenwell, were sitting on  
F the London County Council, adjudicating on his case, Mr. M'Dougall taking a somewhat active part in the discussion thereon. It then, for the first time, appeared that these three councillors were not only adjudicating on the applicant's case, but had themselves, together with another of the committee who had voted against the applicant (viz., Mr. Lidgett), retained counsel and solicitors to appear before the council to press the case against him, and uphold, if they  
G could, their vote on the committee at Clerkenwell. Hence the present rule nisi for a mandamus to hear and determine the applicant's application according to law.

Counsel for the London County Council very frankly admitted that, if what had taken place in this case had taken place when justices were sitting in quarter sessions, he could not have resisted the mandamus. He admitted, and it has been  
H so held, that the presence of one interested justice would render the court improperly constituted and vitiate the proceedings, it being no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party: see *R. v. Hertfordshire Justices* (1); but counsel argued that the London County Council were an elected body and not justices sitting in quarter sessions; and in this we agree. It is true that, by the Disorderly Houses Act, 1751, justices (and now by the Local Government Act, 1888, the county council) are authorised to grant or refuse a licence as they "in their discretion shall think proper," but the discretion is to be exercised, as LORD HALSBURY put it in *Sharp v. Wakefield* (2) ([1891] A.C. at p. 179), "according to the rules of reason and justice." In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; and, to follow the words of COTTON, L.J., in *Leeson v. General Council of Medical Education and Registration* (3), "though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint is well founded." In our judgment, when so acting they are



not emancipated from the ordinary principles on which justice is administered in this kingdom, and which are, as has been said, founded on its very essence. A

Counsel conceded that, if the London County Council adjudicated in a matter of a music and dancing licence against an applicant without hearing him, such an adjudication could not stand. He also admitted that, if any of the council adjudicating had a pecuniary interest in the subject-matter, such adjudication also could not stand. Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of COTTON, L.J., in *Leeson v. General Council of Medical Education and Registration* (3), in which he says (43 Ch.D. at p. 379): B

"Of course the rule is very plain that no man can be plaintiff, or prosecutor in any action, and at the same time sit in judgment to decide in that particular case either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made;" C

and yet this is precisely what, in the present case, the three councillors have done. But it was argued that, after it had appeared that they were in fact both accusers and judges, they no longer took part in the deliberations of the council. This, however, will not avail even if it were the fact, for LORD DENMAN, in *R. v. Hertfordshire Justices* (1) held that a decision was vitiated by any one interested person taking part, it being enough for the purpose that one single interested person has formed part of the court; and PATESON, J., who followed LORD DENMAN, said (6 Q.B. at p. 757): "The question is, has an interested person taken any part at all?" *R. v. Meyer* (4) is also an authority. BLACKBURN, J., in delivering judgment, said (1 Q.B.D. at p. 177): D

"We cannot go into [the question whether the interested justice took no part in the discussion of the case]. The question is, was he so interested in the matter as that he ought not to have sat?" E

In this statement of the law we agree.

A further point was taken for the London County Council that the applicant had waived any objection to the three councillors sitting on his case, and authorities were cited to show that, if there was such a waiver, mandamus would not go. We do not doubt the authorities, but we are clear that there was no waiver in fact. It is true that when Akkersdyk arrived at the council in Spring Gardens, he might, and probably did, see the three councillors he had seen previously sitting on the committee; but neither he nor his solicitor then knew anything of counsel being present on their retainer to press the case against him. In our judgment, the London County Council show no good cause against this rule, and mandamus must go to them to hear and determine Akkersdyk's application according to law. We understand that in this and the subsequent case (about which hereafter) counsel consent to the rules for a certiorari being abandoned without costs. G

In *R. v. L.C.C., Ex parte Fermentia* the salient facts are almost identical with those in the case of Akkersdyk, with the exception that Fermentia had spent £1,135 on alterations according to the requirements of the architect of the London County Council, and that the evidence before the committee was altogether in his favour. The decision of the committee was as follows: H

"The decision of the committee is the same in this case as it was in the last [i.e., Akkersdyk's]. They do not recommend the council to grant a renewal. It will be open to you to appeal to the council on Oct. 23." I

This case came on before the council immediately after Akkersdyk's, and was in reality a continuation of it. The learned counsel for the four councillors pressed the case against Fermentia, as he had done against Akkersdyk, and with the same result. It was argued in this case that the three councillors "had left the bench," a term well known in the administration of justice, and, consequently, that they were no longer judges as well as accusers. It is true, as appears from the

**A** shorthand-writer's notes, that none of the three councillors took any open active part in the discussion of this case, as Mr. M'Dougall had done in Akkersdyk's case. It was sworn, however, by Henry Souch (clerk to the applicant's solicitor) that, on several occasions while the case was proceeding, he saw Mr. M'Dougall, Mr. Beachcroft, and Mr. Leon standing or sitting in the council chamber, and that, on one of such occasions, he saw Mr. Leon sitting immediately behind the official seat of Mr. Fardell, the chairman of the licensing committee, and conversing with other members of the London County Council.

**B** Mr. Leon, in his affidavit in answer, does not deny being in the council chamber, but states that, during the discussion, he was not in that part of the chamber in which councillors who are taking part in the proceedings sit. He admits that he may have conversed occasionally with other members who came and spoke to him there. He does not, however, state what they spoke about, but he adds that he did not attempt to influence their votes. Mr. Beachcroft limits his attendance in the council chamber to one or other of the doorways, and Mr. M'Dougall states that he sat on the dais behind the seat of the chairman, which is the place for visitors, and not where councillors who are taking part in the proceedings sit. In the affidavit of Mr. M'Dougall, handed up to us as originally drafted for him to swear, it is stated:

"I may have conversed occasionally with the members who came and spoke to me there; but I did not attempt to influence their votes, and I left the council chamber before, and was not present during the show of hands."

**E** This paragraph is struck out before Mr. M'Dougall swore to this affidavit, and it is deposed to with the paragraph erased. It should be noticed that it appears from the shorthand notes that Mr. Ford, who addressed the council, considered that the three councillors were still taking part in the proceedings.

**F** In our judgment, if members of such a body as the London County Council, consisting as it does of 139 persons, and sitting in a building like that of Spring Gardens, desire to retain counsel on their behalf to press accusations against applicants for licences, or others before the council, they should either absent themselves altogether from the precincts of the building, or sit in such a position with their counsel that it may be known to all who the real accusers are, and we think that they do not "leave the bench" if they remain in the positions in which the three councillors did on this occasion.

**G** In our judgment, these two cases, conducted as they have been throughout, are in reality one, the one case being referred to in the other, and what we have said about waiver in the Akkersdyk case is applicable in this case: see *R. v. Great Yarmouth Justices* (5). A mandamus must also go in this case as in Akkersdyk's to hear and determine Fermentia's application according to law.

*Rules absolute.*

Solicitors: *H. J. & T. Child; W. A. Blaxland.*

**H** [Reported by A. H. LEROY, Esq., Barrister-at-Law.]

## HARRISON v. DUKE OF RUTLAND AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), November 10, December 3, 1892]

[Reported [1893] 1 Q.B. 142; 62 L.J.Q.B. 117; 68 L.T. 35; 57 J.P. 278; 41 W.R. 322; 9 T.L.R. 115; 4 R. 155]

*Highway—User—Rights of public—Right to pass and re-pass—Use for any other purpose—Trespass.*

When a highway is dedicated to the public the easement acquired by the public is a right of passage, a right to pass and re-pass along the highway at their pleasure for the purpose of legitimate travel, and the use of the highway for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has not transferred the absolute property of the soil of the highway, but, subject to the easement, has precisely the same estate in the soil as he had before the easement was acquired by the public, and constitutes the person using the highway for a purpose other than to exercise the right of passage a trespasser as against the owner of the soil of the highway.

The defendant was the owner of a moor across which ran a highway, the ownership of the soil of which was in the defendant. On an occasion when the defendant, with a party of friends, was lawfully engaged in shooting grouse on the land adjoining the highway, the plaintiff, for the express purpose of annoying the defendant and incommoding him in the exercise of his rights, and for no other purpose, went on the highway and tried in various ways to divert the grouse, which were being driven towards the highway and in the direction of the butts, where the defendant and his friends were stationed. The plaintiff refused to cease what he was doing, and certain keepers of the defendant, by his orders, held the plaintiff down on the ground till the drive was over. In an action by the plaintiff for assault and false imprisonment,

**Held:** the plaintiff was a trespasser on the highway, and (per LOPES and KAY, L.J., LORD ESHER, M.R., dissenting) a declaration would be made to that effect.

**Notes.** Considered: *Allen v. Flood*, [1898] A.C. 1; *Luscombe v. Great Western Rail. Co.*, [1899] 2 Q.B. 313. Applied: *Hickman v. Maisey*, [1900] 1 Q.B. 752. Considered: *London City Land Tax Comrs. v. Central London Railway*, [1913] A.C. 364; *Liddle v. North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222. Referred to: *Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L.T. 174; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Farrugia v. Great Western Rail. Co.*, [1947] 2 All E.R. 565.

As to the rights of the public over a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 73-75; and for cases see 26 DIGEST (Repl.) 326 et seq.

Cases referred to:

- (1) *R. v. Pratt* (1855), 4 E. & B. 860; *Dears. C.C.* 502; 3 C.L.R. 686; 24 L.J.M.C. 113; 25 L.T.O.S. 65; 19 J.P. 578; 1 Jur.N.S. 681; 3 W.R. 372; 119 E.R. 319, C.C.R.; 26 Digest (Repl.) 327, 452.
- (2) *Dovaston v. Payne* (1795), 2 Hy. Bl. 527; 126 E.R. 684; 26 Digest (Repl.) 326, 443.
- (3) *Goodtitle d. Chester v. Alker and Elmes* (1757), 1 Burr. 133; 1 Keny. 427; 97 E.R. 231; 26 Digest (Repl.) 339, 590.
- (4) *Sir John Lade v. Shepherd* (1735), 2 Stra. 1004; 93 E.R. 997; 26 Digest (Repl.) 339, 589.
- (5) *Turner v. Ringwood Highway Board* (1870), L.R. 9 Eq. 418; 21 L.T. 745; 18 W.R. 424; 26 Digest (Repl.) 332, 503.



- A (6) *Curtis v. Kesteven County Council* (1890), 45 Ch.D. 504; 60 L.J.Ch. 103; 63 L.T. 543; 39 W.R. 199; 26 Digest (Repl.) 338, 580.
- (7) *Stevens v. Whistler* (1809), 11 East, 51; 103 E.R. 923; 26 Digest (Repl.) 343, 615.
- (8) *St. Mary, Newington, Vestry v. Jacobs* (1871), L.R. 7 Q.B. 47; 41 L.J.M.C. 72; 25 L.T. 800; 36 J.P. 119; 20 W.R. 249; 26 Digest (Repl.) 339, 591.

B Also referred to in argument :

*Stinson v. Browning* (1866), L.R. 1 C.P. 321; Har. & Ruth. 263; 35 L.J.M.C. 152; 13 L.T. 799; 30 J.P. 312; 12 Jur.N.S. 262; 14 W.R. 395; 26 Digest (Repl.) 498, 1816.

C **Application** by the plaintiff for judgment or a new trial on appeal from the verdict and judgment at the trial of the action before LORD COLERIDGE, C.J., and a jury. There was a similar cross motion by the defendants on certain issues in the claim and on the counterclaim.

The plaintiff in person.

*Sir Henry James, Q.C.*, and *R. M. Bray* for the defendants.

*Cur. adv. vult.*

D Dec. 3, 1892. The following judgments were read.

**LORD ESHER, M.R.** In this case the plaintiff has brought an action against the Duke of Rutland, and other persons who have acted under the duke's authority, for assault and false imprisonment. The defendants justified and alternatively paid five shillings into court; the duke also put forward a counterclaim. The case was tried before LORD COLERIDGE, C.J., and a jury. The jury gave a verdict for the defendants on the claim, and on the counterclaim the Lord Chief Justice directed a verdict for the plaintiff. The plaintiff has now appealed to this court, on the ground that the verdict on the claim was wrong, and the duke has appealed in respect of the judgment on the counterclaim.

The facts of the case are not in dispute. The Duke of Rutland had the right of shooting over certain moors, and on the occasion in question he was exercising that right. The plaintiff went on a highway crossing these moors, knowing that it passed close to the place where the duke, with his friends, on his own land was exercising his undoubted right. The land each side of this highway belonged to the duke, and the soil of the highway was, therefore, vested in him. The plaintiff went on the highway, not for the purpose of going to or coming from, anywhere, and not for the purpose of using the highway for any other object than to incommode the duke and his friends in the exercise of their rights of shooting. That was the plaintiff's sole purpose. He went on the highway near the butts to which he knew the game would be driven, so that as the butts were not far distant from the highway he would necessarily interfere with the drive. He then interfered further by waving his pocket handkerchief, by opening and shutting his umbrella, and in other ways. He was asked to desist, but he refused. The duke's servants then forcibly laid hands on him and held him down on the ground for the purpose of preventing his further interference, until he could not interfere any longer, that is to say, until the drive was over. That was their only purpose, and they held him down only for that period. It is clear that they did not use any greater degree of violence than was necessary to carry out their purpose, because when one of the keepers said to the plaintiff that he hoped they were not hurting him, the plaintiff in reply asked him to sing him a song. However, the defendants paid five shillings into court, alternatively to their plea justifying the assault, on the ground that the plaintiff was trespassing on the duke's land and interfering with his enjoyment of it, and that no more force was used than was necessary under the circumstances. Besides that issue there was, therefore, an alternative one—whether, if the assault was illegal, five shillings was enough damages.

On the claim the jury found a general verdict for the defendants. That might

mean that, even if there was an excess of force used, the five shillings paid into court was enough. The Lord Chief Justice being anxious to maintain to their fullest extent the rights of the public over highways—and in this I fully sympathise with him—without taking into consideration some other matters which should have been considered, directed the jury as a matter of law that the plaintiff was not trespassing on the duke's land, that is to say, on the highway. Notwithstanding that, the judgment on the claim must be right because the jury have found that five shillings is enough if there had been an excess of force. But that direction of the Lord Chief Justice prevented a verdict on the issue whether the plaintiff was a trespasser, and on that issue judgment has been entered for the plaintiff. The direction also prevented any verdict for the duke on the counterclaim, and judgment has been accordingly entered on it for the plaintiff. Under these circumstances the plaintiff has appealed against the finding of the jury, but from what I have said I think it is obvious that this appeal cannot be entertained and his appeal, therefore, fails. On the defendants' cross-appeal, we have been asked to enter a verdict for the defendants on the issue of justification on the claim, and a verdict and judgment for the duke on the counterclaim. As to the result of that, I cannot doubt that a verdict must be entered for the defendants on the issue of justification, and on the counterclaim there must be a verdict for the duke if asked for, at least for nominal damages. As to another claim which is made in the counterclaim I will deal with that presently.

My great difficulty is to express the reasons for my judgment so carefully as to uphold the law in favour of the defendants without so stating them as to make the decision of the court interfere with the rights of the public on a highway. That the defendants in this case were taking a very delicate course seems to me clear. The plaintiff was undoubtedly on the highway; he was not merely told to move on, but was actually in point of law imprisoned for a time. That is a very strong proceeding, and a person who does such a thing is in considerable jeopardy in a civil action. The soil of this highway is the duke's property, and he, therefore, says that the plaintiff was trespassing on his land. The question is whether the plaintiff was a trespasser.

What is the true rule of law with regard to the user of a highway? It has been laid down in *R. v. Pratt* (1). At the trial of this action the Lord Chief Justice took exception to the ruling in that case as being a criminal case, but the decision really depended on the question whether the prisoner was or was not a trespasser, and the judges were obliged to say whether or not he had committed a trespass. The land in question in that case was a highway, and the prosecutor was the owner of the soil. The prisoner was charged with trespassing on land in pursuit of game. He did not go on the highway for the purpose of using it as a highway, but solely for the purpose of searching for game. Lord CAMPBELL, C.J., says in that case (4 E. & B. at p. 865) that Pratt

“was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land, that is Mr. Bowyer. It is true the public had a right of way there, but, subject to that right, the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act; he trespassed by being on the land in pursuit of game.”

Therefore, if a man goes on part of a highway the soil of which part belongs to the owner of the adjoining land, not for the purpose of using it as a highway, but only for some other purpose, whether it be “lawful or unlawful,” as CROMPTON, J., says in the same case, then in so using that part of the highway he is a trespasser. *R. v. Pratt* (1) is authority for that proposition, and the case is founded on earlier authorities. Therefore, on the ground that the plaintiff was

- A** on the highway on soil belonging to the Duke of Rutland, not for the purpose of passing or re-passing or of using the highway in any reasonable mode of using a highway as a highway, he was a trespasser. But I must say that if the language used by ERLE and CROMPTON, JJ., in *R. v. Pratt* (1) is construed too largely, it would interfere mischievously with the rights of the public on a highway. If that language is construed strictly, a person doing anything else on a highway but pass or re-pass is a trespasser. But I do not think that the law is that the public must always be passing and doing nothing else on a highway. There are many things often done and usually done on a highway by the public, and if a person does not transgress any such usual and reasonable mode of using a highway, I do not think he is a trespasser. That seems to me to show that the rights of the owner of the soil are not very large. If a person is passing
- C** along a road over soil belonging to a particular owner, in order to do something beyond the part of the soil of the highway belonging to that owner, then he is only passing along the highway, and whatever he may have an intention of doing afterwards further on, he is not then a trespasser, nor can the owner of the soil interfere with him on that ground. So, if a person is using a highway merely for passing along it, and he afterwards goes into other land belonging
- D** to the same owner as the soil of the highway belongs to, then I think he could not be said to be a trespasser while he is passing along the highway, though he was passing with the intention of committing a trespass upon other land of the owner of the soil of the highway. But in the case we have now to deal with, the plaintiff was using part of the highway merely for the purpose of infringing the rights of the owner of the soil on other land belonging to him.
- E** He did not go on to the duke's private land, he remained on the highway and interfered from there. He was using the highway, not for the purpose of passing and re-passing along it or in any other ordinary and usual mode in which the public use a highway. That is clear from the evidence, and under these circumstances I think he was a trespasser.

It is clear that the question may arise in many cases whether in a particular

**F** instance a person was using a highway in a reasonable and usual way, and that would be a question for a jury. In the present case the Lord Chief Justice ruled that the plaintiff was not a trespasser, and I think that we are bound to say that he was a trespasser. Therefore, on the cross-appeal we must say that a verdict must be entered for the defendants on the issue of justification. There will, therefore, be a verdict for the defendants on the whole claim, and the

**G** plaintiff's appeal must be dismissed.

As to the counterclaim, I fear I have the misfortune to differ from my learned brethren. In the pleadings the Duke of Rutland asked for an injunction, at the Bar we have been asked for a declaration. I have always had a disinclination to have the procedure of the Court of Chancery brought into an ordinary common law action. I think it a misfortune that such procedure should be brought into

**H** a common law action, except perhaps in extreme cases. This action is about nothing but an ordinary trespass to land for which very small damages would be given and now damages are not even asked for. If an injunction were granted, and the plaintiff repeated the trespass, he would have to go to prison for an indefinite time. That seems to me a very severe procedure to bring into such an ordinary common law action as this. However, in this court the counsel for

**I** the defendants have not asked for an injunction, but have said that they will be satisfied with a declaration. What can be the use of a declaration without an injunction against such a man as the plaintiff? It should have been made, if made at all, by the judge at *nisi prius*. In such a case, the judge, after directing the jury that as a matter of law the plaintiff committed a trespass on the occasion in question, would say that, if the plaintiff trespassed again, the direction to the jury would be evidence against him. It seems to me that would be an unnecessary over-burdening of the case. A declaration may, no doubt, be very useful in many cases in Chancery where the decree of the court has to



be carried out by other people, but, in my opinion, it is wholly misplaced in such an action as this. In every ordinary common law action, even in a case of assault, it is becoming usual now for the pleader to ask for an injunction. It only increases the expenses and overloads the matter with unnecessary complications. By the Judicature Act it was provided that when the principles of law and equity differed, those of equity should prevail, but it was not intended that the procedure in equity should prevail in common law actions.

In my opinion, therefore, no declaration ought to be made here, as I think it would be superabundant and overloading the case; but I agree that the judgment on the counterclaim cannot stand, and that judgment should be entered on it for the Duke of Rutland. I may add, that, in my judgment, I have in no way relied on the fact that the rights of the duke which were interfered with were sporting rights, the same result would have happened whatever were the nature of the rights. I think that the plaintiff's appeal fails, and the defendants' appeal must be allowed.

**LOPES, L.J.**—This to my mind is a case of great importance. [His Lordship stated the facts and continued:] With great deference I am of opinion that the Lord Chief Justice was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion, the Lord Chief Justice ought to have told the jury that the plaintiff on the admitted facts was a trespasser, and that the pleas justifying the trespass and the counterclaim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether five shillings was enough to compensate the plaintiff for such excess. The Lord Chief Justice ought further to have told the jury that, if there was no excess, then they must find everything for the defendants; but, if there was an excess, then, if five shillings was enough, they ought still to find everything for the defendants; but if, on the other hand, they thought five shillings was not enough, then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the five shillings. The jury were of opinion that five shillings was enough to cover everything to which the plaintiff was entitled. Their finding on that issue is, therefore, conclusive, and the verdict and judgment in that respect must stand. But ought the Lord Chief Justice to have told the jury that the plaintiff was not a trespasser? The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein, as, for instance, by permitting cattle to depasture thereon.

[His Lordship then discussed *Dovaston v. Payne* (2) and *R. v. Pratt* (1) (see judgment of KAY, L.J., *infra*) and proceeded:] The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and re-pass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public. If this is the law, the plaintiff on the admitted facts was a trespasser. He was using the soil of the highway not for the purpose of passing and re-passing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. Counsel for the duke does not press for an injunction; if he had, I should have thought it ought to be granted, but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act, and a most

A wholesome remedy. This action might have been brought in the Court of Chancery and an injunction on the facts appearing would, in my opinion, have been readily granted, and under R.S.C., Ord. 25, r. 5, there is full power to make a declaration such as we make.

B **KAY, L.J.**—The soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs.

C These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or is not a user of the soil as a highway. The legitimate use of a highway is generally described as a "right of passage," or a "right of passing and re-passing." In 1 *ROLLE'S ABRIDGMENT* 392 B. pl. 1, 2, referred to and adopted by LORD MANSFIELD in *Goodtitle d. Chester v. Alker and Elmes* (3), the law as to highways is there stated (1 Burr. at p. 143):

D "The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil."

E In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment for an exclusion as by a building upon the soil of the highway. In *Sir John Lade v. Shepherd* (4), an action of trespass was brought by the owner of the soil for building a bridge across a ditch, "the end whereof rested on the highway." The plaintiff had judgment, the court saying (2 Str. at p. 1004):

F "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil."

Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil: *Turner v. Ringwood Highway Board* (5); *Curtis v. Kesteven County Council* (6).

G The right of the public upon a highway is, in the language of the judges which I have quoted, described as a right of passage. In other cases it is defined as a right of passing and re-passing. Probably this is sufficiently accurate and precise to enable anyone to determine what, in each particular instance, is an improper use of the soil. Many of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission, he is a trespasser; but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways, to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an extreme in certain cases. But the discretion of a court of justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

I The other reported instances of trespass deserve consideration. In *Dovaston v. Payne* (2) cattle were taken by the defendant damage feasant on his land which adjoined to a highway. It was pleaded that, being on the highway, they had escaped into the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad, because it

did not aver distinctly that the cattle were using the highway for the purpose of passing and re-passing, so that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. HEATH, J., said (2 Hy. Bl. at pp. 531, 532) that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to show that they were lawfully using the road; for "the property is in the owner of the soil subject to an easement for the benefit of the public," and on the plea it did not appear "whether the cattle were passing and re-passing, or whether they were trespassing on the highway." In *Stevens v. Whistler* (7) it was held by the Court of King's Bench that depasturing cattle upon a highway, on one side of which the plaintiff had land, was a trespass on that part of the soil of the highway which belonged to the plaintiff.

In *R. v. Pratt* (1) it was decided that a person who went upon the high road with a gun and attempted to shoot a pheasant which flew over it, was properly convicted of a trespass in search of game, under the Game Act, 1831, s. 30 [repealed in part by the Protection of Birds Act, 1854, and the Game Laws (Amendment) Act, 1960], upon the soil of the highway which belonged to the owner of the close adjoining such highway. LORD CAMPBELL, C.J., said (4 E. & B. at p. 865):

"He was on land the soil and freehold of which was in the owner of the adjoining land . . . It is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in"

the owner of the adjoining land. WIGHTMAN, J., said (*ibid.* at p. 867):

"Though the public have a right to pass and re-pass on land which is a highway, they have no right to use the land for any other purpose than as a highway, and the appellant, being on such land in pursuit of game, was *prima facie* a trespasser."

ERLE, J., said (*ibid.* at p. 868):

"It is said that he could not be a trespasser because it was a highway. But I take it to be clear law that if, in fact, a man be on land where the public have a right to pass and re-pass, not for the purpose of passing and re-passing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston v. Payne* (2)."

CROMPTON, J., said (*ibid.* at pp. 868, 869):

"If a man use the land over which there is a right of way, for any purpose, lawful or unlawful, other than that of passing and re-passing, he is a trespasser."

These authorities were considered and followed by the Court of Queen's Bench in *St. Mary, Newington, Vestry v. Jacobs* (8), where the law is stated thus (L.R. 7 Q.B. at p. 47): "The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication." MELLOR, J., who delivered the judgment of the court, comments thus on *R. v. Pratt* (1) (*ibid.* at p. 55):

"Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway."

The court held that the owner of premises adjoining a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused.

According to these authorities, the right of the public upon a highway is that of passing and re-passing over land the soil of which may be owned by a private



A person. Using that soil for any other purpose, lawful or unlawful, is a trespass. I understand those words to mean that the purpose need not be unlawful in itself, as, for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely, that of passing and re-passing along it. The peculiarity of the decision in *R. v. Pratt* (1) is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and re-pass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But, if a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself—in the words of CROMPTON, J.—any act, “lawful or unlawful, other than that of passing and re-passing, he is a trespasser.” The words must be read with the obvious qualification that the “purpose” they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and re-passing.

In the present case the highway was a cart or carriage road across a moor. The Duke of Rutland had the right of sporting over the moor. The soil in it, and in the highway, I understand, belonged to him. He had butts, in which people stood to shoot grouse driven over them from the moor. These butts were some two hundred yards from the road, so that shooting from them would not infringe the provisions of s. 72 of the Highway Act, 1835, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cartway. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the duke's friends. On this point the evidence was so conclusive that we are told the Lord Chief Justice said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him down upon the road, and held him there during the grouse drive to prevent his further interference. The Lord Chief Justice directed the jury that the plaintiff was not trespassing. Under that ruling they found that a nominal sum of five shillings paid into court was sufficient damages for the assault upon him. Counsel then said that, after his Lordship's ruling, he could hardly press the counterclaim, which asserted that the act of the plaintiff was a trespass, and sought for an injunction to restrain the plaintiff from repeating it.

This counterclaim is in fact a cross-action seeking equitable relief, which may now be brought in the Queen's Bench Division: see Supreme Court of Judicature Act, 1873, s. 24 (3) [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 36]. Where a trespass is committed in assertion of a fancied right, and it is shown that it will be repeated unless prevented, the Court of Chancery has constantly granted injunctions to prevent a repetition of the trespass. Upon this point there is now before us a cross-appeal by the defendants. They ask for an injunction; but, upon being pressed by me, counsel said he would not insist upon the injunction, but desired the decision of this court by declaration whether or not the act of the plaintiff was a misuse of the soil of the highway which amounted to a trespass. It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction. It clearly may be done under R.S.C., Ord. 25, r. 5.

Whatever may be thought of the so-called sport of standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high road, it is a not unlawful exercise of the right of the owner

of the land. The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: "I certainly meant to take up my position in front of the butts." "I went there to defend the public right." With great deference, I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered, and was intended to interfere, with a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the court by injunction to prevent a repetition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under Ord. 25, r. 5, upon their counterclaim, that under the circumstances the plaintiff, upon Oct. 8, 1890, when stopped by the duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The court exercises the power of enforcing such an order by an imprisonment with very great care and caution. The damages given to the plaintiff for the alleged assault upon him by the keepers on the assumption that he was not a trespasser were only five shillings. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the amount. The plaintiff's appeal fails, and must be dismissed. The defendants' appeal succeeds. The plaintiff's claim is dismissed with costs. The defendants' counterclaim is allowed with costs.

*Order accordingly.*

Solicitors : *Hood Barrs & Co.*; *G. L. P. Eyre & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## BARNARDO v. FORD. GOSSAGE'S CASE

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Hannen), April 24, 1891, April 4, 5, May 6, July 25, 1892]

[Reported [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T. 1; 56 J.P. 629; 41 W.R. 333; 8 T.L.R. 728; 36 Sol. Jo. 681; 1 R. 17]

*Habeas Corpus—Return to writ—Cessation of illegal detention before application for writ—Opposition to application—Issue of writ to decide on return matters raised in opposition.*

Where an application for a writ of habeas corpus comes before the court and the court is satisfied that the illegal detention alleged ceased before the application for the writ was made or the person to whom it was directed had notice of the application, so that at those times the person to whom the writ relates was no longer in the custody, power, or control of the respondent to the writ, that is a good return to the writ, which, therefore, should not be ordered to issue. The remedy of habeas corpus is intended to facilitate the release of persons detained in unlawful custody and not to afford the means of inflicting penalties on those persons by whom they were at some time or other illegally detained. If, how-

**A** ever, the court entertains a doubt whether it be a fact that at the material time the person alleged to be detained was not in the control of the respondent to the writ, the court may issue the writ, and the matter can be decided on the return to the writ when the respondent can be cross-examined.

**B** Per LORD HERSCHELL: Appeals against the issue of writs of habeas corpus should not be encouraged. When a tribunal believes that a person is or may be under detention in unlawful custody and issues a writ of habeas corpus accordingly, no court of appeal ought lightly to interfere with the issue of the writ.

*R. v. Barnardo* (1) (1889), 23 Q.B.D. 305, disapproved.

*Contempt of Court—Habeas corpus—Custody of person detained given up from apprehension of issue of writ.*

**C** Per LORD WATSON: In my opinion, no contempt is committed by a person who, lawfully or unlawfully, absolutely gives up the custody of a child [and, semble, any other person detained] from the mere apprehension that, by retaining that person, he may become liable to a writ of habeas corpus, and without any notice that such a proceeding will be taken.

**D** **Notes.** Distinguished: *Secretary of State for Home Affairs v. O'Brien*, [1923] All E.R.Rep. 442. Referred to: *R. v. Maidstone Prison Governor, Ex parte Maguire*, [1925] 2 K.B. 265; *Re Carroll*, [1931] 1 K.B. 317; *R. v. Board of Control, East Ham Corpn. and Mordey, Ex parte Winterflood*, [1938] 1 K.B. 420; *Greene v. Secretary of State for Home Affairs*, [1942] A.C. 284; *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; *Zabrovsky v. General Officer Commanding Palestine*, [1947] A.C. 246; *Re Mwenya*, [1959] 3 All E.R. 525.

**E** As to habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 24 et seq.; and for cases see 16 DIGEST (Repl.) 279 et seq. As to contempt by disobedience to orders of the court, see 8 HALSBURY'S LAWS (3rd Edn.) 25-29; and for cases see 16 DIGEST (Repl.) 52 et seq.

Case referred to:

**F** (1) *R. v. Barnardo* (1889), 23 Q.B.D. 305; 58 L.J.Q.B. 553; 61 L.T. 547; 54 J.P. 132; 37 W.R. 789; 5 T.L.R. 673, C.A.; 16 Digest (Repl.) 304, 799.

Also referred to in argument:

*Re Mattheus* (1860), 12 I.C.L.R. 233; 5 Ir. Jur. 225; 16 Digest (Repl.) 298, \*327.

*R. v. Roberts* (1860), 2 F. & F. 272; 16 Digest (Repl.) 301, 751.

**G** *Viner's Case* (1675), 1 Freem. K.B. 522; 89 E.R. 392; sub nom. *Emerton's Case*, 1 Freem.K.B. 401; sub nom. *R. v. Viner*, 2 Lev. 128; 3 Keb. 470; sub nom. *Emerton v. Viner*, 3 Keb. 434; 16 Digest (Repl.) 303, 788.

**Appeal** from a decision of the Court of Appeal (LORD ESHER, M.R., and FRY, L.J.), reported 24 Q.B.D. 283, under the name of *R. v. Barnardo, Gossage's Case*, affirming an order of the Queen's Bench Division (LORD COLERIDGE, C.J., and BOWEN, L.J.) making absolute a rule nisi for a writ of habeas corpus.

**H** The appellant was the founder and director of institutions in the East End of London and elsewhere, known as Dr. Barnardo's Homes for Destitute Children. The respondent, Mary Ford, was the wife of John W. Ford, of Wolverhampton, a labourer, and the mother of Harry Gossage by her former husband, Edward Gossage, who died in November, 1882, intestate, and without having appointed any guardian for his infant children. The child Harry Gossage was born in **J** January, 1880, and was baptised in 1883 in a Roman Catholic church at Southam, in Warwickshire. It appeared that the mother, in the autumn of 1888, being in destitute circumstances, accepted the offer of an organ-grinder at Leamington, whom she had known for some time and whose character she believed to be good, to take the child for a time, and further exacted a promise from him that he would communicate with her should he at any time wish to part with the boy. According to Dr. Barnardo's statement, he received, in September, 1888, a letter from a clergyman at Folkestone, saying that a policeman had found a little boy there who said he had no home, and that he had come to Folkestone with two



organ-grinders, who had treated him badly and turned him off. The writer having expressed a wish that Dr. Barnardo should receive the boy, he was shortly afterwards admitted to one of the homes. The mother was communicated with, and wrote a letter to Dr. Barnardo, saying she was pleased that he was going to take care of her son, as she could not keep him herself, and added that his two brothers had already been sent to Canada. Shortly afterwards a Mr. Norton, from Quebec, offered to adopt a boy from the homes, and Dr. Barnardo, after making inquiries about this gentleman, accepted his offer, and the boy he selected from several whom Dr. Barnardo put forward was Harry Gossage. On Nov. 16 the boy was handed over to Mr. Norton. According to Dr. Barnardo this was done solely for the welfare and benefit of the boy, and not, as alleged by the respondent, in order to get him out of his custody so that the boy's relations should be unable to interfere and have him placed in a home where he would be brought up in the Roman Catholic faith. The appellant admitted that he received a letter posted on Nov. 11, written at the request of the mother by Mr. Alfred Newdigate, a Roman Catholic gentleman, asking that the boy might be given up to him. Since Dr. Barnardo handed over the boy to Mr. Norton, he said that he had never heard from the boy or from Mr. Norton, and, further, that he did not know where either of them were, nor their address, nor had he any means of communicating with either of them. The respondent applied for a rule nisi for a writ of habeas corpus, which was made absolute by the Queen's Bench Division, a decision which was affirmed by the Court of Appeal. From that decision Dr. Barnardo appealed.

*Rigby, Q.C., Finlay, Q.C., Cock, Q.C., and W. Baker* for the appellant.  
*Sir Walter Phillimore, J. Walton and Lankester* for the respondent.

A preliminary objection was taken on behalf of the respondent that no appeal lay from an order that a writ of habeas corpus should issue. The opinions of their Lordships on this matter will now be omitted from this report in view of the provisions of s. 15 (1) of the Administration of Justice Act, 1960, that "an appeal shall lie, in any proceedings upon application for habeas corpus... against an order for the release of the person restrained as well as against the refusal of such an order."

Their Lordships took time for consideration.

July 25, 1892. The following opinions were read.

**LORD HALSBURY, L.C.**—As there is to be a return, and more evidence may be adduced to show what is the real state of the facts, I designedly abstain from saying anything which may preclude me from forming a perfectly unbiased judgment when all the facts have been finally ascertained. But it is of importance, I think, to say, since it may tend to shorten the inquiry which the respondents suggest that they propose to make, that I cannot acquiesce in the view that some of the learned judges below seem to have entertained, that, if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody. This is a view that I cannot agree to. I think, under such circumstances, the writ ought not to issue at all, as it is not the appropriate procedure for punishing such conduct. Of course where a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a court may, and ought to, examine into the facts by the writ of habeas corpus, because the detention is, in fact, being continued by someone who is really the agent of the original wrongdoer to continue and persist in the unlawful detention. But, assuming that the detention has ceased, then the writ of habeas corpus is, in my judgment, inapplicable. For the reasons I have given I say nothing about the facts in this case, but, treating the facts as still open to inquiry, I think this appeal

A should be dismissed upon the ground that the respondent has a right to the return, and I so move your Lordships.

**LORD HERSCHELL** dealt with the preliminary objection, stated the facts, and continued: On Mar. 1, 1889, the appellant was served with a summons to attend a judge of the Queen's Bench Division to show cause why a writ of habeas corpus, commanding him to produce the body of Harry Gossage, should not be issued. Several affidavits were filed before the summons came on for hearing. In one filed by Dr. Barnardo he stated that before he received any application from the mother for the return of the child, he, on Nov. 16, 1888, transferred him to the care of a Mr. William Norton, an American gentleman, who was at that time on a visit to this country, and that he believed that the boy was taken by Mr. Norton to Canada a few days later. He further deposed that he had not, since he handed over the boy, heard either from him or from Mr. Norton, that he did not know where he or Mr. Norton were, and that he had no means of communicating with either of them. He further stated that before handing over the boy he satisfied himself that Mr. Norton was a fit and proper person to have the custody of the child. In an affidavit sworn a few days subsequently he deposed that Harry Gossage was not then, and since Nov. 16, 1888, when he transferred him to the care of Mr. Norton, had not been, in his custody or power. The summons came on for hearing before **MATHEW, J.**, on Mar. 14, 1889, when the learned judge, having read the affidavits filed, and heard the cross-examination of the appellant, refused to order the writ to issue.

No further steps were taken till Nov. 23, 1889, when a rule nisi was granted for a writ of habeas corpus by the Divisional Court of the Queen's Bench. In the meantime *R. v. Barnardo* (1) had been decided in the Court of Appeal. This was a decision affirming an order of the Queen's Bench Division quashing a return to a habeas corpus and granting an attachment against the defendant for contempt. It was in consequence of the judgments given in the Court of Appeal, which laid down that it was not an excuse for non-compliance with a writ that the defendant had parted with the custody of the child to another person, if he had done so wrongfully, that the application was again made for a writ of habeas corpus in the present case. In addition to the affidavits used on the former application further affidavits were filed. I do not think it necessary, for reasons which I will state presently, to enter upon an examination of any of the affidavits. It will be sufficient to state that Dr. Barnardo deposed that it was on Nov. 10, 1888, that he first made the acquaintance of Mr. Norton, into whose custody he delivered the boy, and Mr. Norton showed him letters of introduction from well-known people in Canada, and stated that his object was to discover if Dr. Barnardo could place a little boy under his care, that he was anxious to find a boy who would not be interfered with by his relations, as he wished, if he liked the boy, to adopt him as his son. Dr. Barnardo accordingly brought five of the boys in his home to see Mr. Norton, among whom was Harry Gossage. After talking with him for some time Mr. Norton asked to be allowed to adopt him. Dr. Barnardo accordingly arranged that he should be ready on Nov. 16, and on that day, when Mr. Norton again came to the home, he took the boy away with him. According to Dr. Barnardo's statement, Mr. Norton expressed himself as very anxious that there should not be any interference on the part of the child's relatives, and his affidavits stated that he did not know where Mr. Norton or the boy then were, nor did he know their or either of their addresses, and that he had no means of communicating with them or either of them. After hearing argument, the Queen's Bench Division made absolute the order for the issue of the writ, and this order was affirmed by the Court of Appeal.

If in order to support this judgment it were necessary to give my adhesion to the law laid down in *R. v. Barnardo* (1), I should hesitate much before doing so. Having regard to the nature of a writ of habeas corpus and the purpose for which it was designed and has hitherto been employed, I cannot feel satisfied, as at present

advised, that it is not a good return to the writ that the person to whom it relates was not at the time it was issued in the custody, power, or control of the person upon whom it is served. The doctrine that he must also show that before the writ was issued or before he had notice of the application for its issue he had not wrongfully parted with the custody of the person named in the writ is novel, and appears to me to involve great difficulty. A gaoler who has allowed a prisoner to escape has wrongfully parted with the custody of that person; could he be commanded by a writ of habeas corpus issued after the escape to produce him and be committed for contempt of court if he failed to do so? Other illustrations might be given to show the difficulty of assenting to the broad proposition laid down in the Court of Appeal. A

The question is not whether one who has parted with the custody of a person committed to his care can be made amenable to the law if he wrongfully parts with that custody, but whether the writ of habeas corpus is the appropriate remedy. The terms of the writ require the recipient to have the body of the person named in it B

"taken and detained under your custody, as is said, together with the day and cause of his being detained, to undergo and receive all and singular such matters and things as the said court shall then and there consider of concerning him in this behalf." D

This indicates that the very basis of the writ is the allegation, and the *prima facie* evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it. E

But the question remains whether, even assuming that the decision in *R. v. Barnardo* (1) was not well founded, the appellant is entitled to have the order that the writ should issue discharged. I have already given my reasons for thinking that this House cannot reject, as incompetent, an appeal against an order for the issue of a writ of habeas corpus, but I feel most strongly that such appeals are not to be encouraged. Where any tribunal believes that a person is or may be under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no court of appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the court entertains a doubt whether this be the fact, it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation and to require a return to be made to it. It is impossible to read the judgment of the Lord Chief Justice without seeing that he did entertain such a doubt, and that he was not prepared, upon the affidavits, to accept as conclusive the statements of the appellant. At your Lordships' Bar the counsel for the respondent contended that they had a right to cross-examine the appellant, and that the proper occasion on which to try the question was when he had returned to the writ that he was not detaining the child, and that it was not at the time the writ was issued in his custody, power, or control. I think this view is the correct one; the truth of the return may, no doubt, be put in issue, and I feel myself unable to advise your Lordships that the Queen's Bench Division were not, in point of law, justified in issuing the writ. F G H I

I must not be understood as indicating that I think the story told by the appellant is untrue. But, as the matter is to undergo further investigation, it would obviously be improper to enter upon any discussion of the statements contained in the affidavits, or to express any opinion upon them. I come to this conclusion with some regret, as the question intended to be raised by this appeal is one of no



**A** small importance. But, in my opinion, it was premature to raise it at the present stage, and I think it very important not to set a precedent which might prove prejudicial to the liberty of the subject, of which the writ of habeas corpus is the most effectual safeguard. For these reasons I think the judgment appealed from must be affirmed.

**B** **LORD WATSON.**—I concur in the motion which has been proposed by the Lord Chancellor. Seeing that the writ must go, and that the appellant will have the opportunity of making further explanations, I refrain from comment upon the facts already in evidence; but I wish to make it clear that my reasons for agreeing with the judgment moved are not quite the same with those by which some of the learned judges in the court below were influenced.

**C** The remedy of habeas corpus is, in my opinion, intended actually to facilitate the release of persons detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed; and rightly so, because it is the fact of detention, and nothing else, which gives the court jurisdiction. I find that, in *R. v. Barnardo* (1), LINDLEY, L.J., said (23 Q.B.D. at pp. 315, 316):

**E** “As a matter of law I think that it is no valid excuse for not producing a child or other person in obedience to a writ of habeas corpus to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed. . . . Persons who illegally put a child out of their power do so at their peril, and, if they are ordered to produce the child, no excuse founded on their own inability to comply with the order will be held a sufficient answer to the writ.”

The circumstances of that case were not altogether the same with those with which your Lordships have to deal. **LORD ESHER, M.R.**, does not appear to have differed in opinion from LINDLEY, L.J., while COTTON, L.J., seems to have treated the case as one of contempt in parting with the custody of the child. In the present case **LORD ESHER, M.R.**, has adopted and repeated, in forcible language, the view expressed by LINDLEY, L.J., in *R. v. Barnardo* (1), although his Lordship's observations are mainly directed to the case of a child.

**F** I venture to doubt whether the law laid down by LINDLEY, L.J., in these broad terms is sound. If it be so, then the writ may be used as a convenient process for punishing a gaoler who has connived at the escape of one of the prisoners under his charge. I see no difference in principle between the case of a gaoler so misconducting himself and the case of a man who unlawfully parts with the custody of an infant. To order the latter to recover the custody of the child and to place its person at the disposal of the court may and probably will necessitate the employment by him of agents and detectives, and application for the assistance of foreign courts, which, in my opinion, are neither more nor less than penalties imposed in respect of his breach of duty. I do not for a moment suggest that there is not a legal wrong committed in both cases, but that wrong is the very reverse of illegal detention, for which alone the writ of habeas corpus was meant to give a remedy. If there be no other remedy in such cases, I am satisfied that it is for the legislature, and not for any court, either of law or equity, to provide one; and I cannot see the propriety of the court applying to these cases a remedy which was enacted for a totally different purpose.

**I** It is, in my opinion, a grave objection to the use of habeas corpus for punitive purposes that the prosecutor would have the unusual privilege of hunting the offender from court to court until he found a tribunal willing to convict. Although that privilege has with much propriety been conceded in all cases where there is actual detention, I can hardly conceive that the legislature would tolerate it in cases where detention has ceased. Where it is shown to the satisfaction of the court

that the person charged with unlawfully detaining a child or adult had de facto ceased to have any custody or control, I am of opinion that the writ ought not to issue. A man who parts with the custody of a child after he is served with the process of the court, or who evades service in order that he may get rid of such custody, commits a plain contempt, for which he is answerable to the court. Even in that case I doubt whether it is competent, and I do not doubt that it is inexpedient, to enforce the writ de plano. The case ought to be dealt with, in such circumstances, as one of contempt; and the court has power to pronounce an order which will compel the quondam custodian to choose between placing himself in a position which will make him liable to the writ or to bear the consequences of his contumacy. I think it right to add that, in my opinion, no contempt is committed by a person who, lawfully or unlawfully, absolutely gives up the custody and control of a child from the mere apprehension that, by retaining it, he may become liable to a writ of habeas corpus, and without any notice that such a proceeding will be taken. In March, 1888, eight months before this proceeding commenced, a similar application was made to MATHEW, J., who, after hearing the cross-examination of the appellant by counsel on behalf of the respondent, came to the conclusion that he had ceased to have the custody or control of the boy, Henry Gossage, in November, 1887. In these circumstances the learned judge, taking what I conceive to be the right view of the law, refused to issue the writ. Four months afterwards the decision of the Court of Appeal was given in *R. v. Barnardo* (1); and it is difficult to resist the impression that the present proceedings were brought in order to get the benefit of the novel doctrine laid down in that case, which had found no favour with MATHEW, J. Had there been no other reason for sustaining it, I should not have hesitated to reverse the judgment appealed from. But I willingly defer to those of your Lordships who are of opinion that the case may be more conveniently disposed of after a return has been made to the writ, although I am not inclined to prolong litigation of this kind, which is little calculated to advance the interests of institutions engaged in the useful work of reclaiming children from the streets. When a waif has been taken up and cared for by one of them, he apparently becomes an object of interest and competition, and funds are wasted in litigation which would be better employed in the rescue of children who are still uncared for.

**LORD MACNAGHTEN.**—I do not dissent from the motion which has been proposed. I cannot say that this is a case in which there ought not to be an opportunity of further inquiring into the circumstances under which Dr. Barnardo parted with the child, and ascertaining beyond all doubt whether the child is or is not still under Dr. Barnardo's control or within his reach. In a matter of this sort it would not, I think, be desirable to interfere with the discretion of the court below unless a stronger case for interference were made out than the one which the learned counsel for the appellant have been able to produce. Whether the child, if it can be got back, ought to be handed over to the mother, or dealt with in accordance with her directions or directions given in her name, is another question, upon which it would not be proper to intimate an opinion at present. Whether or not Dr. Barnardo has rendered himself liable to an attachment may be a matter to be discussed hereafter. That question ought, I think, to be left wholly unprejudiced by any comment upon facts or circumstances which have not as yet been thoroughly sifted or tested by cross-examination. I desire, however, to state my concurrence with the opinion expressed by FRY, L.J., I entirely agree with him in thinking that the writ of habeas corpus ought not to be wrested from its proper purpose and used as an instrument to punish a man for an illegal or unauthorised act complete before the jurisdiction of the court can be supposed to have attached. I will only add that it is very much to be regretted that the managers of a charitable institution which has done, and is I have no doubt doing, an immense deal of good, should have tried to put off a troublesome correspondent by letters which, to say the least, were uncandid and misleading.

**A LORD MORRIS.**—I concur in the judgment which has been moved, but I desire to say that in doing so I adopt the reasons assigned and the views given of the law both in the Queen's Bench Division and in the Court of Appeal as the foundation of my concurrence in the judgment.

**B LORD HANNEN.**—I entirely concur in the conclusions at which your Lordships have arrived, and I have only to add that the opinion expressed by Lord HERSCHELL so exactly represents the view which I take of the case that I do not think it necessary to add anything to what has fallen from the noble and learned Lord.

*Appeal dismissed.*

Solicitors: *Nisbet & Daw; Leathley & Phipson.*

*[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]*

**D**

## MOORE v. MOORE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), July 15, 1892]

**E**

[Reported [1892] P. 382; 62 L.J.P. 10; 67 L.T. 530;  
8 T.L.R. 704; 1 R. 488]

*Divorce—Decree absolute—Decree nisi on wife's petition not made absolute—Wife going through ceremony of marriage with another man—Later resumption of cohabitation with husband—Renewed cruelty—Revival of previous offences.*

**F**

In 1884 the wife was granted a decree nisi on the grounds of her husband's adultery and cruelty, but no steps were taken to make the decree absolute. In May, 1885, the wife, believing that the marriage was dissolved six months after the decree nisi, went through a form of marriage with a man with whom she lived, and by whom she had two children, until he died in June, 1889. In January, 1890, she resumed cohabitation with the husband who told her that she was not divorced from him, but, owing to his cruelty towards her, she left him in November, 1891. On an application by the wife to make the decree nisi of 1884 absolute, the Queen's Proctor intervening,

**G**

**Held:** while the wife's resumption of cohabitation with her husband condoned his previous marital offences, that condonation was only conditional and his subsequent cruelty revived the previous offences; in those circumstances and the other circumstances of the case, the petitioner should not be debarred from obtaining a decree absolute.

**H**

**Notes.** Considered: *Rogers v. Rogers*, [1894] P. 161. Applied: *Elwes v. Elwes*, [1950] 1 All E.R. 826. Referred to: *Whitworth v. Whitworth*, [1893] P. 85; *Braddock v. Braddock* (1910), 27 T.L.R. 94; *Beard v. Beard*, [1945] 2 All E.R. 306.

**I**

As to decree absolute, see 12 HALSBURY'S LAWS (3rd Edn.) 405 et seq.; and for cases see 27 Digest (Repl.) 437, 438.

Cases referred to:

- (1) *Dent v. Dent* (1865), 4 Sw. & Tr. 105; 34 L.J.P.M. & A. 118; 13 L.T. 252; 164 E.R. 1455; 27 Digest (Repl.) 399, 3283.
- (2) *Collins v. Collins* (1884), 9 App. Cas. 205; 32 W.R. 501, H.L.; 27 Digest (Repl.) 410, 3388.
- (3) *Noble v. Noble and Godman* (1869), L.R. 1 P. & D. 691; 38 L.J.P. & M. 52; 20 L.T. 1016; 27 Digest (Repl.) 437, 3665.



Also referred to in argument:

*Durant v. Durant* (1825), 1 Hag. Ecc. 733; 162 E.R. 734; 27 Digest (Repl.) 396, 3265.

*Worsley v. Worsley* (1730), 2 Lee, 572; 1 Hag. Ecc. 734; 161 E.R. 444; 27 Digest (Repl.) 411, 3394.

**Application** to make a decree nisi absolute on an intervention of the Queen's Proctor.

The petitioner, Ernestine Catherine Moore, was born of German parents in England, and married the respondent in 1874. In July, 1883, she filed a petition, praying for a divorce on the grounds of her husband's adultery and cruelty, and for the custody of the children of the marriage. On June 24, 1884, a decree nisi was granted. That decree had never been made absolute. The petitioner's reasons for this, as detailed in evidence, were that she knew that she had to allow six months to elapse from the date of the decree nisi, but that she did not know of any decree absolute being required, and she did not trouble any more about the divorce, and did not leave her address with her solicitors. She was moving about a good deal at that time, and she did not remember receiving from her solicitors a letter dated Jan. 22, 1885, and addressed to her in reference to the divorce. Alimony stopped as soon as the decree nisi was obtained. She never received or read any copy of that decree. In May, 1885, she married James Brown, with whom she lived till his death, in June, 1889, and by whom she had two children. She described herself in the marriage certificate as a "spinster," because she had been told that a divorced woman should describe herself as "single."

In January, 1890, the respondent husband returned, and told her that she had been living in adultery with Brown, because she had not got her decree nisi made absolute before she married him. Until then she had only seen the husband on one occasion since the decree nisi, and had never heard about any decree absolute before January, 1890. She was, at that time, carrying on a small business, and had got a home together for herself and the children. The husband wanted to come and live with her again. She told him that it would first be necessary for them to be married again. He said that was not so, as she was not divorced. He said that it would be better for the children that he and she should live together again, and he promised, if she would consent to take him back, that he would be different in his behaviour towards her. She consented, and some of her friends found him a situation, but he gave her none of his wages, and he soon lost his place, and took to drinking again. She was obliged to give up the business, and removed to 58, King's Road, Camden Town, and let apartments to earn a little money. In October, 1891, the husband came home intoxicated, and knocked her down. She fell against the kitchen fender. He struck her, and she became insensible. When she returned to consciousness, she found the top of one of her fingers nearly off. She tried to rise, and he then struck her three times. On Nov. 10, 1891, the husband committed another violent assault on her, and she was in bed for four days. He said he would "do twelve months" for her. In consequence of his violence, she left him altogether about the middle of November, 1891, and had never lived with him since. She went to her mother's. Some of the children went there, and others to friends of hers. She had been earning her living since then. After finally leaving the husband, the wife went to consult her present solicitor, and, by his advice, she volunteered to the Queen's Proctor a full statement of all the facts. The Queen's Proctor thereupon intervened. The cruelty in October and November, 1891, was corroborated by three witnesses, and GORELL BARNES, J., said that he was fully satisfied as to that part of the case.

*Bromby* for the wife.

*Guy Stevenson* for the Queen's Proctor.

**GORELL BARNES.**—*Dent v. Dent* (1) appears to me to be precisely in point on the question of revival of a matrimonial offence, and I do not see that the observations of LORD BLACKBURN in *Collins v. Collins* (2) overrule that decision.

- A [His LORDSHIP stated the facts.] Having regard to the circumstances and the way in which the petitioner gave her evidence, and also having regard to the fact that from her German origin she may not have been fully alive to the necessary details of procedure, I think she honestly believed—and the Queen's Proctor also seems to have come to that conclusion—that she was legally right in going through the ceremony of marriage with another person. According to the decision in
- B *Noble v. Noble and Godman* (3), if the court is satisfied that the petitioner, in going through the form of a second marriage, honestly believed that she was entitled to do so by reason of the decree nisi, she ought not to be debarred from obtaining her decree absolute.

- A further point arises on this case, which is one of some novelty, and has not been the subject of any previous decision. It arises thus. In June, 1889, the man
- C Brown died, and the petitioner some time in the following year seems to have met the respondent, who informed her of her position in consequence of the decree nisi not having been made absolute, and invited her to resume cohabitation. She apparently thought it was for the interests of her children that she should renew cohabitation, and she continued to live with him until he treated her with great cruelty. No doubt that cohabitation was in itself a condonation of the former
- D marital offences; but I cannot see why the fact that the petitioner went through a form of marriage with another person should debar her from the benefit of the ruling in *Dent v. Dent* (1), that condonation is only conditional, and that a matrimonial offence committed after condonation revives the offences committed before it. It follows, therefore, that the subsequent cruelty of her husband places the petitioner in the position which she occupied when she obtained a decree nisi, and entitles
- E her to have that decree made absolute. I, therefore, dismiss the Queen's Proctor's intervention, and the decree will be made absolute on the usual affidavits.

Solicitors: *J. D. Langton; Sir A. K. Stephenson.*

[*Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.*]

F

G

## REISCHER v. BORWICK

[COURT OF APPEAL (Lindley, Lopes and Davey, L.JJ.), June 29, July 2, 1894]

[Reported [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238;

10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558]

H

*Insurance—Marine insurance—Proximate cause of loss—Insurance against collision with any object—Collision with snag in river—Temporary repair of damage—Renewed leaking leading to loss of vessel.*

- A ship was insured against damage received in collision with any object, but not against perils of the sea. During the currency of the policy, the ship
- I ran against a floating snag in a river, the collision, among other things, breaking the cover of a condenser and leaving an opening. Temporary repairs in the form of plugs in the ejection pipes running from the condenser were effected, and a tug was sent to tow the ship to a place where she could be thoroughly repaired. While she was being towed, one of the plugs came out, the ship began to leak, and she was run aground and abandoned.

**Held:** the collision was the proximate cause of the loss, since the damage resulting from it remained throughout, and, accordingly, the loss of the ship was covered by the policy.

**Notes.** Considered: *Jeyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918-19] All E.R.Rep. 443. Applied: *The Christel Vinnen*, [1924] All E.R.Rep. 197. Considered: *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R.Rep. 66; *Marine Insurance Co., Ltd. v. Liverpool Marine and General Insurance Co., Ltd.*, [1928] All E.R.Rep. 452; *Board of Trade v. Hain Steamship Co., Ltd.*, [1929] All E.R.Rep. 26. Applied: *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033. Referred to: *Becker, Gray & Co. v. London Assurance Corpn.*, [1916-17] All E.R.Rep. 146; *Charente Steamship Co. v. Transports Director* (1921), 38 T.L.R. 148; *Mancomunidad del Vapor Frumiz v. Royal Exchange Assurance* (1926), 43 T.L.R. 103; *Clan Line Steamers, Ltd. v. Board of Trade, The Clan Matheson*, [1929] All E.R.Rep. 17; *Occan Steamship Co., Ltd. v. Liverpool and London War Risks Insurance Association, Ltd., The Priam*, [1946] 2 All E.R. 355; *Royal Greek Government v. Minister of Transport* (1949), 66 (pt. 1), T.L.R. 504; *West Wake Price & Co. v. Ching*, [1956] 3 All E.R. 821.

As to proximate cause of loss, see 22 HALSBURY'S LAWS (3rd Edn.) 90 et seq.; and for cases see 29 DIGEST (Repl.) 237 et seq.

Case referred to:

- (1) *Pink v. Fleming* (1890), 25 Q.B.D. 396; 59 L.J.Q.B. 151, 559; 63 L.T. 413; 6 T.L.R. 432; 6 Asp.M.L.C. 554, C.A.; 29 Digest (Repl.) 234, 1764.

Also referred to in argument:

*Dudgeon v. Pembroke* (1877), 2 App. Cas. 284; 46 L.J.Q.B. 409; 36 L.T. 382; 25 W.R. 499; 3 Asp.M.L.C. 393, H.L.; 29 Digest (Repl.) 230, 1716.

*Davidson v. Burnand* (1868), L.R. 4 C.P. 117; 88 L.J.C.P. 73; 19 L.T. 782; 17 W.R. 121; 3 Mar.L.C. 207; 29 Digest (Repl.) 224, 1663.

**Appeal** by the defendants from an order of KENNEDY, J.,

The plaintiff was the owner of the steam tug *Rosa*, which was insured by the defendants. The risks insured against in the policy were "the risk of collision (as per clause attached) and damage received in collision with any object, including ice," while in the Danube or its tributaries. The clause attached related to collision with other vessels, and the policy did not include perils of the sea. During the currency of the policy, on Mar. 4, 1892, while the *Rosa* was engaged on a trip in the Danube, she ran against a floating snag, which first struck the bottom of the ship and then fouled the port paddle-wheel and damaged the vessel. That damage included serious injury to the engine-room machinery, and amongst other things the breaking of the cover of the condenser, which left an opening some twenty square inches in area. In consequence of the damage received, the vessel commenced leaking and there was imminent danger of the entrance of water through the ejection pipes and the connection therefrom into the ship through the broken condenser cover. As speedily as possible those pipes were plugged from the outside. The captain immediately sent for assistance to the owner, and assistance came in the shape of a tug called the *Olga*, which arrived on Mar. 6, and on that night commenced to tow the vessel to a place where she could be repaired and the damage made good. On the morning of Mar. 7, while she was being towed by the *Olga*, a large quantity of water poured into the engine-room through the hole in the condenser cover, and caused the vessel to fill rapidly. The inrush of water was caused by the plug which had been placed in the ejection pipe on the port side of the *Rosa* having suddenly fallen out. The towing was stopped, and an attempt was made to stop up the aperture in the ejection pipe, but without success. In order to prevent the *Rosa* from sinking in deep water, as otherwise she would have done, the *Olga* towed her towards the southern bank of the river, but, while this was being done, the *Olga* suddenly took the ground, and the *Rosa* became stranded and partly submerged, and was abandoned.

The plaintiff claimed damages for the total loss of the vessel. The defendants paid into court a sum sufficient to satisfy their liability, if any, for the damage sustained by the collision with the snag up to the time when the vessel was taken in tow by the *Olga*, but with a denial of liability. With respect to the subsequent



A damage, they contended that they were under no liability, on the ground that the proximate cause of that damage was not the collision, but the towing to a port of repair. KENNEDY, J., overruled this contention, and gave judgment for the plaintiff for the full amount claimed.

*Pickford, Q.C., and J. A. Hamilton* for the defendants.

B *Cohen, Q.C., and C. C. Scott* for the plaintiff.

*Cur. adv. vult.*

July 2, 1894. LINDLEY, L.J.—There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard “proximate” and not “remote” causes of loss. This rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions. The risks insured against in this policy are:

“the risk of collision (as per clause attached), and damage received in collision with any object, including ice.”

D The “risk of collision as per clause attached” refers to collisions with other ships, and may be disregarded. The other risk refers to, and includes, such a collision as took place in the present case, viz., a collision between the ship insured and a snag in the river which she was navigating. She was injured by a peril insured against, and liability to make good that injury has arisen, and is not denied. The extent of that liability is the matter in dispute. Is the liability confined to repairing the injured parts? If not, does the liability extend to making good all loss or damage which is, in fact, attributable to the injury occasioned by the collision?

E The liability of the underwriters cannot, I think, be restricted to repairing the injured parts, and, indeed, counsel for the defendants did not seriously contend that it could. If the ship had sunk, and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the damage would not be the measure of the liability of the underwriters. The moment, however, that this conclusion is arrived at, it is difficult to see on what principle liability for a loss occasioned by that injury can be excluded, except on the ordinary principles applicable to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, show that

H no liability attaches under a policy such as the present.

I Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts while she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a “proximate” cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy. Negligence or mismanagement on the part of those on board the ship is not suggested. To stop up the ejection pipes was right and proper, and, although one of them became unstopped and water reached the injured parts through this unstopped pipe, this was not the result of negligence. All was done that could be done to save the ship and get her out of harm’s way, and she sank because, notwithstanding all efforts to keep water out of her, water got into her through the hole in her condenser cover which had been caused by the collision.

I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed, it is comparatively easy to distinguish them and to trace their respective effects, but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—i.e., under circumstances which, but for the injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of that loss—the *causa causans* and not merely the *causa sine qua non*. I am not aware of any authority opposed to this view. It is consistent with the judgment in *Pink v. Fleming* (1), which is more favourable to the defendants than any other authority cited or known to me. In my opinion, the judgment appealed from is correct, and this appeal must be dismissed, with costs.

**LOPES, L.J.**—This is a policy indemnifying the insurers against “the risk of collision” (by which I understand collision with other ships) “and damage received in collision with any object, including ice.” The question is, under the circumstances of this case, was the damage “received in collision” with a snag in the river Danube? It is admitted that damages for the injury sustained by the condenser are recoverable, but it is contended that what subsequently happened was not attributable to the collision as a proximate cause, but to some intervening and independent cause. [His LORDSHIP stated the facts, and continued:] In cases of marine insurance, it is well-settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them. Damage received in collision must, therefore, in this case be the proximate cause of the loss to entitle the plaintiff to recover. The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of the plug in the outside of this vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision (that is, the broken condenser) never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable.

It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances. This may have been a concurrent cause, and one without which the loss would not have happened, but, in my judgment, it is not, but the broken condenser is, the proximate cause. The appeal must, therefore, be dismissed.

**DAYEY, L.J.**—In this case, the defendants admit that damage done by water coming through a hole caused by a collision with any object is damage against which the assurers are bound to indemnify the assured. What is the *causa proxima* of the damage caused in this case? The only answer seems to me to be the inroad of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot, in my opinion, be justly described as the cause of the ultimate damage. I, therefore, agree in the judgments which have been given.

*Appeal dismissed.*

Solicitors: *Vanderpump & Eve; Waltons, Johnson, Bubb & Whatton.*

[Reported by W. C. Briss, Esq., Barrister-at-Law.]

A

## R. v. BLABY

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Hawkins, Cave and Grantham, JJ.), April 21, 1894]

B

[Reported [1894] 2 Q.B. 170; 63 L.J.M.C. 133; 70 L.T. 879; 58 J.P. 576; 42 W.R. 511; 10 T.L.R. 431; 38 Sol. Jo. 420; 18 Cox, C.C., 5; 10 R. 277]

*Criminal Law—Uttering counterfeit coin—Subsequent offence—Evidence of previous conviction—Certificate of conviction—Coinage Offences Act, 1861 (24 & 25 Vict., c. 99), s. 9, s. 12.*

C

By s. 9 of the Coinage Offences Act, 1861, a person who utters counterfeit coin is guilty of a misdemeanour, and, being convicted thereof, is liable to imprisonment. By s. 12, a person who has been convicted of a misdemeanour under s. 9 and who subsequently commits a misdemeanour under that section is guilty of a felony. By s. 37, a certificate stating the substance and effect only of the indictment, charging and conviction of the previous offence is sufficient evidence of that previous conviction. The prisoner was indicted for felony under s. 12, and a certificate of previous conviction under s. 9 was produced which showed that she had been released on finding one surety for her appearance to hear judgment when called on.

D

**Held:** the word "convicted" in s. 9 and s. 12 meant only "having been found guilty" and must not be taken to include judgment or sentence; accordingly, the prisoner was liable to conviction under s. 12.

E

**Notes.** The Coinage Offences Act, 1861, has been repealed; for ss. 9 and 12, see now the Coinage Offences Act, 1936, s. 5. Section 37 has not been reproduced, but see, e.g., s. 18, of the Prevention of Crimes Act, 1871: 5 HALSBURY'S STATUTES (2nd Edn.) 875.

F

Considered: *R. v. Sheridan*, [1936] 2 All E.R. 883; *R. v. Manchester Justices*, *Ex parte Lever*, [1937] 3 All E.R. 4. Referred to: *R. v. Rabjohns* (1913), 109 L.T. 414.

As to coinage offences, see 10 HALSBURY'S LAWS (3rd Edn.) 642 et seq.; and for cases see 15 DIGEST (Repl.) 864 et seq. For the Coinage Offences Act, 1936, s. 5, see 5 HALSBURY'S STATUTES (2nd Edn.) 1080.

G

Cases referred to in argument:

*R. v. Miles* (1890), 24 Q.B.D. 423; 59 L.J.M.C. 56; 62 L.T. 572; 54 J.P. 549; 38 W.R. 334; 6 T.L.R. 186; 17 Cox, C.C. 9, C.C.R.; 14 Digest (Repl.) 384, 3752.

*Burgess v. Boetefeur* (1844), 7 Man. & G. 481; 8 Scott, N.R. 194; 13 L.J.M.C. 122; 3 L.T.O.S. 161; 8 Jur. 621; 8 J.P.Jo. 358; 135 E.R. 193; 14 Digest (Repl.) 575, 5744.

H

*Jephson v. Barker and Redman*, *Swan v. Barker and Redman* (1886), 3 T.L.R. 40; 15 Digest (Repl.) 904, 8711.

*R. v. Ackroyd and Jagger* (1843), 1 Car. & Kir. 158; 1 L.T.O.S. 414; 1 Cox, C.C. 46; 14 Digest (Repl.) 578, 5781.

*R. v. Stonnell* (1845), 4 L.T.O.S. 474; 9 J.P. 183; 1 Cox, C.C. 142; 14 Digest (Repl.) 578, 5782.

I

*R. v. Kenworthy* (1823), 1 B. & C. 711; 107 E.R. 261; 16 Digest (Repl.) 485, 3040.

**Case Stated** by the Common Serjeant of London.

This prisoner was tried at the Central Criminal Court for feloniously uttering counterfeit coin under s. 12 of the Coinage Offences Act, 1861. The prisoner was given in charge to the jury on the first part of the indictment only, viz., that which charged her with uttering a counterfeit florin, on Jan. 11, 1894, to Emily Hutchinson, well knowing it to be false and counterfeit. She pleaded guilty. The



prisoner was then given in charge to the jury on the second part of the indictment, which charged her with having been previously convicted on April 23, 1888, in the name of Ellen Edwards, of unlawfully uttering a counterfeit half-crown to Ellen Dann, knowing the same to be false and counterfeit. To this charge, she pleaded Not Guilty. A police officer was called who stated that he had been present in court when the prisoner was convicted on April 23, 1888, and produced a certificate of her conviction which read as follows :

“Central Criminal Court to wit. These are to certify that at the general session of the delivery of the Queen’s Gaol of Newgate, and other prisons holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, on Monday, the 23rd day of April, in the year of our Lord 1888, before certain justices of our said Lady the Queen, assigned to deliver the said gaols of the prisoners therein being, Ellen Edwards was in due form of law convicted on a certain indictment against her for that she did unlawfully utter a counterfeit half-crown to Ellen Dann, knowing the same to be false and counterfeit, against the statute, etc., and against the peace, etc., and the said Ellen Edwards was thereupon ordered to find one surety in the sum of twenty pounds for her appearance to hear judgment when called upon.—Dated the 30th day of January, 1894.—H. K. AVORY, Clerk of the said court.”

Counsel for the prisoner submitted there was no case to go to the jury, because in order to constitute a conviction there must be both verdict and judgment; here there was no judgment, only an order, empowering the prisoner to be released on entering into a recognisance to come up for judgment. The Common Sergeant overruled the submission, and the jury found that the prisoner was the person named in the certificate. The question for the court was whether the prisoner could properly be convicted of felony.

The Coinage Offences Act, 1861, provides :

“Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen’s current gold or silver coin, knowing the same to be false or counterfeit, shall . . . be guilty of a misdemeanour.”

“12. Whosoever, having been convicted either before or after the passing of this Act, of any such misdemeanour, or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanours or crimes and offences in any of the said sections mentioned, shall . . . be guilty of felony.”

“37. Where any person shall have been convicted of any offence against this Act . . . and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first committed, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court.”

*Burnie* for the prisoner.

*Sutton and Partridge* for the Crown.

- A** **HAWKINS, J.**, delivered the following judgment of the court.—I have no difficulty in expressing my opinion that this conviction should be affirmed, and on the very simple ground that s. 9 and s. 12 of the Coinage Offences Act, 1861, show clearly what construction should be placed on the word “convicted” as there used. It is unnecessary, therefore, to decide any of the questions which have been so ably argued by counsel for the prisoner.
- B** Section 9 of the Act enacts that whosoever shall put off any false or counterfeit coin shall be guilty of a misdemeanour, and being convicted thereof, that is to say, being found guilty of the misdemeanour, shall be liable to be imprisoned. The sentence was to follow the conviction. It is clear, therefore, that the intention of the legislature in enacting this was that, if a person was found guilty of an offence within the section, the legislature meant that to be treated as a conviction,
- C** and used the word “convicted” as meaning having been found guilty. In this case, the prisoner was clearly found guilty, for, on looking at the certificate, it shows that. It is true that there is no mention in it of an actual judgment or sentence, but that she had been found guilty the certificate established beyond all question.
- The prisoner was indicted under s. 12 of the Coinage Offences Act, 1861, which creates this new offence, and enacts that whosoever having been convicted of any
- D** such misdemeanour, or crime and offence, as in any of the last three preceding sections mentioned, that is to say, s. 9, s. 10 and s. 11, shall afterwards commit any of the misdemeanours, or crimes and offences, in any of the sections mentioned, shall be guilty of felony. The statute, therefore, makes that a felony which, had it been the first occasion on which the prisoner had been convicted, would have been a misdemeanour. The prisoner having pleaded guilty to the charge, in order
- E** to prove the previous conviction the certificate was put in and was admitted without objection. That certificate shows undoubtedly that the prisoner had been previously convicted. Such conviction was under s. 9, and she pleaded guilty to having committed a similar offence to that of which she had been convicted under s. 9. Therefore, it seems to us that she comes directly within the language of s. 12, and is guilty of the felony of which it is stated in the Case she has been
- F** convicted. It seems to me and to my learned brothers that the Case is beyond all argument when one comes to read s. 9 and s. 12. The conviction must, therefore, be affirmed.

*Conviction affirmed.*

Solicitors: *Treasury Solicitor; T. O. Evans.*

[*Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*]

## YARROW v. YARROW

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Charles Butt, P.), January 13, 1892]

[Reported [1892] P. 92; 61 L.J.P. 69; 66 L.T. 383; 8 T.L.R. 215]

*Divorce—Adultery—Defence to charge—Insanity.*

At the date of the filing of a husband's petition for the dissolution of his marriage on the ground of his wife's adultery, the wife was insane. Her guardian ad litem pleaded that, if she had committed adultery, she was not at the time responsible for her actions or capable of understanding the guilty nature of her acts, and so was not legally competent to consent to them.

**Held:** if, at the time of the acts of adultery, the wife was capable of appreciating the nature of the act and its probable consequences, her insanity was no defence, and, on the evidence, the defence of insanity failed.

**Quære,** whether such insanity as would entitle an accused person to an acquittal on an indictment for a criminal offence would constitute a valid defence to a claim for relief in a Divorce Court on the ground of adultery.

**Notes.** Referred to: *Astle v. Astle*, [1939] 3 All E.R. 967; *White v. White*, [1949] 2 All E.R. 389; *Lissack v. Lissack*, [1950] 2 All E.R. 283; *S. v. S.*, [1961] 3 All E.R. 133.

As to bars to relief in divorce petitions, see 12 HALSBURY'S LAWS (2nd Edn.) 291 et seq.; and for cases see 27 DIGEST (Repl.) 372 et seq.

**Petition** by the husband for divorce on the ground of his wife's adultery with divers men unknown.

The parties were married at St. Giles's Church, Camberwell, Surrey, in 1874, the age of the husband being twenty-eight and that of the wife twenty. There was no issue of the marriage. Shortly after the marriage they went to Monte Video, where they remained about twelve years, during which time the husband carried on the business of a corn merchant. While on the voyage, the wife confessed to the husband that she had led a life of immorality before marriage, and had contracted a venereal disease. In 1886 they returned to this country, and subsequently settled in Hertfordshire. They lived happily together until about 1890, when the wife's feelings towards her husband suddenly changed. In the course of that year, she expressed a wish to go to London, for the alleged purpose of consulting a doctor; and, on the husband offering to go with her, or to send a servant to accompany her, she persistently declared that she would go alone. Accordingly, in July, 1890, she went to London, and did, in fact, consult the doctor who had formerly attended her, and who assured her that there was nothing the matter with her. She engaged lodgings in Bernard Street, Brunswick Square, and, while residing there, on several occasions she took men to the house and committed adultery with them in her rooms. The identity of the men was unknown to the landlady, and it appeared that the wife had met them casually in the streets. The wife wrote to her husband informing him that she had committed adultery, and expressing her intention to do so again. She suggested that he should apply for a divorce, and added that, if he did not care to get a divorce, he would have to maintain her. In an interview which she subsequently had with the husband's solicitor, she repeated these statements.

The husband did not at once file his petition, being unwilling to cast her off altogether, and negotiations took place with a view to a separation by deed. These, however, were broken off, owing to the husband's advisers insisting upon, and the wife objecting to, the clause *dum casta vixerit*. On Aug. 18, the husband's solicitor had an interview with the wife, on which occasion she stated to him that she knew perfectly well that she was frequently committing adultery, and she fully intended to go on doing so. On Sept. 23, she went, clad only in her night-dress, to a neighbouring police-station, and asked the police to protect her from some imaginary danger. She talked in an incoherent manner about "knives" and



A "poison." She was then undoubtedly insane, and was subsequently taken to an asylum, where she had since remained. It appeared, from the evidence of the husband, that before she left him in July, 1890, she had at various times talked about "poison," and had accused him of administering to her some poisonous drug, with the alleged object of weakening her sexual passions and of reducing her to the same state, in this respect, as she said he was himself in. The wife being, B at the time the petition was presented, confined in an asylum, her brother was appointed to act as her guardian ad litem. In the answer put in by him on her behalf, he formally denied the alleged acts of adultery, and said that the wife was of unsound mind at the dates when the acts were said to have been committed. He further pleaded, "that if she did commit any or either of the alleged acts of adultery she was at the time not in any way responsible for her actions or capable C of understanding the guilty nature of the acts which she committed; and that she was not legally competent to consent to the commission of such acts."

*The Solicitor-General (Sir Edward Clarke, Q.C.), and Bargrave Deane for the husband.*

*Inderwick, Q.C., and Marshall Hall for the wife.*

D **SIR CHARLES BUTT, P.**, in delivering judgment, said.—Even assuming the wife to have been of unsound mind and subject to insane delusions on some points which have been referred to, I am of opinion, that, if at the time she committed adultery, she was capable of appreciating the nature of the act and its probable consequences, such insanity would be no defence to the husband's claim to have his marriage dissolved. The case, albeit a very painful one, is not one which E presents much difficulty. There can be no possible doubt that the acts of adultery alleged against the wife are fully established by the evidence which has been called in support of those charges. In addition to this, the wife has written letters confessing adultery. It was, however, contended, on behalf of the wife, that, at the time when the acts of adultery were committed by her, she was of unsound mind and not in any way responsible for her actions, or capable of appreciating the guilty F nature of those acts, and that she was, in law, incapable of consenting to the commission of any of them. But this allegation that she was incapable of understanding their nature and consequence is absolutely negatived by the evidence which has been adduced.

There remains, however, for decision the question whether the wife was, at the time of the adultery, so insane as to render her then state of mind a defence to the suit. The evidence has clearly established as a fact that, at the time when the G improper intercourse with men unknown occurred, the wife, though not absolutely sane or free from delusions, was perfectly capable of appreciating the nature of the acts which she was committing and the consequences which those acts would probably entail. That being so, if the acts in question had been not only criminal but punishable by the criminal law, the defence of insanity could not have prevailed. That view probably goes further than is necessary for the purposes of the H present case, because I am by no means certain—and I express no opinion on this point—that such insanity as would entitle an accused person to an acquittal on a criminal indictment would constitute a valid defence to a claim for relief in this court on the ground of adultery.

I In order that the wife may be under no difficulty in carrying the case to a higher tribunal, should she be so advised, I desire to state that the present decision is based on a finding, that the wife left her home under an insane delusion that her husband was administering, or was attempting to administer, poison to her, and that she believed, at the time she committed the adultery, that this act of hers might probably be the means of bringing about a divorce. That being my view of the case, I hold that the defence of insanity fails, and that the husband is entitled to the relief which he prayed for. I, therefore, pronounce a decree nisi.

*Solicitors: Stoneham & Jones; Robinson.*

*Decree nisi.*

[*Reported by H. DARLEY-GRAZEBROOK, ESQ., Barrister-at-Law.*]

## ALLEN v. ALLEN

[COURT OF APPEAL (Lindley, A. J. Smith and Davey, L.JJ.), December 13, 1893]

[Reported [1894] P. 134; 63 L.J.P. 78; 70 L.T. 326; 42 W.R. 230;  
10 T.L.R. 161; 38 Sol. Jo. 128; 6 R. 585]

*Divorce—Costs—Security for wife's costs—Discretion of court—Exercise with regard to all circumstances of case—Relative incomes of spouses—Wife in possession of separate estate.*

Where an application was made by a wife under the Rules and Regulations in Divorce and Matrimonial Causes, r. 158, for an order directing her husband to pay her costs already incurred and to give security for her future costs, the judge had a discretion to be exercised having regard to all the circumstances of the case, and that he might take into account the relative incomes of the husband and the wife, and was not bound to refuse the application because the wife had separate property much more than sufficient to pay her costs.

**Notes.** For r. 158 of the Rules and Regulations in Divorce and Matrimonial Causes (Dec. 26, 1865), see now r. 67 of the Matrimonial Causes Rules, 1957.

Applied: *Williams v. Williams*, [1928] All E.R.Rep. 238. Considered: *Luff v. Luff*, [1949] 2 All E.R. 753. Referred to: *Halls v. Halls and Lukover*, [1938] 4 All E.R. 573.

As to security for wife's costs, see 12 HALSBURY'S LAWS (3rd Edn.) 358 et seq.; and for cases see 27 DIGEST (Repl.) 505 et seq.

Cases referred to in argument:

*Russell v. Russell*, [1892] P. 152; 61 L.J.P. 45; 66 L.T. 436; 8 T.L.R. 442; 36 Sol. Jo. 346, C.A.; 27 Digest (Repl.) 510, 4525.

*Robertson v. Robertson and Favagrossa* (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880, C.A.; 27 Digest (Repl.) 570, 5258.

*Wilson v. Wilson* (1797), 2 Hag. Con. 203; 161 E.R. 716; 27 Digest (Repl.) 508, 4510.

*Westmeath v. Westmeath* (1827), 2 Hag. Ecc. Supp. 61; 162 E.R. 1012; on appeal (1829), 2 Hag. Ecc. Supp. 134; 27 Digest (Repl.) 400, 3300.

*D'Aguilar v. D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, 4256.

*Ronalds v. Ronalds* (1875), L.R. 3 P. & D. 259; 27 Digest (Repl.) 486, 4251.

*Carstairs v. Carstairs and Dickenson* (1864), 3 Sw. & Tr. 538; 4 New Rep. 381; 33 L.J.P.M. & A. 170; 10 L.T. 696; 12 W.R. 1015; 164 E.R. 1384; 27 Digest (Repl.) 640, 6021.

**Appeal** by the husband from an order of GORELL BARNES, J.

On Mar. 17, 1893, the wife filed a petition for judicial separation on the ground of cruelty, and the next day her husband filed a petition for divorce on the ground of adultery. The suits were afterwards consolidated. On Mar. 19, the wife presented a petition for alimony pendente lite. The husband had an income of about £4,000 a year, and the wife had separate property producing an income of about £280 a year. On June 23, an order was made directing the husband to allow the wife alimony pendente lite at the rate of £500 a year, in addition to her separate income. In August, the wife took out a summons for her husband to show cause why he should not be ordered to pay her taxed costs of suit up to the time of setting down the cause, and to pay into court or give security for a sufficient sum of money to cover her future costs of and incident to the hearing. The summons came before the judge on Aug. 12, who directed the parties to go before the registrar.

On Nov. 17, the registrar reported as follows:

"It having been referred to me to report as to the means respectively of the husband and wife in this suit, and whether, having regard to their respective

A incomes, the husband should be ordered to pay the wife's costs already incurred, and to secure to the wife the costs of the hearing or otherwise, I beg to report as follows: Since the allotment of alimony the solicitors for both parties have been before me, and I have carefully reconsidered their respective incomes. The husband's means are derived from various investments."

B He then made some observations with reference to the fluctuations in their value, and continued:

C "I think, therefore, that the husband's income may be considered to amount to about £4,000 a year. The wife has an income of £280 derived from various investments, and a further sum of £500 a year has been awarded her during the suit for alimony. The husband's income would therefore, after deducting £500 a year for alimony, amount to about £3,500, and the wife's, with the alimony, to £780—i.e., £280 would be her income absolutely, and a further allowance of £500 a year, but only during the suit. The suit is an expensive one, as there have already been two commissions, at the husband's instance, to France. The wife's costs already incurred amount (subject to taxation) to £318, and £90 have been already paid to her in respect of these costs, and probably about another £50 will be incurred before the trial. It is submitted that the husband should be ordered to pay the costs already incurred and pay or secure the costs of the hearing."

D On Nov. 20, the case came before GORELL BARNES, J., who made the order asked by the summons. During the argument it was admitted that the £6,000 which produced the wife's income of £280 a year, was her absolute property.

E *Lockwood, Q.C.*, and *Searle* for the husband.

*Lawson Walton, Q.C.*, and *R. H. Pritchard* for the wife.

LINDLEY, L.J.—This is an appeal by the husband from an order of GORELL BARNES, J., directing him to pay the wife's costs already incurred, and to pay or secure her costs of the hearing. This order was made in accordance with the usual F practice of the Divorce Court that the husband should be ordered to put the wife in funds to pay her costs of the proceedings. The appeal is founded on the argument that there is no occasion for such an order, as the wife has property amply sufficient to enable her to defend herself. The suit has not yet come on for trial. Alimony pendente lite has been ordered at the rate of £500 per annum, and her own income, arising from separate property to which she is absolutely entitled, is £280 a year. The order for alimony was made after considering the incomes of herself and her husband, hers being £280 and his about £4,000 a year. After this G the wife took out a summons for the husband to show cause why he should not pay her costs up to the setting down for trial, and pay into court or secure a sufficient sum to cover her costs of the hearing. The matter was referred to the registrar, who, after considering the income of the husband and the income of the H wife, including the allowance for alimony, submitted that the husband should be ordered to pay the wife's costs already incurred, and to pay or secure the costs of the hearing. GORELL BARNES, J., made an order in conformity with this report.

Whether this order is right depends on r. 158 of the Rules and Regulations of Dec. 26, 1865. That rule, as amended in 1875, is as follows:

I "After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of the cause, by order of the judge ordinary or of the registrar, to be obtained on summons, a wife who is petitioner or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband; and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial shall have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum



within a time to be fixed by the registrar: provided that in case the husband should, by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the court as to his liability."

Under that rule it is obvious that the judge has a discretion, not merely as to the amount, but whether an order ought under the circumstances to be made at all against the husband. I will assume that the present case is not within s. 49 of the Judicature Act, which prohibits appeals as to costs, for that section may, perhaps, be held not to apply to an order made *pendente lite* to pay costs or secure costs. Still the order is a discretionary order, and we should not interfere with it unless the judge has gone on a wrong principle, or gone so far wrong as to cause a miscarriage of justice.

It is contended on behalf of the husband that the judge has proceeded on a wrong principle, and that, on the question whether the husband shall be ordered to pay or secure the wife's costs, the relative incomes of the parties ought not to have been taken into consideration; but that the only question is whether the wife has property enough to enable her to pay her own costs. But the more I consider the case the more I think that the judge was right in considering their relative incomes. If we were to disturb the order as to costs, we should indirectly disturb the order as to alimony, for, if we were to make an order which would have the effect of reducing the wife's separate income by making it liable to costs, we should in fact be reducing the alimony. In considering the question of alimony, the court must consider the relative incomes, and so, reasoning back, since an order as to the wife's costs must affect the order for alimony, I cannot say that the judge was wrong in considering the relative incomes on the present occasion.

**A. L. SMITH, L.J.**—It is contended that the judge has proceeded on a wrong principle. In August, 1893, the wife took out a summons against her husband with reference to her costs. It was referred to the registrar, who reported that the husband had an income of about £4,000 a year, out of which he had to pay £500 a year for alimony, and that the wife had separate property bringing in £280 a year, in addition to the £500 a year alimony. **GORELL BARNES, J.**, made an order directing the husband to pay the wife's costs up to the hearing and to secure her future costs. It is contended that this is wrong because the wife has separate property sufficient to pay costs. But, if we look at r. 158, we shall see that **GORELL BARNES, J.**, was right. [His LORDSHIP read the rule, and continued:] In the proviso to this rule, "having separate property" must be read "having sufficient separate property." What is "sufficient" separate property? It has been argued that no order can be made against the husband if the wife has property which can be charged with her solicitor's costs, and is sufficient in amount to pay them. I do not think that the true meaning of the rule. An order has been made for alimony, and, if we were to reverse the order now appealed from, the alimony of £500 a year which was considered just when the wife had, in fact, £280 a year of her own would have to be adjusted. I think that it was for **GORELL BARNES, J.**, to decide what was sufficient separate property to make it right to refuse an order for costs pending suit. He may take into consideration what the husband has, but the main point is, has the wife sufficient separate property to prevent the order from being made? Of that question he is the judge, and we cannot say that, in deciding as he has, he has done wrong in taking into consideration the relative means of the parties.

**DAVEY, L.J.**—*Prima facie*, a husband suing his wife is, by the practice of the Divorce Court, liable to be ordered to make provision for her costs. Whether there are circumstances sufficient to take a case out of that rule it is for the judge of the court below to say. If it were shown that **GORELL BARNES, J.**, proceeded on a wrong principle, or took circumstances into consideration which he ought not to

**A** have taken into consideration, the appeal ought to succeed; but whether he exercised his discretion wisely as to amount is a question with which we ought not to interfere. It has been contended that the decision proceeded on a wrong principle, because it was founded on the relative incomes of the husband and wife, which it is said ought not to have been taken into consideration. What was it the learned judge had to decide? Whether the wife had a sufficient separate income to induce

**B** the courts to abstain from making an order for her costs. In my opinion, before coming to a conclusion on that, the income of the husband ought to be taken into consideration, for the means of the wife to defend the action must in some measure depend on what is necessary for her maintenance, and the wife of a man with £4,000 a year is entitled to spend more on her maintenance than the wife of a poorer man. Again, the alimony was settled with regard to the husband's means,

**C** and to alter the order now under appeal would practically interfere with the alimony. I am of opinion that GORELL BARNES, J., took nothing into consideration which he ought not to have taken, and that his discretion ought not to be interfered with.

*Appeal dismissed.*

**D** Solicitors: *J. R. Roberts* for *G. J. Simpson*, Sheffield; *F. A. K. Doyle*.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

**E**

## GREEN v. CHELSEA WATERWORKS CO.

[COURT OF APPEAL (Lindley, Kay and A. L. Smith, L.JJ.), February 8, 1894]

**F** [Reported 70 L.T. 547; 10 T.L.R. 259]

*Statutory Duty—Damage caused in performance—No negligence of statutory undertakers—Water—Water-pipe laid under statutory powers bursting and causing damage—Liability of waterworks company.*

**G** The defendants, under statutory powers, laid down a main water-pipe in a street near the plaintiffs' premises. The pipe burst, and water from it poured into the plaintiffs' premises causing damage to their stock. In an action for damages the jury found that the damage was not caused by the defendants' negligence in the management of the water-pipe.

**Held:** as the defendants were only doing what they were authorised to do under statutory powers and had not been guilty of any negligence, they were not liable for the damage caused.

**Rylands v. Fletcher** (1) (1868), L.R. 3 H.L. 330, distinguished.

**Notes.** Distinguished: *Charing Cross, West End, and City Electricity Supply Co., Ltd. v. London Hydraulic Power Co.*, [1914–15] All E.R.Rep. 85. Applied: *Longhurst v. Metropolitan Water Board*, [1948] 2 All E.R. 834. Considered: *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923. Referred to: *Swansea Corpn. v. Harpur*, [1912] 3 K.B. 493; *Markland v. Manchester Corpn.*, [1934] 1 K.B. 566; *North-Western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*, [1935] All E.R.Rep. 196; *Hale v. Jennings Bros.*, [1938] 1 All E.R. 579; *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471.

As to the exercise of statutory functions, see 30 HALSBURY'S LAWS (3rd Edn.) 685 et seq.; and for cases see 38 DIGEST (Repl.) 4 et seq.

Cases referred to:

(1) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.;

affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334. A

- (2) *Dunn v. Birmingham Canal Co.* (1872), L.R. 8 Q.B. 42; 42 L.J.Q.B. 34; 27 L.T. 683; 21 W.R. 266, Ex. Ch.; 36 Digest (Repl.) 75, 404.

Also referred to in argument :

*London, Brighton and South Coast Rail. Co. v. Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, 690. B

*Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, 8.

*Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P. 791; 43 Digest 1096, 267. C

*Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59.

*Snook v. Grand Junction Waterworks Co., Ltd.* (1886), 2 T.L.R. 308; 38 Digest (Repl.) 13, 51.

*National Telephone Co. v. Baker*, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 38 Digest (Repl.) 39, 203. D

*Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, 185.

*Dixon v. Metropolitan Board of Works* (1881), 7 Q.B.D. 418; 50 L.J.Q.B. 772; 45 L.T. 312; 46 J.P. 4; 30 W.R. 83; 38 Digest (Repl.) 40, 202.

*Southport Corpn. v. Ormskirk Union Assessment Committee*, [1894] 1 Q.B. 196; 63 L.J.Q.B. 250; 69 L.T. 852; 58 J.P. 212; 42 W.R. 153; 10 T.L.R. 34; 9 R. 46; Ryde, Rat. App. (1891-93) 438, C.A.; 38 Digest (Repl.) 497, 152. E

*Sadler v. South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q.B.D. 17; 58 L.J.Q.B. 421; 53 J.P. 694; 37 W.R. 582, C.A.; 43 Digest 353, 105.

**Appeal** by the plaintiffs from a decision of MATHEW, J., on further consideration in an action tried before him with a special jury.

The plaintiffs were fly proprietors, carrying on their business at 141, Upper Richmond Road, Putney, and the defendants were a waterworks company, authorised by certain statutes, namely, the Chelsea Waterworks Acts, 1852, 1875, and 1887 (15 & 16 Vict., c. clvi; 38 & 39 Vict., c. cviii; 50 & 51 Vict., c. xciv), to construct and maintain certain waterworks. The plaintiffs in their statement of claim alleged that the defendants had laid down and were the owners of a main water-pipe which passed along Putney Hill and near to the plaintiffs' premises, that this water-pipe was constantly filled with large quantities of water, and that, on Jan. 10, 1889, the water-pipe burst and the water therefrom poured down into the plaintiffs' premises, and did great damage to the plaintiffs' premises, horses and stock, and other property thereon. In the alternative, they claimed for loss and damage through the defendants' negligence. The defendants pleaded that they were empowered by their Acts and were obliged to construct and maintain the waterworks, and that the main was duly laid and maintained under and in pursuance of their statutory powers, and not otherwise. They also pleaded that the statement of claim disclosed no cause of action, on the ground that the defendants, being under a statutory obligation to supply water, were not liable for damage by its escape, unless caused by the negligence of the defendants, and they denied that they were guilty of any negligence, and said that the main was properly and skilfully constructed and laid down and kept in proper repair. The jury found that the damage to the plaintiffs' premises was not caused by the defendants' negligence in the management of their mains. On the question whether the defendants were liable as insurers, which the trial judge reserved for further consideration, he held that the defendants were not liable. The plaintiffs appealed. F



A *Henry Kisch* for the plaintiffs.

*Sir Richard Webster, Q.C., Moulton, Q.C., and English Harrison* for the defendants.

LINDLEY, L.J.—In my opinion, this is an experiment which ought not to succeed. Counsel for the plaintiffs has exercised his ingenuity in inviting the court to lay down the law differently from the way in which it ought to be laid down. So far as the action is based on negligence it is not maintainable, because the jury have found that there was no negligence. Then on what principle can the defendants be held liable except negligence? It was argued that they were liable by reason of the doctrine in *Rylands v. Fletcher* (1), and it was said that this was like the case of a landowner who stores water on his land so as to become a source of danger to his neighbours, and that, consequently, the defendants were bound to show that they were relieved by the Acts of Parliament under which they were constituted from the duty of keeping the water in their pipes. The fault of that argument is in the major proposition. *Rylands v. Fletcher* (1) was not a case of a company authorised to lay down water pipes by Act of Parliament. It was a case of a private individual storing water on his own land for his own purposes. There was no negligence on his part, but the principle of that case, as explained by LORD BLACKBURN in his judgment in the Court of Exchequer Chamber (L.R. 1 Exch. at pp. 279, 280), was that

“the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . This, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.”

And this is cited with approval by LORD CAIRNS, L.C., in his opinion in the House of Lords on appeal from that court. It is possible that that principle might have been applied to companies having statutory authority to make railways or carry water, but the court has declined to extend it to such cases. The same argument was used without success in *Dunn v. Birmingham Canal Co.* (2), where, without any negligence on the part of the company, water from the canal had flooded the plaintiff's mine. It was there held that the defendants were not liable expressly on the ground that the doctrine of *Rylands v. Fletcher* (1) was inapplicable to a company which was doing what it was authorised to do by Act of Parliament. That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision. Here the defendants were only doing what they were authorised to do by their Act, and, as they were not guilty of negligence, they are not liable for damage. The appeal fails, and must be dismissed with costs.

KAY and A. L. SMITH, L.JJ., concurred.

*Appeal dismissed.*

Solicitors: *A. Pope; Hollams, Sons, Coward & Hawksley.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

A

## Re HOWES. Ex Parte HUGHES

[COURT OF APPEAL (Lord Esher, M.R., Bowen and A. L. Smith, L.JJ.), July 1, 1892]

[Reported [1892] 2 Q.B. 628; 62 L.J.Q.B. 88; 67 L.T. 213;  
40 W.R. 647; 36 Sol. Jo. 629; 4 R. 4]

B

*Bankruptcy—Notice—Setting aside notice—Notice not in accordance with terms of final judgment—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 4 (1) (g).*

Judgment creditors obtained final judgment against the judgment debtor, the judgment being headed "H. and others, plaintiffs." In fact, the plaintiffs were trustees, and they served a bankruptcy notice on the judgment debtor requiring him to pay the amount obtained on the judgment to "H. and others (the trustees of St. John's Hospital, Northampton)." On an application by the judgment debtor to set aside the bankruptcy notice,

C

**Held:** the bankruptcy notice was not in accordance with the terms of the judgment and ought to be set aside.

**Notes.** The Bankruptcy Act, 1883, has been repealed. For s. 4 (1) (g) of that Act, see now s. 1 (1) (g) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 324).

D

Considered: *Re A Judgment Debtor (530 of 1908)*, [1908] 2 K.B. 474. Distinguished: *Re A Debtor (No. 2 of 1912)*, *Ex parte The Debtor* (1912), 106 L.T. 895. Considered: *Re Debtor (No. 41 of 1951)*, *Ex parte Debtor v. Hunter*, [1952] 1 All E.R. 107. Referred to: *Re Low, Ex parte Gibson*, [1895] 1 Q.B. 734; *Re Lynes, Ex parte Lester*, [1893] 2 Q.B. 113; *Lyons v. Collins*, [1936] 3 All E.R. 788; *Re A Debtor (No. 30 of 1956)*, *Ex parte The Debtor v. Harman*, [1957] 2 All E.R. 216.

E

As to the form of a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 279, 280; and for cases see 4 DIGEST (Repl.) 100-102.

**Appeal** by the judgment creditors against an order of the Divisional Court (POLLOCK, B., and VAUGHAN WILLIAMS, J.), affirming an order of the registrar of the Stafford County Court, setting aside a bankruptcy notice issued against the judgment debtor.

F

On Nov. 5, 1889, the Rev. N. T. Hughes and others, who were trustees of a charity known as St. John's Hospital, Northampton, issued a writ against the debtor, M. Howes, and his wife Elizabeth, for damages for breach of a covenant contained in a lease for lives. The writ set out not only the Rev. N. T. Hughes' name in full, but also the names of all the other trustees of the charity in question, but did not state that they were trustees. The judgment debtor appeared to the writ. On Dec. 5, a statement of claim was delivered, by which the creditors alleged that they were "the present trustees" of the hospital of St. John, and the owners of the reversion in the demised premises and that the claim against the debtor was as a legal personal representative of a deceased person, and also as beneficially interested in the lease. No statement of defence was delivered, and on April 24, 1890, interlocutory judgment was signed for want of defence against the debtor, and the question of damages was referred. On Aug. 11, final judgment was entered for £166 11s. 4d. against the debtor. The note of the judgment described it as having been obtained by the "Rev. N. T. Hughes and others, plaintiffs." No mention was there made of the names of the other trustees, or that the creditors were trustees. On Jan. 22, 1892, a bankruptcy notice was issued against the debtor, and duly served on him, requiring him within seven days after service

G

H

I

"to pay to the Rev. N. T. Hughes and others (the trustees of St. John's Hospital, Northampton), of the convalescent home, Weston Favell, in the county of Northampton, the sum of £250 16s. 6d. claimed by them as being

- A** the amount due on a final judgment obtained by them against you in the Queen's Bench Division of the High Court, dated Aug. 11, 1891;"
- or to secure or compound for the same, or to satisfy the court
- "that you have a counterclaim, set-off, or cross-demand against the said Rev. N. T. Hughes and others (the trustees of St. John's Hospital, Northampton), which equals or exceeds,"
- B** etc. On the application of the judgment debtor, the registrar of the county court set aside the bankruptcy notice. The judgment creditors appealed.
- Muir Mackenzie* for the judgment creditors.  
*H. Reed* for the judgment debtor.
- C** **LORD ESHER, M.R.**—I am of opinion that this appeal must be dismissed. This bankruptcy notice does not follow the terms of the judgment in the sense in which it ought to do so. In the judgment, the creditors are described "Hughes and others," whereas the bankruptcy notice requires payment to be made to "Hughes and others (trustees of St. John's Hospital)." That addition, although in law it may be mere surplusage, yet alters the character of the creditors in such a way as would probably puzzle the debtor. The notice is not in the terms of the judgment, as required by the Act. I go further. I say that, if a creditor obtains a judgment by default, and chooses to accept a judgment expressed in such terms as in this case (he need not accept such a judgment), and then issues a bankruptcy notice in similar terms, it is so unfair as to bring the case within the equitable jurisdiction of the bankruptcy court, and the court may refuse to enforce the notice.
- D**
- E** **BOWEN, L.J.**—I am of the same opinion. The bankruptcy notice does not follow the judgment because the words "trustees of St. John's Hospital" are added. We must either take cognisance of that addition or not. If we do, then the notice varies from the judgment. We must assume that "Hughes and others" means the persons named in the writ, but the addition "trustees of," etc., is not necessarily a description of the persons suing. If we reject the addition altogether, then the
- F** bankruptcy notice is in the terms of the judgment, but the question arises whether a bankruptcy notice calling on the debtor to pay "Hughes and others" can be a good notice. There is no information given who the others are, and it would be most oppressive to sanction such a bankruptcy notice. This is not a technical matter. The bankruptcy law is a law of a penal character, and it is not right that forms should be so varied as to cause confusion to the parties to whom they are
- G** addressed.
- A. L. SMITH, L.J.**—I am of the same opinion. In the judgment, Hughes and the other creditors claim against the debtor in their personal capacity, but in the bankruptcy notice they are claiming in a representative capacity as trustees, or, if they are not, they have not given their respective addresses.
- H** *Appeal dismissed.*
- Solicitors: *Phipps & Watkins* for *A. Phipps*, Northampton; *A. C. Doyle* for *F. W. Thompson*, Stafford.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]



## SOUTH HETTON COAL CO. v. NORTH-EASTERN NEWS ASSOCIATION, LTD., AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), October 30,  
November 28, 1893]

[Reported [1894] 1 Q.B. 133; 63 L.J.Q.B. 293; 69 L.T. 844;  
58 J.P. 196; 42 W.R. 322; 10 T.L.R. 110; 9 R. 240]

*Libel—Parties—Plaintiff—Corporation—Company—Capacity to bring action.*

Although a corporation or company cannot maintain an action for libel in respect of anything reflecting on its members personally, yet it can maintain an action for a libel reflecting on the management of its trade or business and injuriously affecting the corporation or company as distinct from the individuals which compose it. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. To maintain an action the corporation or company need not prove special damage.

*Libel—Fair comment—Questions for judge and jury—Public interest—Fairness of comment—Duty of jury.*

Where to an action for libel the defence of fair comment on a matter of public interest is pleaded the question whether the matter commented on is one of public interest is for the judge, and, the judge having held that there is some evidence that the comment is unfair, the question whether it is in fact unfair is for the jury. In deciding that question the jury must not dwell too much on isolated passages, but must consider the words complained of as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff, but if there are no such deviations, or the deviation is minute and within the latitude of fair discussion and the region of that diversity of opinion which may be fairly and reasonably entertained by different persons on the same subject-matter, they should find for the defendant.

*Libel—Damages—No need to prove damage—Presumption of damage—Damages at large.*

In an action for libel damage is presumed and the plaintiff need not prove any particular damage. The damages are at large, and the jury can give such damages as they think right having regard to the conduct of the parties and all the circumstances of the case.

**Notes.** Considered: *Willmott v. London Road Car Co.*, [1908-10] All E.R. Rep. 908. Referred to: *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L.T. 8; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T.L.R. 389; *Adam v. Ward* (1915), 31 T.L.R. 299; *Pratt v. British Medical Association*, [1918-19] All E.R. Rep. 104; *Knuppfer v. London Express Newspaper, Ltd.*, [1942] 2 All E.R. 555; *D. and L. Caterers, Ltd. and Jackson v. D'Anjou*, [1945] 1 All E.R. 563; *National Union of General and Municipal Workers v. Gillian*, [1945] 2 All E.R. 593.

As to who may sue for libel, the defence of fair comment, and damages, see 24 HALSBURY'S LAWS (3rd Edn.) 12, 70, 113; for cases see 32 DIGEST 12, 141, 164.

Cases referred to:

- (1) *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87; 28 L.J.Ex. 201; 32 L.T.O.S. 283; 5 Jur.N.S. 226; 7 W.R. 265; 157 E.R. 769; 13 Digest (Repl.) 327, 1330.
- (2) *Manchester Corpn. v. Williams*, [1891] 1 Q.B. 94; 60 L.J.Q.B. 23; 63 L.T. 805; 54 J.P. 712; 39 W.R. 302; 7 T.L.R. 9, D.C.; 13 Digest (Repl.) 327, 1331.

- A** (3) *Merrivale v. Carson* (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 36 W.R. 231; 4 T.L.R. 125, C.A.; 32 Digest 152, 1837.
- (4) *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, 1802.
- (5) *Phillips v. Jansen* (1798), 2 Esp. 623, N.P.; 32 Digest 40, 385.
- B** (6) *Ingram v. Lawson* (1840), 6 Bing.N.C. 212; 8 Scott, 471; 9 L.J.C.P. 145; 7 L.T. 134; 4 Jur. 151; 133 E.R. 84; 32 Digest 26, 161.
- (7) *Hayward & Co. v. Hayward & Sons* (1886), 34 Ch.D. 198; 56 L.J.Ch. 287; 55 L.T. 729; 35 W.R. 392; 3 T.L.R. 102; 32 Digest 22, 125.
- (8) *Le Fanu v. Malcolmson* (1848), 1 H.L.Cas. 637; 13 L.T.O.S. 61; 9 E.R. 910, H.L.; 32 Digest 12, 34.
- C** (9) *Russell v. Webster* (1874), 23 W.R. 59; 32 Digest 13, 37.
- (10) *Williams v. Beaumont* (1833), 10 Bing. 260; 3 Moo. & S. 705; 3 L.J.C.P. 31; 131 E.R. 904; 10 Digest (Repl.) 1269, 8970.
- (11) *Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch.D. 763; sub nom. *J. W. Thorley's Cattle Food Co. v. Massam*, *Massam v. J. W. Thorley's Cattle Food Co.*, 42 L.T. 851; 28 W.R. 966, C.A.; 32 Digest 210, 2612.
- D** Also referred to in argument:
- Ratcliffe v. Evans*, post; [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, 2086.
- Thomas v. Williams* (1880), 14 Ch.D. 864; 49 L.J.Ch. 605; 43 L.T. 91; 28 W.R. 983; 32 Digest 210, 2611.
- E** *Forster v. Lawson* (1826), 3 Bing. 452; 11 Moore, C.P. 360; 130 E.R. 587; sub nom. *Foster v. Lawson*, 4 L.J.O.S.C.P. 148; 32 Digest 12, 33.
- Hill v. Hart-Davies* (1882), 21 Ch.D. 798; 51 L.J.Ch. 845; 47 L.T. 82; 31 W.R. 22; 32 Digest 181, 2251.
- Liverpool Household Stores Association v. Smith* (1887), 37 Ch.D. 170; 57 L.J.Ch. 85; 58 L.T. 204; 36 W.R. 485; 4 T.L.R. 93, C.A.; 32 Digest 183, 2254.
- F** *Bonnard v. Perryman*, post; [1891] 2 Ch. 269; 60 L.J.Ch. 617; 65 L.T. 506; 39 W.R. 435; 7 T.L.R. 453, C.A.; 32 Digest 180, 2220.
- Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 31 W.R. 668, C.A.; 10 Digest (Repl.) 866, 5696.
- Evans v. Harlow* (1844), 5 Q.B. 624; 1 Dav. & Mer. 507; 13 L.J.Q.B. 120; 2 L.T.O.S. 400; 8 Jur. 571; 114 E.R. 1384; 32 Digest 209, 2601.

**G** **Application** by the defendants for judgment or a new trial on appeal from the verdict and judgment at the trial of the action before LORD COLERIDGE, C.J., and a jury at Newcastle.

The action was brought by the plaintiff company to recover damages for a libel contained in a newspaper belonging to the defendants, called the "North-Eastern Daily Gazette." The plaintiffs were incorporated under the Companies Acts and carried on a colliery business, owning a large number of pitmen's cottages, in a colliery village. These cottages formed a large part of the village, and were occupied by the pitmen rent free as part of their wages. The village contained about 2,000 inhabitants, and was under the jurisdiction of a rural sanitary authority. The libel was contained in an article headed: "Homes of the pitmen. South Hetton. By our special commissioner." This was one of a series of articles dealing with the state of colliery villages in the county. The article in the present case, in effect, described the village generally as being unfit for habitation according to the rules of health and morality, and as being in a most insanitary condition. In their statement of claim the plaintiffs did not allege any special damage, and they did not prove any special damage at the trial. The defendants pleaded that the action did not lie and also that the statements complained of were bona fide comments upon a matter of public interest, made honestly and without malice. The action was tried before LORD COLERIDGE, C.J., and a jury at Newcastle. The

Lord Chief Justice held that the matter was one of public interest, and asked the jury to find whether the comment was fair, or not. He directed them that, if the comment was not fair and the statements tend to the discredit of the plaintiffs, the plaintiffs were entitled to maintain the action. The jury returned a verdict for the plaintiffs with £25 damages, and the defendants now applied for judgment or for a new trial.

*Robson, Q.C., and Scott Fox* for the defendants.

*Waddy, Q.C., Lawson Walton, Q.C., and T. Willes Chitty* for the plaintiffs.

*Cur. adv. vult.*

Nov. 28, 1893. The following judgments were read.

**LORD ESHER, M.R.**—In this case an action was brought by the South Hetton Coal Co., Ltd., against the defendants to recover damages for an alleged libel published in a newspaper belonging to the defendants. This alleged libel was contained in an account given by a representative of the newspaper respecting the condition of things in a certain district. The action was tried at Newcastle before LORD COLERIDGE, C.J., and a jury. The jury found that the matter published was libellous. The Lord Chief Justice held that it related to a matter of public interest, but the jury found that the description was so exaggerated as not to be a fair description of the condition of things, and was, therefore, not fair comment. Thereupon, the learned judge entered judgment for the plaintiffs.

I have thought out for myself the questions of law in this case, and I have come to the conclusion that the law of libel is the same as regards all manner of parties, and that the question is always the same, namely, whether the jury are of opinion that the matter published would, with regard to the conduct of the plaintiff, lead persons of ordinary sense to look upon the plaintiff with hatred, contempt, or ridicule. That is always the question, whether the plaintiff is an individual, a firm, or a corporation. The application of that law is different, according to the different kinds of plaintiffs. There are some kinds of plaintiffs about whom things may be written which may lead ordinary people to entertain feelings of hatred, contempt, or ridicule, but there are other kinds of plaintiffs as to whom those same things could not lead people to entertain such feelings. For instance, if a man said that the manners of the plaintiff were grossly contrary to all proper sense of decency, that might lead ordinary people to entertain feelings of hatred, contempt, or ridicule towards him; but if the same thing was said as to the manners of a firm, or of a corporation, a firm or corporation cannot have manners, and in such a case, although the law is the same, the necessary conditions are wanting and the matter published is not a libel, because it could not lead to feelings of hatred, contempt, or ridicule towards a firm or corporation.

There are, however, other things which may be said as to the conduct of the plaintiff, when the plaintiff is a firm or corporation, which may be libellous. For instance, if you say of a man engaged in business that he conducts his business like a foolish man, that is a libel upon him in his business, that is, upon him in respect of his conduct in his business. With respect to such a man, if you only say that his goods are bad, it is for the jury to consider whether this was so said as to imply that his conduct in his business was bad. For instance, if the plaintiff is a wine merchant, and you say that there is a bad vintage, and the wine of that vintage is bad with him and with all merchants, that is no reflection upon the plaintiff in his business, but is only a reflection upon the goods, and is not a libel upon the plaintiff. If such a statement as that is made maliciously, and does injure the plaintiff, it only gives rise to an action upon the case, and not to an action for libel. If you say of a wine merchant that he has been selecting bad wine, that is a reflection upon him in his business, and may be a libel upon him in his business. In such a case the jury would have to say what was meant, and, if they find that the statement reflected upon the goods only, there is no libel; but, if they find otherwise, there is a libel.



**A** Then, with regard to a firm or a corporation, no exhaustive account can be given of the kinds of statement which are libellous, or are not libellous. The rule of law, however, is the same as in the case of an individual. If a firm or a corporation carry on a business, they may carry it on in such a way as to lead a person to say that they carried it on in a bad way. Such a statement would be a libel on the business, and the law is the same as in the case of an individual. That statement, **B** if true, would lead an ordinary person to say that they managed their business in so inefficient a way as to lead people to entertain feelings of contempt or ridicule towards them. It follows, therefore, that the law is the same in all respects in the case of a corporation and of an individual.

In an action for libel the damages are at large, and the plaintiff need not prove any particular damage. The jury can give such damages as they may think right, **C** having regard to the conduct of the parties and all the circumstances of the case. The law as to that is the same in the case of an individual, of a firm, and of a corporation. It is not necessary, therefore, for the plaintiffs to prove any special damage when they are a firm or a corporation. It is only necessary to prove the libel, and then the damages are at large in the hands of the jury. In this case, then, the only question was whether the statements complained of made allegations **D** as to the conduct of the plaintiffs in their business, that they carried it on in such an inefficient manner as to lead people, if the allegations were true, to entertain feelings of hatred, contempt, or ridicule towards the plaintiffs. In my opinion, the statements complained of, if not fair comment upon a matter of public interest, were such as to entitle the jury to find that they were defamatory of the plaintiffs.

Then comes the question whether this is a matter of public interest. The Lord **E** Chief Justice held that it was a matter of public interest, and I agree with him. The matter regarded so many people, and people of such a class, and the matter itself was so important, as, in my opinion, to make it matter of public interest that the conduct of the colliery proprietors should be criticised. Yet, if the matter is one of public interest, the person who criticises must do so with moderation, and if it is shown that the criticism was malicious, or so unfair as to be exaggerated, then such criticism is not fair comment upon a matter of public interest, **F** but is a libel for which damages can be recovered. If, however, it is a fair comment upon a matter of public interest, then it is not a libel at all, and the defendant is entitled to a verdict. If the matter complained of is fair comment upon a matter of public interest, that takes it out of the category of libels. Then comes the question whether there was in this case a sufficient exaggeration of description **G** to entitle the jury to say that the matter published went beyond a fair comment upon a matter of public interest. I am not prepared to say whether, if I had been on the jury, I would not have found that this was within the bounds of fair comment. I am inclined to think that it was, but I cannot say that the jury were not entitled to take a different view, and to say that so exaggerated and florid a description went beyond the limit, and was unfair, and that damages ought to be **H** awarded. I think that we cannot interfere with the verdict of the jury, and that this appeal must be dismissed.

**LOPES, L.J.**—The libel complained of attacks the plaintiffs in respect of the management of their property as colliery proprietors. The defence is fair and bona fide comment on a matter of public interest. No action will lie if the defendant can prove that the words complained of are a fair and bona fide comment on a matter of public interest. The court decides whether the matter commented on is one of public interest; the jury, if the court is of opinion that there is some evidence that the comment is unfair, finds whether it is so in fact.

**I** I do not propose to go into the facts of the case at length, but shall state my view of the law on the questions raised. It is not contended that the words complained of are not prima facie defamatory. Three questions arise: (i) Will the action lie by the plaintiffs who are a corporation? (ii) Is the matter commented on one of public interest? (iii) Is the comment complained of fair and bona fide?

With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals which compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, or for an assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. Can it be contended that, if words are written attributing to a banking company insolvency, an action will not lie, and that without alleging or proving special damage?

The limits of a corporation's right of action are those suggested by POLLOCK, C.B., in *Metropolitan Saloon Omnibus Co. v. Hawkins* (1), where he says (4 H. & N. at pp. 90, 91):

"That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong, and, if its property is injured by slander, it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured. Then, has a corporation created under [the Companies Acts] the same power? Though [the Joint Stock Companies Act, 1856 (repealed Companies Act, 1862)] makes the partnership a corporation, Mr. Stammers says that this is merely for the purpose of carrying on the business mentioned in it, and that it can only sue in respect of matters necessarily incident to that purpose. But in order to carry on business it is necessary that the reputation of such a corporation should be protected, and therefore, in the case of libel or slander, it must have a remedy by action."

This was adopted by DAY, J., in *Manchester Corpn. v. Williams* (2), in which he says ([1891] 1 Q.B. at p. 96):

"The limits of a corporation's right of action for libel are those suggested by POLLOCK, C.B., in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation."

In a case of slandering a man in respect of his office, profession, or trade, it is not necessary to allege or prove special damage, nor is it necessary in the case of libelling a corporation or company in respect of their trade or business.

In my judgment, this action by the plaintiffs will lie. But is the matter commented on one of public interest? This is a question for the court. The attack upon the plaintiffs is in respect of the sanitary condition of their property, involving the health, comfort, and well-being of over 2,000 human beings. The sanitary condition of this large population is placed under the control of a public body who do not interpose. Can it be said that this alleged state of things is not a matter of grave public interest? It may be that there is no case in the books holding a matter like this one of public interest, but I am clearly of opinion that a matter like this now before the court may be made the subject of hostile criticism and of hostile animadversions, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty. I agree with the

A Lord Chief Justice in holding this a matter of public interest. But is the comment fair and bona fide? This is essentially a question for the jury, provided there is any evidence upon which they may so find. This defence raised no question of privilege. The defence, in such a case, is that the words are not defamatory; that fair and proper comment is no libel. It is only, as was said by BOWEN, L.J., in *Merivale v. Carson* (3), when the writer goes beyond the limits of fair criticism that

B his criticism passes into the region of libel at all. It is for the jury to consider what impression would be produced in the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. They must not dwell too much on isolated passages; they must consider the report as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff; but if there are no such deviations,

C the deviation is minute, and within the latitude of fair discussion and within the region of that diversity of opinion which may be fairly and reasonably entertained by different persons upon the same subject-matter, they should find for the defendant.

Applying these rules to this case, I have come to the conclusion that the jury were justified in finding for the plaintiff. Whether I should have found the same

D verdict is not the question. If there was evidence upon which the jury might reasonably find as they did the verdict cannot be disturbed. The appeal must be dismissed with costs.

**KAY, L.J.**—This appeal raises questions of great importance and interest. The action is by a joint-stock company, incorporated and carrying on a colliery business,

E against the proprietors and publishers of a newspaper, for libel published in that paper. The alleged libel describes the condition of a village in which the miners and their families, to the number of about 2,000, are living, and it describes it as being unfit for habitation according to rules of health or morality. We are told that the miners are allowed to occupy the houses in this village rent free, and receive less money wages in consequence. The article goes into considerable

F detail as to the sanitary arrangements, water supply, overcrowding of the houses, and the like.

The first question is whether the subject of this article is a matter of public interest upon which it is lawful to make fair criticism or comment. Considering the extent of colliery business in this country, the enormous number of men employed in it, the legislative provisions that have of necessity been made concerning

G the mode of carrying it on, as, for instance, in the ventilation of coal mines; considering the number of people in this particular village, the fact that the houses in which they live are supplied by the colliery proprietors rent free as part of the colliers' wages, that this very village is within the jurisdiction of a rural sanitary authority, and that the article complained of seems, from the commencement of it, to be one of a series dealing with the houses of pitmen in the county of Durham,

H I am of opinion that the subject of the articles is a matter of public interest, and that a fair criticism upon such a subject would not be a libel at all: *Campbell v. Spottiswoode* (4), per LORD BLACKBURN; and *Merivale v. Carson* (3), per BOWEN, L.J. Whether, upon the whole, the article is fair criticism or comment is eminently a matter for a jury to decide.

The next and most important question is, whether this action will lie without

I allegation and proof of special damage. One of the differences between libel and slander is, that in an action for libel, i.e., where the defamatory statement is printed or written and published, and not merely communicated orally, generally speaking damage is presumed, and that which is called special damage, viz., the suffering some definite loss, need not be proved or alleged. But when the plaintiffs are two or more persons associated in partnership the only libel of which they can jointly complain is one which may injure their joint property or their joint trade or business. The same law is applicable to a certain extent to a trading corporation. Its property or its business may be injured by defamatory statements,



whether written or oral. It has a trading character, the defamation of which may ruin it. If, for example, an individual, a private partnership, or a corporation were carrying on a trading business, and someone wrote and published an untrue statement that they were insolvent, or any other statement which might destroy their credit or paralyse their business, it is obvious that such a statement, if untrue, would be a libel. For a libel calculated to injure the business of a trading concern, is it the law that no action will lie unless special damage is alleged and proved? The general rule is that, in an action for libel against an individual, no proof of special damage is necessary. If such proof were necessary in order to lay a foundation for the action, it is obvious that in many cases the plaintiff would be put in a position of much difficulty.

But there is considerable authority upon the question. In the first place, if a slander be spoken calculated to injure an individual in his trade, it is not necessary to allege or prove special damage to found the action, that being an exception to the general rule that in actions of slander special damage must be alleged and proved: *Phillips v. Jansen* (5); *Ingram v. Lawson* (6); *Hayward & Co. v. Hayward & Sons* (7); [but see now Defamation Act, 1952, s. 2; 32 HALSBURY'S STATUTES (2nd Edn.) 400]. It would be strange if, that being so in an action for slander, it should still be necessary to allege and prove special damage in an action, not for slander, but for libel of a person in respect of his trade: The presumption of damage in the case of libel is much stronger. In *Le Fanu v. Malcolmson* (8) the libel was upon the defendants as owners of factories, imputing that cruelties were practised in their treatment of the persons employed in them. There was no allegation of special damage, but the plaintiffs, it was held, could maintain a joint action, and were entitled to recover substantial damages. In *Ingram v. Lawson* (6) the action was brought three days after the publication of the libel, which was held to be a libel on the plaintiff in his business of a master mariner and ship-owner. There was no allegation of special damage. It was held that the plaintiff was not bound to wait until actual damage had been incurred. The jury were warranted in giving such damages as they thought fit for the publication of the libel and the injury to his character in the way of his business. The verdict was for £900, some evidence of general damage having been given. In *Russell v. Webster* (9), BRAMWELL, B., and PRIGOT, B., held that a libel published of the defendants as co-proprietors of a newspaper, being of a defamatory character and published of them in relation to their business, might be made the subject of a joint action without any proof of special damage, and that the jury might give general damages, that is, damages according to their discretion under all the circumstances of the case.

It is suggested that, although an individual can sue for a libel upon him in relation to his business, or even the members of a partnership may maintain a joint action for such a libel, yet that an incorporated trading company cannot. But why not? Such a corporation has a trading character which may be destroyed by libel. If an individual or the members of a firm may sue for a libel imputing to them insolvency because of the damage which such a libel is calculated to do to them in relation to their business, could it possibly be maintained that a trading corporation could not sue for a like libel? Again, the authorities seem to show that such a corporation can sue for such a libel as an individual might. In *Metropolitan Saloon Omnibus Co. v. Hawkins* (1), POLLOCK, C.B., held that a trading corporation formed under the Joint Stock Companies Act, 1856, had the same power, saying this (4 H. & N. at pp. 90, 91):

"In order to carry on business it is necessary that the reputation of such a corporation should be protected, and therefore, in cases of libel or slander, it must have a remedy by action."

The other judges of the Court of Exchequer concurred. It had previously been held in *Williams v. Beaumont* (10) that a trading association, not incorporated, entitled by Act of Parliament to sue or be sued in the name of its chairman, might

A sue in his name for a libel on the association in the way of its business. In *Thorley's Cattle Food Co. v. Massam* (11) the plaintiffs were a company incorporated under the Companies Act, 1862, and had brought the action for a libel, and BRAMWELL, L.J., said (14 Ch.D. at p. 784):

B "I am satisfied that this was a libel on the plaintiffs in the way of their trade and calculated to do them injury, and consequently an action is maintainable."

I, therefore, am of opinion that a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any proof of damage, general or special. Of course, if there be no such evidence, the damages given will probably be small.

C With respect to the article now in question, it is suggested that it does not impute anything to the corporate company. I cannot agree in this. It states in the commencement that they are the owners of the colliery, and throughout the meaning of the writer seems to me to be to throw great blame upon them for the manner in which the colliers are housed in this village.

Then, is the article fair? Does it come within the rules which allow fair criticism and comment upon a matter of public interest? Not much fault has been D found with that part of it which consists of comment or criticism properly so called. It is the accuracy of the statements of fact which is called in question. According to the evidence many of the houses in this village are little better than hovels—low buildings consisting of one room on the ground floor, and an unceiled garret under a slated roof above. Others, scarcely any larger, have the ground floor divided into two small rooms. Many of these houses have no privies at all. E Very many have none provided by the company, but the occupiers have provided some in their plots of garden which are not immediately attached to the houses. From the houses all the refuse is taken in boxes and thrown into open pits in the streets, from which the company's carts carry it away. The water supply consists of water pumped from those pits into large iron tanks, from whence it is conducted to taps here and there in the streets. There is no restriction upon the occupiers taking lodgers, and this is done to a great extent. No one who has attended to F the evils which result from overcrowding of houses and want of decent sanitary accommodation can resist the conviction that this state of things deserves severe comment. I am not able to say that there are not in this article misstatements and exaggerations which were evidence for the jury of unfairness. But the state of things admitted to exist is so serious that I should not have been inclined to interfere if the verdict had been for the defendants. However, as I began by saying, the question whether the article is fair is eminently a question for the jury. G It seems to me impossible to hold that there was not some evidence of unfairness, and, therefore, I think that we cannot, according to the rules which we observe on motions for new trials, interfere with the verdict in this case.

*Appeal dismissed.*

H Solicitors: *Jackson & Jackson; Crossman & Prichard* for *Dees & Thompson*, Newcastle-on-Tyne.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

# KEARNEY v. WHITEHAVEN COLLIERY CO.

[COURT OF APPEAL (Lord Esher, M.R., Lopes and A. L. Smith, L.J.J.), April 17, 19, 1893]

[Reported [1893] 1 Q.B. 700; 62 L.J.M.C. 129; 68 L.T. 690; 57 J.P. 645; 41 W.R. 594; 9 T.L.R. 402; 4 R. 388]

*Coal Mine—Wages—Payment by weight of mineral gotten—Deductions in respect of excessive "dirt"—Legality—Right of miner to payment for all coal gotten—Coal Mines Regulation Act, 1887 (50 & 51 Vict., c. 58), s. 12.*

*Contract—Severability of promise—Illegal term—Separate term based on independent good consideration.*

By the Coal Mines Regulation Act, 1887, s. 12 (1): "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable. Provided that nothing in this section shall preclude the owner . . . or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten . . . such deductions being determined in such special mode as may be agreed upon. . . ."

A miner was employed in a mine under a contract which provided that wages were to be calculated upon the amount of coal gotten by him, and that fourteen days' notice should be given on either side to terminate the employment. A system of fines or forfeitures which was agreed between the employers and the workmen under the contract provided that, if the amount of "dirt" in a tub after the coal had been riddled exceeded specified weights, the miner who sent up the tub should forfeit his remuneration in respect of specified proportions of the contents of the tub. The miner left his employment without giving notice, and the owner proceeded against him for damages.

**Held:** (i) under s. 12 (1) the miner was entitled to be paid for all the coal sent up by him, the only valid deduction being in respect of material sent up which was not coal, and, therefore, the provisions in the contract for forfeiture were in breach of the subsection and illegal; but (ii) the term of the contract providing for 14 days' notice to terminate it was based on good consideration and was severable from the illegal provisions relating to the deductions, and, therefore, the miner was liable to the mineowner in damages for his breach of contract.

**Notes.** Distinguished: *Chell v. Hall and Boardman* (1896), 12 T.L.R. 408; *Humble v. Humphreys* (1901), 85 L.T. 563. Considered: *Coltness Iron Co., Ltd. v. Dobbie*, [1920] All E.R.Rep. 514. Referred to: *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513; *Bennett v. Bennett*, [1952] 1 All E.R. 413.

As to the payment of miners' wages according to weight, see 26 HALSBURY'S LAWS (3rd Edn.) 611-613; and as to severability of promises in a contract, see *ibid.*, vol. 8, pp. 147, 148. For cases see 34 DIGEST 730 et seq., and 12 DIGEST (Repl.) 325.

Case referred to:

(1) *Netherseal Colliery Co. v. Bourne* (1889), 14 App. Cas. 228; 59 L.J.Q.B. 66; 61 L.T. 125; 54 J.P. 84, H.L.; 34 Digest 730, 1107.

Also referred to in argument:

*Hewlett v. Allen*, [1892] 2 Q.B. 662; 62 L.J.Q.B. 9; 67 L.T. 457; 57 J.P. 260; 41 W.R. 197; 8 T.L.R. 793, C.A.; affirmed, [1894] A.C. 383; 63 L.J.Q.B. 608; 71 L.T. 94; 58 J.P. 700; 42 W.R. 670; 10 T.L.R. 464; 38 Sol. Jo. 455; 6 R. 175, H.L.; 24 Digest (Repl.) 1100, 475.



**A** **Appeal** by Patrick Kearney from a decision of the Queen's Bench Division (GRANTHAM and CHARLES, JJ.), dismissing his appeal upon a Case stated by justices for the county of Cumberland.

At a petty sessions held at the Petty Sessional Court House at Whitehaven on Mar. 10, 1892, a summons taken out by the complainants, the Whitehaven Colliery Co., under the Employers and Workmen Act, 1875, against the defendant, Patrick Kearney, came on for hearing. The complainant claimed the sum of 7s. 6d. as damages for breach by the defendant of a contract entered into between them and the defendant, such breach of contract being his neglect to proceed to or perform his duties as a collier in William Pit, on Thursday and Friday, Mar. 3 and 4, 1892. Evidence of a contract in writing was tendered, but the contract was not put in. It was admitted that the contract was subject to fourteen days' notice on either side, and that the wages of the defendant were to be calculated upon the weight of coal obtained by him. It was proved that the defendant was in the employment of the complainants on Mar. 3 and 4, 1892, and that he did not proceed to his work on those days. He had given notice of his intention to quit the employment of the complainants on Mar. 12, 1892. In consequence of the absence of the defendant and other miners on Mar. 3 and 4, 1892, the complainants incurred loss, such loss being the wages paid to enginemmen and other men and boys employed on the surface and underground and in receipt of a fixed rate of wages, who had to be and were in attendance at the pit, but whose work was rendered unremunerative owing to the absence of the colliers. It was proved that the lampman, acting under orders, withheld the lamps of three men named Alfred Coles, William Cooper, and John Mitchell, who attended at the pit top on Mar. 3, 1892, and that all the men then and there assembled, including the defendant, thereupon refused to descend the pit, and they did not in fact descend the pit nor work from that time up to and inclusive of the day upon which the summons was heard, namely, Mar. 10, 1892. The justices found as a fact that the withholding of the three lamps was not a dismissal of the men to whom they belonged, but was an intimation that they had to speak to the manager, and that the men so understood it. The manager wished to speak to the three men in consequence of the excessive amount of dirt which, it was alleged, they had been sending up with their coal. The justices found that a system of fines or forfeitures had been for some time in force at the pit in respect of dirt sent up with the coal, and that a revised scale had been arranged between the employers and the workmen on Dec. 2, 1891. The scale of fines and forfeiture then arranged provided that there should be no fine or forfeiture if after the coal was riddled the amount of dirt in the tub did not exceed 25 lb. If the amount of dirt after riddling exceeded 25 lb. and did not exceed 35 lb., one-half of the tub was to be forfeited, the collier who sent the tub up receiving payment in respect of one-half only of the total contents of the tub. If the amount of dirt after riddling exceeded 35 lb., then the whole tub was to be forfeited. The tubs weighed about 15 cwt. each. The dirt referred to was not coal, nor of the nature nor substance of coal, but a mineral substance known locally as "metal." The defendant's lamp was not withheld from him, nor was he in any way prevented by the complainants from proceeding to his work, nor was there any evidence that coal sent up by him had been forfeited, or that any complaint had been made with reference to his coal.

**I** It was submitted by the defendant's solicitor that the above-mentioned system of fines or forfeitures was illegal, that when the lamps of the three men were withheld it amounted to a dismissal or termination of the contract with them, and was notice or intimation to the defendant that the complainants were seeking to impose a condition upon their contract with him which was illegal, and that the defendant was, therefore, justified in refusing to work. The justices held that the defendant was not justified in refusing to work and carry out his contract, and that there was no notice to him that the complainants were seeking to impose an illegal condition upon their contract with him. The defendant's solicitor further submitted that, he being paid by piece work, was not liable in damages if he

neglected to continue his work, unless by such neglect injury was caused to the employer's property or machinery. The justices held that he was liable in damages, and ordered him to pay to the complainants the sum of 7s. 6d., that being, in their opinion, a fair proportion of the actual total loss sustained by the complainants for wages paid by them in respect of the pit on Mar. 3 and 4, 1892, and rendered unremunerative in consequence of the absence of the defendant and other men on those days.

The questions of law for the opinion of the court were: (i) Were the justices right in holding that the defendant was not justified in leaving his work without notice? (ii) In the event of the defendant not being justified in leaving his work without notice, were they right in holding that he was liable in damages to the complainants?

The Divisional Court gave judgment in favour of the complainants, GRANTHAM, J., being of opinion that the agreement as to fines was not illegal, and CHARLES, J., that the agreement was illegal, but that the stipulation as to notice was binding, and could be enforced. The defendant appealed.

*Willis, Q.C.*, and *Atherley Jones* for the defendant.

*Finlay, Q.C.*, and *Mattinson* for the complainants.

**LORD ESHER, M.R.**—I am of opinion that the judgment of the court below must be affirmed, and this appeal dismissed, but I am of opinion that the judgment of CHARLES, J., was right, and I do not agree with the judgment of GRANTHAM, J. I think that the deductions which were agreed to in this case were illegal deductions, but I think that, there being different promises, as distinct from the consideration, though one promise is illegal, yet the rest of the promises can be supported and be insisted upon. The court, therefore, is of opinion that the stipulation as to notice was a legal and binding promise; it is that stipulation which has been broken, and the owners may insist on their remedies for the breach of that contract. The point relating to the illegality of the stipulation in respect of fines for dirt depends upon the true construction of the provisions of s. 12 of the Coal Mines Regulation Act, 1887, with respect to such a matter.

That section has been construed by the House of Lords in *Netherseal Colliery Co. v. Bourne* (1). I cannot agree with the suggestion that this court ought to say that the opinions of the House of Lords are founded upon particular propositions as to the meaning of an Act of Parliament, and that though it is clear that the Lords meant to put a certain interpretation upon the Act, we ought to disregard that part of their opinions because it was not necessary for the decision of the case. I do not think that that is the proper way to deal with opinions of the House of Lords. I take the decision of the House of Lords in *Netherseal Colliery Co. v. Bourne* (1) to be founded upon the proposition enunciated in express terms by all the noble Lords. That proposition, and the grounds for it, are most clearly stated by LORD HALSBURY. He says that taking the section as a whole, and construing the first part of the section and the proviso together, one will see what is the true construction of the first part. If you place one construction upon it the proviso has hardly any effect; if you place the other construction upon it the clause and the proviso work harmoniously together. He says that the phraseology used in the first part of the section is general, and, therefore, can be construed into a concrete form by looking at the course of business in coal-mining. He applies that well-known rule of construction, and says that the words "where the amount of wages paid to any of the persons employed . . . depends on the amount of mineral gotten by them," construed in one way, might mean the amount of actual mineral gotten, but that if you look at the course of business they might have another meaning. There is a well-known course of business among miners; miners working in a coal mine get a quantity of what I may call "stuff," which they put into tubs and send up to the surface. When the stuff has come to the surface it is taken to be the mineral sent up, though in strict language it is not all mineral, but is partly something else. LORD HALSBURY, therefore, says, that, if the first part of the section

A stood alone, we could give it that meaning, but that the proviso makes it clear that we ought not to do so.

The phrase "amount of mineral gotten" would mean the amount of stuff which the miner gets and sends up, whatever is in the tub, including dirt and other substances. If that were so, the mineowner would have to pay wages for mineral which practically was not gotten, that is, for something other than mineral gotten  
B in the course of mining unless the statute provided some means of avoiding that result. We know that it would be practically impossible for him to have every tub weighed for dirt. The Act, therefore, by means of the proviso, arranges a method of preventing that result, and says that deductions shall be agreed in respect of stones or substances other than the mineral contracted to be gotten. From what are such deductions to be made? Not from the mineral itself, but in  
C respect of that which is mixed with it, which is not strictly speaking mineral. Those deductions can only be made in a certain way. They cannot be made without giving the miner an opportunity of seeing that it is properly done. An agreement must be made in the terms of the proviso, in order that the miner may see that it is fairly done. By the proviso, therefore, the mineowner may agree with the workmen as to the method of making deductions. If they do not agree, there  
D is no method specified; if they do agree, they must agree that the deductions shall be made in a particular manner.

If that is the true view of the enactment, that which is to be deducted is the extraneous substance which adds to the weight, and, therefore, the deduction is to be made from weight. The deduction is not to be made from the weight of mineral actually gotten, but in respect of "stones or substances other than the mineral contracted to be gotten."  
E The deduction is to be made from the weight of the tub, and is not a direct deduction from wages but a deduction from weight, and in that way is in effect a deduction from wages. The wording of the subsection and proviso leads us to the conclusion that the deduction is to be made in respect of the weight of something which is not mineral, from the weight of that which is sent up in the tub. As to the other part of the proviso, relating to tubs being  
F improperly filled, it works in the same way. I think that it means that you are to take the weight of the tub and deduct from it that which has got into the tub by improper filling. As suggested by some of the Lords in *Netherseal Colliery Co. v. Bourne* (1), that may apply to the inclusion of too much dust or slack; that may be a deduction from weight by taking from the weight of the tub the improper quantity of dust. I take it, therefore, that the House of Lords said, in *Netherseal Colliery Co. v. Bourne* (1), that under the Act there could only be a deduction  
G from weight, and that so far as weight was concerned there could only be deducted that which was not mineral. There could only be a deduction from weight, and from the weight of the tub sent up from the mine.

Is that the true view of the decision of the House of Lords? LORD HALSBURY says (14 App. Cas. at pp. 234, 235):

H "It is obvious further that the draftsman, or some person familiar with mining, feared whether in creating that duty and imposing the obligation to pay according to the weight so ascertained—knowing that such weight would have to be ascertained according to the practical usage of miners—feared, I say, that if the earlier part of the section remained unqualified the mineowner would be obliged to pay by weight, when so ascertained, for whatever might be contained  
I in the tubs, baskets, or hutches."

LORD HALSBURY, therefore, thought, that, if the first part of the section stood alone, the mineowner would have to pay according to the weight as ascertained by the practical usage of miners, that is, for all that was in the tub, and he proceeds to say that the proviso was introduced to modify such a state of things. LORD BRAMWELL says (*ibid.* at p. 237):

"The effect of the enactment, then, is that the men must be paid by weight, that that weight is to be the weight of all they send up, but that from it may



be deducted the weight of certain matters, provided that weight is ascertained in a certain way."

His meaning is perfectly clear, that from all that is in the tub there is to be deducted the weight of extraneous substances which are not the mineral contracted to be gotten, and that that must be done in a certain way according to the Act. LORD HERSCHELL says the same, and LORD MACNAGHTEN says (*ibid.* at p. 246):

"One thing is clear, that no deduction is permissible except what the Act specifies and allows. That being the law, if the agreement had stated in plain terms that a deduction was to be made from the wages of the miners in respect of slack—whatever form the deduction might have taken, whether the slack was to be absolutely rejected or paid for at a lower rate—no one, I think, could have doubted that that part of the agreement would have been in contravention of the Act of Parliament."

Those observations mean that the deduction must be made from weight, and in respect of the weight of extraneous substances. How can we here, in the face of those observations, hold that the judgment of GRANTHAM, J., in the court below was right in which he says that the deduction in this case was a deduction from wages, and that a deduction from wages is allowed by the Act. His judgment upon that point was wrong, and the judgment of CHARLES, J., was right, in which he says that weight only can be deducted, and that the miners are to be paid only for the coal in the tubs, but that, unless it is agreed that deductions are to be made in accordance with the proviso, the mineowner must pay in respect of the weight of everything which is in the tub. Looking at the agreement in this case for fines for dirt, the deductions are clearly made in the wrong way, and in a way which contravenes the Act. The miner is not to be paid for the coal which is left in the tub after the other stuff has been cleared out of it, and is to forfeit his wages for that tub if more than a specified amount of dirt has been sent up in it. That contract, as acted upon by the parties, shows that the deduction is illegal, because it is in contravention of the Act of Parliament. Such an agreement as this as to the mode of payment of wages is illegal by reason of the statute.

The agreement as to deductions being illegal, the question then arises whether that makes the whole contract illegal, and consequently destroys the stipulation as to fourteen days' notice. I take it that the rule as stated in MAXWELL ON STATUTES (2nd Edn.), p. 491, is properly enunciated and laid down. It is there stated thus:

"The question whether the whole instrument or only the invalid part is void depends on the more rational ground whether the vitiated part be severable from the rest or not. If the one cannot be severed from the other part the whole is void; but if it be severable, whether the illegality was created by statute or by the common law, the bad part may be rejected and the good retained. If a deed was made on a consideration, part of which was illegal, the whole instrument would be void, for every part of it would be affected by the illegal consideration; and a contract of which the consideration is in any part illegal cannot be enforced. But it would be otherwise if only some of the promises which constituted the consideration were illegal and the illegality did not taint the rest."

If the whole consideration is illegal, or if any part of the consideration is illegal, then every promise is illegal because every part of the consideration is the consideration for each promise, and if a part of the consideration is illegal, the promise is founded upon an illegal consideration and the whole is illegal. If, however, the consideration is lawful, there may be several promises or liabilities depending upon it, and if one is illegal it cannot be enforced because the promise is illegal and that promise is not supported by the consideration; but as to the other promises and liabilities in the same contract they are not illegal, and are supported by a lawful consideration. Each of these other promises is, therefore, good, and can be enforced. That is the rule of law. What was stated by LORD

**A** HALSBURY in *Netherseal Colliery Co. v. Bourne* (1) is applicable to this case, viz., that the whole contract is not illegal, but that the deductions are not enforceable. What is the consideration in this contract? There is a consideration on both sides which is without blemish: on the one side there is the promise to employ, and on the other side the promise to enter into the employment; both of these are lawful considerations. In this case there is one illegal promise, and that promise consequently cannot be enforced. The other promises founded upon the same consideration are not illegal, and are supported by a good consideration. This promise, as to giving fourteen days' notice, is founded upon a good consideration, and can, therefore, be relied on and enforced, though the other promise as to deductions is illegal and cannot be enforced. I am of opinion that the judgment of CHARLES, J., was right, and that the stipulation as to deductions was illegal, but that the

**B** promise as to notice, which was relied on in these proceedings, was binding, and that the decision of the justices was right. This appeal must be dismissed.

**C** **LOPES, L.J.**—I am of the same opinion. I think that the judgment of CHARLES, J., was right. I think that the deductions agreed to in this case were not authorised by the Act of Parliament, and were, therefore, illegal. The

**D** contract, however, is only illegal in part, and that part is severable from the other parts.

The question whether these deductions are legal or illegal depends upon the true construction of s. 12 (1) of the Coal Mines Regulation Act, 1887. The meaning of that section is not clear and unambiguous. The first part of the section is as follows:

**E** “Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable.”

**F** Every provision of that part of the section refers to weight, and, in my opinion, means the weight of the whole of the stuff brought to the pit mouth in the tub. That construction makes the proviso easy to construe. The House of Lords in *Netherseal Colliery Co. v. Bourne* (1) took that view.

The first part of the section, then, referring to the whole of the stuff brought to the surface, we come to the deductions provided for in the proviso, which says

**G** that

“nothing in this section shall preclude the owner . . . from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs . . . being improperly filled in those cases where they are filled by the getter of the mineral or his drawer . . . such deductions being determined in such special mode as may be agreed upon between the owner and the persons employed in the mine.”

**H**

What are those deductions? It is clear that the deductions contemplated are in respect of weight. In respect of the weight of what? In respect of the weight of

**I** “stones and substances other than the mineral contracted to be gotten.” In my view, the intention of the legislature was that the miner was, in any event, to be paid for the mineral gotten, but that the mineowner should be entitled to make certain deductions in weight from the tubs in respect of stones and other substances. I think that it is essential that, in any case, the miner shall be paid for all the coal sent up by him as distinguished from stones or other substances not coal. What has happened in this case? The mineowner and the miners have arranged thus: If a tub contains twenty-five pounds of dirt the miner is to be paid only for one half of the coal in the tub, and if the tub contains thirty-five pounds

of dirt, then the whole weight of the tub is to be forfeited. Such an arrangement seems to me to contravene the provisions of s. 12, and is, I think, unlawful. A

With reference to the other point raised, it has been argued that an agreement containing this provision, which is illegal, is itself wholly illegal. The law is, in my opinion, clearly as follows. If any part of the consideration for a promise is illegal, the whole agreement is void. The reason for that rule is that in such a contract one cannot ascertain the weight of each part of the consideration, and, therefore, if any part of the consideration is unlawful, all the promises founded upon it must fail. When, however, there is no illegality in the consideration, and some of the promises are legal, but others are illegal, the illegality of those promises which are bad does not contaminate those promises which are good unless, owing to the form of the contract, they are so connected together as to be inseparable. Let us test this case by that rule. The consideration moving to the miners is employment and payment of wages, and the consideration moving to the employer is the promise to serve. Both of these are good and lawful considerations. Then there is this provision for deductions, which is, in my opinion, entirely independent of, and severable from, the provision as to notice. CHARLES, J., was, therefore, right in his judgment when he held that the one promise was separable from the other, that the consideration for the promise was good, and that the good separable promise could be given effect to, though the other promise was illegal and could not be given effect to. The decision of the Divisional Court was right, and this appeal must be dismissed. B C D

**A. L. SMITH, L.J.**—This was a proceeding by the mineowner against the miner to recover damages under a contract. The contract was in this form: E

“I, the undersigned, in consideration of being employed at this colliery, do hereby agree to give to, and receive from, the Whitehaven Colliery Company fourteen days’ notice to terminate such employment, and, in the event of my leaving without giving such notice, to render myself liable to be proceeded against according to law. And I also further agree to the company making the undermentioned deductions from my wages, viz., fines for dirt.” F

The miner broke that contract by leaving the employment without giving notice, and these proceedings were taken. The justices held that the defence set up by the miner was no answer to the proceedings. The defence was that, by reason of the provisions of the Coal Mines Regulation Act, 1887, a stipulation in the contract as to deductions rendered the whole contract illegal, and that the contract could not be sued upon at all. G

What is it that the master has done in this case? That which has been done has been done for a long time; nineteen out of twenty tubs are not tested for dirt at all, and the whole weight of those nineteen is allowed; about one tub out of twenty is tested, which is selected at random; if there is more than twenty-five pounds of dirt in this tub one half of the weight is forfeited, and if there is more than thirty-five pounds then the whole weight is forfeited. I agree with the other members of the court that the House of Lords has put a construction upon this Act in *Netherseal Colliery Co. v. Bourne* (1), which is, that a person employed in a mine is to be paid according to the weight of coal which he actually wins, but that by reason of the proviso the mineowner may make deductions, in respect of stones and other substances, from the weight of the stuff sent up in the tub. If it had been agreed that an average should be taken of the amount of dirt without weighing all the tubs, I do not think that any difficulty would have arisen under the statute. Here, however, the practice was to forfeit one-half or all of the weight of a tub if it contained a certain amount of dirt. How can it be said that that practice does not transgress the provisions of s. 12? In my judgment, it does transgress against the provisions of s. 12, and I have nothing more to say as to the illegality of this agreement. H I

Does that illegal part of the contract vitiate the whole contract? CHARLES, J., held that it did not, and I am of opinion that his reasons were well founded. The



**A** rule is that if the consideration is tainted with illegality, either wholly or in part, all the promises depending upon that consideration must fail; but that if the consideration is not tainted with illegality and there are several promises founded upon that consideration, and one promise is illegal, but others are not, there being a good consideration, the good promises will be upheld and enforced. That being the rule, take this case. What was the consideration moving from the master to the miner? The master was to employ the miner. The miner promised not to leave without giving notice, and that promise was not illegal. Looking at the contract the other way, it was that, in consideration of the miner serving, the master promised to pay wages. That was altogether a legal contract. Looking at it either way, then, it cannot be said that there was any illegality in the consideration. Both considerations were legal, and the promise depending thereon, which was illegal, cannot be enforced by either party, but the other promises which are good can be enforced. When, therefore, the miner breaks his promise as to giving notice, the master has a right to enforce it. The decision of the court below was right, and the appeal fails.

*Appeal dismissed.*

**D** Solicitors: *Wood & Wootten* for Milburn, Workington; *Harrison & Powell* for T. Brown, Whitehaven.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

## MERRYWEATHER & SONS v. MOORE AND OTHERS

**F** [CHANCERY DIVISION (Kekewich, J.), May 18, 1892]

[Reported [1892] 2 Ch. 518; 61 L.J.Ch. 505; 66 L.T. 719;  
40 W.R. 540; 8 T.L.R. 539; 36 Sol. Jo. 488]

**G** *Master and Servant—Duty of servant—During service—Abuse of confidential relationship—Compilation of table of specifications of articles made by master.*

**H** In 1881 the defendant apprenticed himself to the plaintiffs, a firm of fire-engine makers, for a period of five years. After serving his apprenticeship he was employed by the plaintiffs as a draftsman until May, 1891, when he left their service. Two days before leaving the plaintiffs' service, the defendant, without their knowledge or authority, compiled a table of the dimensions of the various types of fire-engine made by the plaintiffs. The plaintiffs sought an injunction to restrain the defendant from disclosing the contents of the table.

**I** **Held:** the compilation of the table was an abuse of the confidential relationship existing between the defendant and the plaintiffs, giving rise to a breach of an implied contract between them, and the injunction would be granted.

**Notes.** Applied: *Robb v. Green* (1895), 64 L.J.Q.B. 593; *Measures v. Measures* (1910), 79 L.J.Ch. 707. Considered: *Reid and Sigrist, Ltd. v. Moss and Mechanism, Ltd.* (1932), 49 R.P.C. 461. Applied: *Bents Brewery Co. v. Hogan*, [1945] 2 All E.R. 570. Referred to: *Lamb v. Evans* (1892), 2 R. 189.

As to injunction to restrain disclosure of confidential information, see 21 HALSBURY'S LAWS (3rd Edn.) 395, 396; and for cases see 28 DIGEST (Repl.) 854–857. For duties of servant during and after employment, see 25 HALSBURY'S LAWS (3rd Edn.) 462–465; for cases see 34 DIGEST 117 et seq.

Cases referred to :

- (1) *Tipping v. Clarke* (1843), 2 Hare, 383; 67 E.R. 157; 18 Digest (Repl.) 217, 1864. A
- (2) *Prince Albert v. Strange* (1849), 1 Mac. & G. 25; 1 H. & Tw. 1; 18 L.J.Ch. 120; 12 L.T.O.S. 441; 13 Jur. 109; 41 E.R. 1171, L.C.; 28 Digest (Repl.) 741, 19. B
- (3) *Pollard v. Photographic Co.* (1888), 40 Ch.D. 345; 58 L.J.Ch. 251; 60 L.T. 418; 37 W.R. 266; 5 T.L.R. 157; 28 Digest (Repl.) 772, 236. B
- (4) *Reuter's Telegram Co. v. Byron* (1874), 43 L.J.Ch. 661; 28 Digest (Repl.) 854, 850. B

Also referred to in argument :

- Morison v. Moat* (1851), 9 Hare, 241; 20 L.J.Ch. 513; 18 L.T.O.S. 28; 15 Jur. 787; 68 E.R. 492; affirmed (1852), 21 L.J.Ch. 248; 16 Jur. 321, L.J.J.; 28 Digest (Repl.) 854, 849. C
- Tuck & Sons v. Priester* (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 36 W.R. 93; 3 T.L.R. 826, C.A.; 28 Digest (Repl.) 854, 851.
- Portal v. Hine* (1888), 4 T.L.R. 330; 34 Digest 121, 925.
- Abernethy v. Hutchison* (1825), 1 H. & Tw. 28; 3 L.J.O.S.Ch. 209; 47 E.R. 1313, L.C.; 13 Digest (Repl.) 63, 107. D
- Caird v. Sime* (1887), 12 App. Cas. 326; 57 L.J.P.C. 2; 57 L.T. 634; 36 W.R. 199; 3 T.L.R. 681, H.L.; 13 Digest (Repl.) 63, 109.

**Motion** for an injunction to restrain the defendant from publishing or communicating the contents of a table made by the defendant while employed by the plaintiffs, and to restrain the defendant companies from publishing or using the table. E

In 1881 the defendant, Edward J. Moore, apprenticed himself for the purpose of learning the business of mechanical engineering to the plaintiffs, a firm of fire-engine makers, for a period of five years. After having served his apprenticeship he was taken by the plaintiffs into their employ as a draftsman at a salary of 30s. a week. In May, 1891, the defendant left the plaintiffs' service, and entered the employment of the defendants, Mobbs & Co., Ltd., makers of machinery, and shortly afterwards that company, in conjunction with the defendants, the Sphincter Grip Armoured Hose Co., Ltd., commenced the business of fire-engine makers under the style of the Fire Appliances Co. From the evidence it appears that about two days before leaving the plaintiffs' employ the defendant, without their knowledge or authority, compiled a table of the various dimensions of the various types of fire engines made by the plaintiffs, which dimensions the plaintiffs claimed to be "trade secrets," and the plaintiffs stated their belief that these dimensions were taken for the purpose of being communicated to the defendant companies, inasmuch as those companies had recently exhibited in their shop for sale a fire engine of the same dimensions as those of one of the engines whose dimensions were given in the table in the defendant's possession. The plaintiffs then commenced this action, and now moved for an interim injunction to restrain the defendant from publishing or communicating to any person the paper or table of dimensions or the contents thereof, "which paper had been compiled by him in breach of his contract of employment with the plaintiffs, and in breach of the confidence reposed in him by the plaintiffs," and to restrain the defendant companies from publishing or using in the construction of fire engines, or otherwise in the course of their trade or business, the information so obtained from the plaintiffs by the defendant. The defendant said he prepared the table merely for his general information; that when he left the plaintiffs' service he placed the table with his engineering and mechanical text-books; that since he had been in the service of the defendant companies he had not been employed in designing or making drawings for fire engines for which the table, or any information therein, could be of the slightest use and he denied ever having shown it to his present employers. The managers of the defendant companies deposed that they had F  
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A never made use of, or even seen, the table in question, and they denied that the engine referred to by the plaintiffs was of any of the dimensions therein stated.

*Warmington, Q.C.*, and *Scrutton* for the plaintiffs.

*D. M. Kerly* for the defendant.

*Marten, Q.C.*, and *Arnold Statham* for the defendant companies.

B **KEKEWICH, J.**—There is inconvenience in trying this question on motion, because some expression of opinion is inevitable, and the circumstances under which the case comes before me make that opinion unsatisfactory. There has been a conflict of evidence which requires to be submitted to the test of cross-examination, and there is no evidence as to the usual course of trade, or as to what is done in this particular trade. I shall deal differently with the case of the defendant Moore and with the case of the other defendants.

C What is the state of the law with respect to a gentleman who occupies the position of a clerk or servant in the employ of a professional man or tradesman? The law has been laid down in *Tipping v. Clarke* (1), *Prince Albert v. Strange* (2), and other cases which have been cited, and finally in a recent case before NORTH, J., which has not been cited, that of *Pollard v. Photographic Co.* (3), where his Lordship said (40 Ch.D. at p. 354):

D “It is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence.”

E It is sometimes difficult to say in any particular case whether the court proceeded on the ground of implied contract or of confidence. Perhaps the real solution is, that confidence postulates an implied contract. Where the court is satisfied of the existence of a confidential relation, it at once implies a contract arising from that confidential relation which calls for the exercise of the jurisdiction.

F *Reuter's Telegram Co. v. Byron* (4) (43 L.J.Ch. at p. 663) shows why an injunction is refused. There no restraint will be granted “in the absence of a contract express or implied.” There was no confidence in that case. This is the case of a gentleman who was formerly apprenticed to the plaintiffs. It is immaterial to consider whether he paid a fee for his apprenticeship, or what the terms of his articles were. His object was to learn his trade and to give his principals the benefit of such services as he could perform. No question now arises with regard to his duty during that apprenticeship; but after the expiration of his apprenticeship he was taken into the plaintiffs' employment as a paid clerk, and from that time forward his duty towards the plaintiffs was based upon a bargain made by him to give them his full time during office hours in exchange for a proper remuneration. It was all a matter of bargain. I cannot imply from that bargain any obligation on the part of the plaintiffs to instruct their clerk. If in the course of doing his work he was able to learn, that would be so much the better for him in the course of his employment, as giving him a claim to higher remuneration and a better position, and it would also be the better for him in future years; but I see no obligation upon the plaintiffs to instruct him or to give him their books or drawings to look over during his spare hours. It was simply a bargain that for a certain remuneration he should perform certain services. He, being then in that relation, thought fit within a few days of leaving the plaintiffs' service, and when he knew he was leaving, and when anything he did could be of no advantage to them, to draw out this table. It may be added this table was compiled from data at his disposal as clerk to the plaintiffs. It may be that with care all these details might have been obtained by inspection of the engines at hand or from worked drawings; but in this compendious form it was common ground that these materials did not exist, and the defendant thought it would be for his benefit that they should exist, and exist in his possession, and he must be taken to have intended to use them for his own purposes.



Was it lawful, was it right to do that? If he carried the figures in his head, no one could interfere with his use of them; but was not this an abuse of the confidence necessarily existing between himself and the plaintiffs, a confidence arising merely out of the fact of his employment, the confidence being that a servant should not use, except for the purposes of his service, those opportunities of service which were given him? The question appears to be one of some novelty; but I think that the abuse of the confidence was shown by the fact of this table having been compiled by the defendant within the last few days of his service, and of its having been compiled, therefore, when it could not be of any use to the plaintiffs. Where is it to stop if this is right? If the defendant was at liberty to do this, he could make extracts from working drawings as a whole or from any part, or he might take and carry away copies. It is difficult to draw the line and say that a clerk cannot do this or do that. It is impossible to lay down a rule applicable to all trades. The circumstances in different trades may vary. Take the case of a Bar student copying a conveyancer's precedents. In that case there is no contract certainly; but it is an unwritten law that the student may have the conveyancer's books of precedents not only for consultation, but for copying, and it is well known in the profession that not only with regard to conveyancing precedents, but also with regard to pleadings, these are of so much value that gentlemen go to particular chambers to follow that weary work of copying precedents. We all know what a long time LORD CAMPBELL spent in copying precedents in pleaders' chambers.

I think the present case is beyond the line. Accordingly the defendant will be restrained from publishing or communicating to any person this paper or the contents thereof. With regard to the other defendants, the companies, there is a good deal to be said; but the evidence displaces the plaintiffs' contention that those defendants must have made use of the paper, and counsel for the defendant companies has expressed his willingness that the order should contain an express disclaimer of any intention to make use of this paper for any purpose, and therefore an injunction ought not to be granted as against them. I say this on the ground that there was no threat or intention on their part to use the paper, and that there is no probability of their using it. A case may possibly be made out against them at the trial of the action, but I leave that for the present entirely open and free from comment. Their costs and the costs of the plaintiffs will be costs in the action, and the order will contain a statement that the defendant companies by their counsel disclaim any intention to publish or use this paper.

Solicitors: *R. J. Witty; Kerly, Son & Verden.*

[Reported by FRANCIS E. ADY, ESQ., Barrister-at-Law.]

A

## HARRIS v. BEST, RYLEY &amp; CO.

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), December 19, 1892]

B

[Reported 68 L.T. 76; 9 T.L.R. 149; 7 Asp.M.L.C. 272;  
4 R. 222]

*Shipping—Demurrage—Liability of charterers—Cargo to be loaded at two ports—First cargo damaged and shifting during voyage to second port—Need of re-stowing—Delay by stevedore—Servant of shipowners.*

C

By a charterparty it was agreed that the ship should proceed to Leith and to London and there load cargo to be shipped by the charterers, and that a stevedore should be "appointed by the charterers in London only, but employed and paid for by owners." Cargo was loaded at Leith by the charterers, no information as to the London cargo being then asked for by the captain. On the voyage to London, owing to bad weather, some of the cargo was damaged and some was shifted. After the arrival of the vessel at London the captain found it necessary to land the damaged cargo to be re-conditioned, and to re-stow the cargo which had shifted. It was also necessary to shift some of the cargo to enable the London cargo to be properly stowed. Owing to these matters, and to some delay on the part of the stevedore who had been appointed under the terms of the charterparty, three days more than those allowed by the charterparty were occupied at London for loading. In an action by the shipowners against the charterers for demurrage,

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**Held:** (i) the stevedore was the servant of the shipowners and the charterers were not liable for the delay occasioned by him; (ii) the shipowners were responsible for stowing the cargo and the charterers were not liable for the delay and expense brought about by the re-stowage; and (iii) the captain was not acting as agent for the charterers in re-stowing the cargo; and, therefore, the action failed.

F

**Notes.** Approved: *Argonaut Navigation Co., Ltd. v. Ministry of Food*, [1949] 1 All E.R. 160. Referred to: *National Steamship Co. v. Sociedad Anónima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia), Ltd.* (1932), 48 T.L.R. 325; *Canadian Transport Co. v. Court Line, Ltd.*, [1940] 3 All E.R. 112; *Pyrene Co. v. Scindia Steam Navigation Co.*, [1954] 2 All E.R. 158.

G

As to demurrage and delivery and stowage of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 311, 384 et seq.; and for cases see 41 DIGEST 558 et seq.

Cases referred to in argument:

*Notara v. Henderson* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Ex. Ch.; 41 Digest 495, 3237.

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*Hingston v. Wendt* (1876), 1 Q.B.D. 367; 45 L.J.Q.B. 440; 34 L.T. 181; 3 Asp.M.L.C. 126; sub nom. *Kingston v. Wendt*, 24 W.R. 664, D.C.; 41 Digest 496, 3244.

*Burton v. English* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 41 Digest 596, 4218.

*Budgett & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35; 60 L.J.Q.B. 1; 63 L.T. 742; 39 W.R. 131; 7 T.L.R. 15; 6 Asp.M.L.C. 592, C.A.; 41 Digest 533, 3609.

I

*Blaikie v. Stemberge* (1860), 6 C.B.N.S. 894; 6 Jur.N.S. 825; 8 W.R. 239; 141 E.R. 703; sub nom. *Blakie v. Stemberge*, 29 L.J.C.P. 212; 2 L.T. 570, Ex. Ch.; 41 Digest 466, 2975.

**Application** by the defendants for judgment or for a new trial upon appeal from the verdict and judgment at the trial before GRANTHAM, J., and a jury.

The plaintiffs, who were the owners of the steamship *Dalbeattie*, sued the defendants, who were the charterers of the ship, to recover a sum of £60 for three days'

demurrage, and also a sum of £28 8s. 4d. for expenses incurred in shifting some of the cargo. By a charterparty it was agreed between the plaintiffs and the defendants that the steamship *Dalbattie* should proceed to a loading berth in Leith and Victoria Docks, London, and there load, and being loaded should proceed to five of certain named ports. The charterparty provided as follows:

"Stevedore to be appointed by the charterers in London only, but employed and paid for by owners at current rate. The cargo to be taken to and from alongside the ship at merchant's risk and expense, but to be taken on board and discharged by the owners and at their expense. Ten clear working days are to be allowed the said charterers (if the ship is not sooner despatched) for loading, the day of departure not counting; and all working days on demurrage over and above the said laying days in port of loading to be paid for at the rate of £20 per working day. Lay days to commence on the steamer being placed at the charterers' disposal, with clean swept holds and with steam cranes and all other appliances ready for work, notice of which to be given to the charterers in writing. The charterers' liability on this charter to cease when the cargo is shipped, except for freight due from charterers and any demurrage in loading, the owner having an absolute lien on the cargo for average and demurrage in discharging."

The charterers, as the owners knew, were putting up the ship as a general ship. The charterers shipped some cargo at Leith, the loading there occupying three working days. The captain did not then make any inquiries of the charterers as to the cargo to be loaded at London. The ship then proceeded to London, and on the voyage encountered bad weather. She arrived in the Victoria Docks, London, on Mar. 18, before 7 a.m., and the captain then gave the charterers notice that the ship was ready to load. On taking off the hatches, it was found that, owing to the bad weather, part of the cargo had shifted and part had been damaged. The captain had a survey made, and it was found to be necessary to land part of the cargo to be re-conditioned, and to re-stow some of the cargo which had shifted. It also became necessary to shift some of the cargo in order to enable the London cargo to be properly stowed. The charterers had at all times sufficient cargo alongside the ship to be loaded. Owing to the necessity of moving and re-stowing part of the cargo, and owing to some delay on the part of the stevedore, who had been appointed under the terms of the charterparty, the loading was not completed until Mar. 31.

The owners then brought this action to recover the sum of £60 for three days' demurrage in London, and also the sum of £28 8s. 4d. for expenses in shifting or removing part of the cargo at London.

At the trial the jury found, in answer to specific questions left to them, that (i) the ship was properly loaded at Leith as far as the stowage of the ship was concerned irrespective of convenience for loading other cargo at London; (ii) the captain was justified in loading her at Leith as he did with the information as to London cargo which he possessed or could have obtained, looking to the proper trim of the vessel for her voyage to London; (iii) the way in which the ship was loaded at Leith, irrespective of the shifting of the cargo in the storm, did not increase to any appreciable extent the time occupied in loading at London so as to increase the number of days for which demurrage could be charged; (iv) the loading in London was not delayed through the shifting of cargo in the storm; (v) half a day was a reasonable time for the stevedore in which to have unloaded and re-loaded Leith cargo that had shifted in the storm; (vi) looking at the various ports for which the cargo in London was to be consigned, the captain could not have loaded the cargo at Leith in such a way as to avoid unloading, in London, the whole or a considerable portion of the cargo that was put in Nos. 1 and 3 holds at Leith, irrespective of its having got shifted through the storm; (vii) the ship-owner did not by any act or default prevent the charterer from loading the ship within the stipulated lay days; (viii) the captain was not negligent in stowing the



**A** cargo at Leith. Upon further consideration the learned judge ordered judgment to be entered upon the findings for the plaintiffs for £88 8s. 4d. The defendants applied for judgment or for a new trial.

*Cohen, Q.C., Newsom and Leck* for the charterers.

*Willes Chitty* for the shipowners.

**B** **LORD ESHER, M.R.**—In this case the shipowners brought an action against the charterers to recover certain expenses, and also for three days' demurrage in London, and the question is whether there was any case upon which the judge could properly hold that the shipowners were entitled to recover either sum. The action is one between the shipowners and the charterers, and the rights of those two parties must be determined by the charterparty, and the case must be considered just as if no bills of lading had been given at all.

**C** The charterparty provides that the ship

“shall with all convenient speed proceed to a loading berth in Leith and Victoria Docks, London . . . and there load such lawful merchandise as the charterers may think proper to ship as will go down hatchways and stow, not exceeding 1,500 tons weight . . . and being so loaded shall therewith proceed to . . . and deliver the same as customary as fast as steamer can deliver, remaining always afloat.”

**D** There is the obligation of the shipowner, viz., to place the ship at the disposal of the charterers at two different places to be there loaded. What is the obligation created by the agreement “to be loaded?” Loading is a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading. What is that part of the loading? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner. What is a reasonable course of action for both parties? The shipper has all the lay days within which to bring his cargo to the ship, and, if he did not act reasonably, he might bring it all upon the last of those days; to do so would be unreasonable; he must act reasonably and bring the cargo alongside in sufficient time to enable the shipowner to do his part within the lay days. The shipowner must receive and stow the cargo reasonably as it is brought alongside.

**E** The shipowner, if no stevedore is to be employed by the terms of the contract, may employ a stevedore or not as he chooses; he may load the ship by his own officers, without the assistance of a stevedore, and stow the cargo in that way; if there is no obligation upon the shipper to employ a stevedore, the captain may, if he chooses, employ one, and, if he does, the stevedore is his servant, and he is liable for all his wrongful acts or conduct. Very often the charterparty contains a stipulation as to the employment of a stevedore. Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage. There is also another way in which the arrangement is made. The charterer may desire to have good stowage, but yet not to be under any obligation for the stevedore's actions; the charterer makes a contract with the shipowner or captain that the shipowner or captain shall employ a stevedore, to be appointed or nominated by the charterer. In such a case the shipper nominates a good stevedore, and then leaves him to be the servant of the shipowner, just as if he had been nominated by the shipowner.

What, then, does this contract say upon that matter? It says:

"Stevedore to be appointed by the charterers in London only, but employed and paid for by owners."

At Leith, therefore, this matter was left under the ordinary rule; but in London the stevedore was to be appointed by the charterers but employed and paid for by the owners. If the stevedore was to be appointed by the charterers and to be paid by the shipowner, then the stevedore would be the servant of the charterers; but I have no doubt that the words "employed and paid for by owners" were put into this contract for the very purpose of providing that the stevedore was to be deemed to be the servant of the shipowner. In this case, therefore, the stevedore who was to be appointed was to be the servant of the shipowner, but was to be nominated or appointed by the charterers. This, then, is a charterparty in a form which provides that the stevedore is to be the servant of the shipowner.

Then comes a clause which provides as follows :

"The cargo to be taken to and from alongside the ship at merchant's risk and expense, but to be taken on board and discharged by the owners."

That imposes an obligation which would exist without any such clause. In this case the obligations of the two parties are, that the cargo is to be taken to the ship and lifted to the ship's rail by the charterers, and is then to be taken on board by the shipowner and then stowed by the shipowner when taken on board. There was this peculiarity about the cargo, that there were two ports of loading; and the ship was to be loaded in this way at each of those ports; the joint act of loading was to be done at each port; each party was bound to do that which might be reasonable at each port; and each party was bound to give reasonable information to the other if so requested. If the captain had, at Leith, asked for information from the charterers as to the cargo to be loaded at London, and the charterers could have given such information but did not do so, that would have been unreasonable conduct on their part, and the shipowners could, at all events, have recovered damages in an action against the charterers.

The shipowner, however, knew that cargo was to be loaded at London, and he knew pretty well what that cargo would be, and it was his duty to leave the ship in such a condition that the London cargo could be put on board at London, and for that purpose to ask for information from the charterers if he wanted any. If he did not ask for any information he took the risk. He might have asked for such information, and was entitled to get it, if the other party could reasonably give it. He did not ask, and, therefore, took the risk. When the ship came to London, he found out what the London cargo consisted of, and he had to arrange to take it on board, and for that purpose to re-arrange the Leith cargo. That is all a matter of stowage. The shipowner solely had undertaken that matter. He was to stow the cargo because the stevedore was his servant. If the charterers had cargo ready, and the shipowner was obliged to move the cargo, which was already on board, in order to stow the London cargo, that cannot impose any obligation on the charterers. If by so moving the cargo the shipowner was not ready to take on board the London cargo so as to do it within the lay days, that difficulty arose from the obligation which lay upon him, and which he failed in fulfilling. If the shipowner failed in fulfilling his part, but the charterers had cargo ready to be taken on board, the shipowner cannot charge the charterers for demurrage. All the delay was the delay of the shipowner, and the delay of the ship was his misfortune.

There is very strong evidence in this case that the stevedore at London took a longer time than was necessary to do his work in London, and the jury have in fact so found. It is impossible for the shipowner to charge the charterers for that. It is said that the charterers did not perform their part of the loading, and they had not cargo ready to be taken on board, and that the stevedore was delayed by that fact. That point was raised at the trial, and the evidence showed conclusively that there was always cargo ready to be taken on board, and the case must, therefore, be dealt with on the assumption that there was always sufficient cargo along-

A side the vessel. It is clear that there was default on the part of the stevedore at London, and it is beyond doubt that he was the stevedore of the shipowner. The claim for demurrage, therefore, cannot be sustained.

B As to the claim for expenses, if they were the expenses incurred in taking out the damaged cargo, there would have been a curious question raised. If that had been done in a case of necessity, the cesser clause would have had nothing to do with it. If not done in a case of necessity, the captain would not be the agent of the shippers unless he had consulted them and obtained their authority. In this case, if the charterers are treated as being the shippers, the captain could not be their agent of necessity at London, because they were at London and could be consulted. The captain could have told them that their goods were damaged, and have asked them to consider what ought to be done. The captain was not, there-  
C fore, their agent here, and they cannot be charged with those expenses. If these expenses were the expenses of moving the cargo to make room for the London cargo, then they were expenses of stowage, and the charterers cannot be charged with them. The plaintiffs had no cause of action on either claim, and the learned judge at the trial ought to have directed the jury to find a verdict for the defendants. This appeal must be allowed, and judgment entered for the defendants.

D **LOPES, L.J.**—I am of the same opinion, and have nothing to add to the exhaustive judgment of the Master of the Rolls, with which I entirely agree.

**KAY, L.J.**—I am of the same opinion.

*Appeal allowed.*

Solicitors: *Lowless & Co.; Botterell & Roche.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

F

## MEDAWAR v. GRAND HOTEL CO.

G [COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), February 5, 6, 1891]

[Reported [1891] 2 Q.B. 11; 60 L.J.Q.B. 209; 64 L.T. 851; 55 J.P. 614; 7 T.L.R. 269]

H

*Inn—Loss of guest's property—"Guest"—Temporary user of room engaged by other persons arriving later—Valuables and luggage left in unlocked room—Luggage later moved into corridor by innkeeper's servants—Negligence of guest—Loss exceeding £30—Burden of proof—Innkeepers' Liability Act, 1863 (26 & 27 Vict., c. 41), s. 1.*

I

The plaintiff went to the defendants' hotel at an early hour in the morning, and asked for a bedroom. He was told that he could not have a room, as the hotel was full, but that there was a room, engaged by people who would arrive during the day, which he might use for the purpose of washing and dressing. He was shown up to this room, and his luggage (consisting of portmanteau, hat-box, and dressing-bag) were taken there. He washed and dressed in this room, opening his dressing-bag for that purpose, and taking out of it and placing on the dressing-table a dressing-case. He then went down to the coffee-room, had breakfast, paid for it, and went out, leaving his luggage in the room he had used, with the dressing-bag open and the dressing-case on the table. He did not return till late at night. In the meantime the persons who had engaged the room arrived, and the whole of the plaintiff's luggage



was then placed in the corridor by the defendants' servants. When the plaintiff returned at night, he asked for his room, and was told he had none. Ultimately it was found that a room had been vacated since the morning, and the plaintiff's luggage was brought from the corridor and placed in it, the plaintiff's name being then entered for the first time in the guest-book of the hotel. The next morning the plaintiff discovered that jewellery had been stolen from an unlocked drawer in his dressing-case.

**Held:** assuming the relation of innkeeper and guest to have existed between the plaintiff and the defendants until the arrival of the other guests, the onus was upon the defendants to show that the loss occurred before the removal of the luggage to the corridor, and, consequently, through the plaintiff's negligence alone, which they had failed to do; but as to any loss exceeding £30, the onus was upon the plaintiff, under the Innkeepers' Liability Act, 1863, to show that it arose through the wilful act, default, or neglect, of the innkeeper or his servant, and, as the plaintiff had not shown that the loss occurred after the removal of the luggage to the corridor, he had not fulfilled that onus, and was not entitled to recover more than £30.

**Notes.** The Innkeepers' Liability Act, 1863, has been repealed and replaced by the Hotel Proprietors' Act, 1956, s. 2 (3) of which replaces s. 1 of the 1863 Act. The Act of 1956 increased the statutory limit to £50 for one article and £100 in the aggregate.

Referred to: *Orchard v. Bush* (1898), 78 L.T. 557.

As to burden of proof, see 15 HALSBURY'S LAWS (3rd Edn.) 267-272. As to liability of innkeepers, see *ibid.*, vol. 21, p. 441 et seq.; and for cases see 29 DIGEST (Repl.) 6 et seq. For s. 2 (3) of the Hotel Proprietors' Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 467.

Cases referred to in argument:

*Burgess v. Clements* (1815), 1 Stark, 249, n.; 4 M. & S. 306; 105 E.R. 848; 29 Digest (Repl.) 17, 197.

*Cashill v. Wright* (1856), 6 E. & B. 891; 27 L.T.O.S. 283; 20 J.P. 678; 2 Jur.N.S. 1072; 4 W.R. 709; 119 E.R. 1096; 29 Digest (Repl.) 18, 200.

*Morgan v. Ravey* (1861), 6 H. & N. 265; 2 F. & F. 283; 30 L.J.Ex. 131; 3 L.T. 784; 25 J.P. 376; 9 W.R. 376; 158 E.R. 109; 29 Digest (Repl.) 22, 251.

*Oppenheim v. White Lion Hotel Co.* (1871), L.R. 6 C.P. 515; 40 L.J.C.P. 231; 25 L.T. 93; 20 W.R. 34; 29 Digest (Repl.) 18, 201.

*Jones v. Jackson* (1873), 29 L.T. 399; 37 J.P. 776; 29 Digest (Repl.) 18, 207.

*Herbert v. Markwell* (1881), 45 L.T. 649; 46 J.P. 358, D.C.; 29 Digest (Repl.) 17, 192.

*Bennett v. Mellor* (1793), 5 Term Repl. 273; 101 E.R. 154; 29 Digest (Repl.) 15, 177.

*Day v. Bather* (1863), 2 H. & C. 14; 2 New Rep. 37; 9 Jur.N.S. 444; 11 W.R. 575; 159 E.R. 6; sub nom. *Bather v. Day*, 32 L.J.Ex. 171; 8 L.T. 205; 29 Digest (Repl.) 19, 213.

*Gelley v. Clerk* (1607), Cro. Jac. 188; Noy, 126; 4 Bac. Abr. 448; 79 E.R. 164; 29 Digest (Repl.) 5, 43.

*Yorke v. Grenaugh* (1703), 2 Ld. Raym. 866; 92 E.R. 79; sub nom. *York v. Grindstone*, 1 Salk. 388; 29 Digest (Repl.) 6, 51.

*Spice v. Bacon* (1877), 2 Ex.D. 463; 46 L.J.Q.B. 713; 36 L.T. 896; 42 J.P. 261; 25 W.R. 840, C.A.; 29 Digest (Repl.) 21, 231.

*Allen v. Smith* (1863), 1 New Rep. 404; 9 Jur.N.S. 1248; 11 W.R. 440, Ex. Ch.; 29 Digest (Repl.) 27, 316.

**Appeal** from the judgment of A. L. SMITH, J., on the trial of the action for damages for loss of goods from the defendants' hotel.

The plaintiff arrived at the defendants' hotel at 7 o'clock in the morning. He had with him three articles of luggage, namely, a portmanteau, a hat-box, and a dressing case bag. He asked for a bedroom, and was told that the hotel was full

A and that no bedroom was available, but there was one vacant room on the fourth floor which had been booked by a couple who were to arrive later in the day. The plaintiff was told that he could make use of this room for washing and dressing. He was shown to the room and his luggage was taken there by the hotel porter. There was posted up in the hall of the hotel a notice pursuant to the Innkeepers' Liability Act, 1863, and at the foot thereof in leaded type was printed:

B "For the safe custody of money and valuables visitors are requested to apply at the office. By order."

There was also hung up over the washing-stand in the room a printed table of charges and regulations, among which was as follows:

C "The proprietors will not be responsible for property lost in the hotel unless the same be deposited at the office and a receipt taken (see the Innkeepers' Liability Act, 1863, s. 1), and, as a matter of precaution, request that visitors will bolt and lock their room doors at night."

There was also pasted upon the inside of the door, just above the door-handle, the following notice:

D "Visitors are respectfully requested to lock and bolt their room doors at night."

There was a key in the lock of this door, with a label attached with the number of the room thereon, so that the door could be locked and the key taken had it been desired to do so. After arriving in the room, the plaintiff opened his dressing-case bag, and took thereout a stand and placed it on the dressing-table. This stand contained a large number of silver-mounted bottles, a flask with brandy in it, and also ivory brushes, combs, boot and button hooks, knives, scissors, and other implements supposed by some to be requisite for the proper performing of a toilet. In a drawer in this stand were the trinkets for the loss of which the action is brought. The plaintiff washed and dressed, and then went downstairs into the coffee-room, and had breakfast, having left the room unlocked, with the stand of his dressing-bag exposed upon the dressing-table as above described. He gave no information to anyone of what he had done. Having paid for his breakfast, which also included the accommodation he had had, he went out, and did not return to the hotel till late at night on the same day.

E In the meantime, namely, about 9 p.m., the couple for whom the room had been reserved arrived, and were shown up thereto by the page-boy of the hotel. Upon going into the room the page-boy found the plaintiff's luggage situated as already mentioned, and whistled down the tube to the head porter for directions. No evidence was given to show that the head porter or anyone else in the hall was aware of the way in which the plaintiff had left his dressing-bag and its stand, or of its contents. The page-boy, pursuant to the order of the head porter, removed the luggage into the corridor, and there left the stand as it was, the dressing-bag, and the other luggage. At about half-past twelve at night, the plaintiff having shortly before returned to the hotel, asked for his room, but was told that he had none. It was ascertained, however, that a room upon the first floor had been vacated, and this was given to the plaintiff. The plaintiff then entered his name in the guest-book, pursuant to the practice of the hotel when guests are received, and his luggage was brought down to the first floor from the corridor on the fourth. The next morning the plaintiff discovered that his trinkets had been stolen from the drawer of his dressing-bag stand, and the brandy in the flask was also partially abstracted.

I The plaintiff brought an action for damages against the innkeepers for £140, the total value of the stolen articles. A. L. SMITH, J., held that the plaintiff was not a guest at the hotel when the goods were stolen and that they were lost as a result of his own negligence. The plaintiff appealed.

*Henn Collins, Q.C., and Commins* for the plaintiff.

*Kennedy, Q.C., and W. F. Taylor* for the defendant.

**LORD ESHER, M.R.**—The solution of this case will, to my mind, depend upon the inference of fact to be drawn from events as to which there is no doubt. There is no question here of the credibility of witnesses. We have the facts found by the learned judge, and we have to determine whether he has drawn the right inference from those facts. We are entitled to bring to bear on the facts our knowledge of the world, and I shall, therefore, bring to bear on this case my knowledge of the manner in which the business of hotels is conducted. A

The plaintiff, then, goes to an hotel in Liverpool. With what intention does he go there? Certainly not with the intention of making a contract. He goes there in the exercise of his right as one of the public to use the house as an hotel. An innkeeper does not make a specific contract with every individual who comes to his inn. He has no right to refuse anyone; and, in return for that obligation, he is given a lien on his guest's luggage for his charges. Of course he is not bound to take anyone if there is no room for him in the inn; in that case he can do nothing else but refuse to take him. In the present case, the plaintiff was told by the person left in authority for that purpose that they could not give him a room, that they had no room to give him; but, after reflection, the same person said that she could give him a room for the purpose of washing at that time, but that it was engaged by persons who were to arrive later. So it comes to this, that he was told that they could not give him a room to sleep in. Then his luggage is taken up to the room. The effect of what was said and done seems to me to be this: that he was to have a room in the hotel as a guest, but only for a time. Supposing that the people who were expected had not come, the manager of the hotel would never have thought of saying to the plaintiff that he could not have the room for the night. His things were there, and would have been allowed to remain there. There was a tacit understanding that his things were to be left in the room till the other people came. B C D E

Then was the relationship of innkeeper and guest established between the plaintiff and the defendants at any time? There certainly was such a relationship, to my mind, while he was actually using the room. What other relationship could it be at that time? But it was argued that the relationship only lasted while he was washing and dressing and then came to an end. That argument admits that the plaintiff was received as a guest into the hotel. It certainly is not the ordinary custom in hotels that a guest should carry his own luggage up or down the stairs. In this case the hotel servants carried his luggage up. If he ceased to be a guest when he had finished using the room, why did they not then carry his luggage down? It is said that he ought to have given them notice to do so. Why? If, the defendants knew, when the plaintiff applied for a room, that he could only have it for the purpose of washing and dressing, what need was there for him to give any notice? Supposing that to have been the understanding, it would have been the manager's duty in the ordinary course to have told the porter that the room was only given to the plaintiff to wash and dress in, and that, when he had washed and dressed, his things were to be fetched down. In that case, after the guest had had breakfast, if the things had not come down, the manager should have sent up for them. There was no new contract entered into with reference to the plaintiff's luggage after the plaintiff had left the room; nor, indeed, was there any contract made at any time, except such as necessarily arose out of the relationship of innkeeper and guest. The plaintiff was, therefore, a guest at all events up to the time when his things were taken out of the room. F G H

What is an innkeeper bound to do with respect to a guest's luggage? He is bound to keep it safely. If a guest's property is lost while it is in an inn, the innkeeper is *prima facie* liable. But the innkeeper can get rid of that *prima facie* case if he shows that the goods were lost by the negligence of the guest. The onus of proof of that is upon him. I think that in this case the defendants did prove that the plaintiff was guilty of negligence in leaving his jewellery in an unlocked drawer of his dressing-case which he had taken out of his bag; and, if they had also proved that the goods were lost in the room, then they could have shown I



**A** that the goods were lost by the negligence of the plaintiff. But the defendants, through their servants, cut themselves off from the possibility of proving that by turning the things out into the corridor. What happened was, that the parties to whom the room was let arrived; that they are taken up to the room by a page-boy, who finds the plaintiff's things there; that he asks what to do with them, and is told by the head porter to put them out in the corridor; and that he puts **B** them out into the corridor just as they were, with the dressing-case outside the bag. There can be no doubt that this was gross negligence on the part of the porter and the page-boy. The defendants, therefore, could not prove that the things were lost while they were in the room. It is just as likely that they were lost in the corridor. The effect of their being stolen in the corridor and not in the room is, that the loss then is the result of the negligence of the defendants' servants in placing the things there, and not of the negligence of the plaintiff in leaving his things about. It is like the case of the donkey left carelessly in the road and run over when it could have been avoided. The fact that the plaintiff had been negligent did not entitle the defendants' servants to be negligent afterwards.

The matter, therefore, stands thus: The plaintiff has proved that the loss in **D** question was of property that he had at the hotel as a guest; the defendants have left it in doubt whether the loss occurred through the negligence of the plaintiff or through the negligence of their own servants; in order to escape liability they were bound to prove that the loss occurred through the negligence of the plaintiff; and the defendants are therefore liable, apart from the Act of Parliament which I am about to refer to, for the whole amount of the claim. The Innkeepers' **E** Liability Act, 1863, leaves the rights and obligations of the parties as they were before, but says that the plaintiff shall only recover £30, unless he can show that the loss arose through the wilful act, default, or neglect of the defendant or his servants. To get rid of that limitation of the defendant's liability the plaintiff has to prove that the loss has been the result of such wilful act, default, or neglect; and I think that he must prove that the loss was solely so caused, and that, if it **F** may have been caused partly by his own negligence, he fails to get rid of the limitation. In the present case I think that the plaintiff has not shown that the loss was caused solely by the wilful act, default, or neglect of the defendants' servants. If the goods were lost after they were placed in the corridor the loss was so caused; but the burden of proof is upon the plaintiff to show that. As it is not proved whether the loss occurred in the room or in the corridor, and as, for this **G** purpose, the onus of proof is shifted, I think that the plaintiff has failed to get rid of the limitation of liability given to the defendants by the Act. In my opinion there ought to have been judgment for the plaintiff for £30.

**BOWEN, L.J.**—This case turns on inferences of fact, but it is an interesting case to a lawyer, because the result depends upon nice questions as to onus of **H** proof. In order to arrive at a correct conclusion, it is necessary to follow the shifting of that onus from the defendants to the plaintiff. The reason why we have to determine whether the relationship of innkeeper and guest existed between the defendants and the plaintiff is that, if the plaintiff can only rely on the negligence of the defendants as bailees, it is, of course, for him to prove his case; whereas, if he can bring himself within the relationship of landlord and guest, it **I** lies on the landlords to discharge themselves from liability.

There is no doubt that during the whole of the day on which the plaintiff arrived at the hotel his goods were on the premises, and that, in the course of that day, some of them disappeared. The difficulty in the case arises from the fact that, if the loss of the goods happened before they were removed by the defendants from the room where the plaintiff had left them to the corridor, there would then have been such negligence on the plaintiff's part causing the loss as would prevent him from recovering, notwithstanding the subsequent negligence of the defendants; if the loss happened after they were removed, then the plaintiff would be entitled

to recover. We desire to know, therefore, whether the goods were lost before or after they were removed; but we are unable to ascertain this. Thereupon it becomes necessary to decide upon which of the parties the onus of proof rests. This depends, as I have said, upon whether the relationship of host and guest ever existed between them, and upon whether, if it ever existed, it ceased when the plaintiff left the hotel in the morning. If such a relationship never existed, or if it ceased in the morning, the plaintiff would have to show that the goods were lost after they were put out into the corridor, which he could not do, and his action would consequently fail.

In considering what was the relationship between the parties, you start with this, that a person who goes to an hotel has a right to the use of an unoccupied room. If a room is let to a guest who has not arrived, that is an unoccupied room. Until the room is actually wanted for the guest who has engaged it, it seems to me that the hotel-keeper is bound not to refuse accommodation at his house to any person applying for it. The hotel is not full until those who have engaged the rooms have arrived. The plaintiff, when he arrived at this hotel, was told by the manageress that the hotel was full, that he could not have a bedroom, but that there was a room then vacant, which was engaged by a lady and gentleman who were expected to arrive during that day, and that the plaintiff could then utilise it for the purpose of washing and dressing. I think that that meant that they could not guarantee the plaintiff a room beyond the time that the people who had engaged it should arrive, but that till those people arrived he might have it. The subsequent facts seem to bear out that view. His luggage was taken up to the room, and he went down to breakfast leaving his things there. No bill was made out for the use of the room. It is true that his name was not entered in the guest-book of the hotel; but that was because it was not certain that he would sleep there. Although it may have escaped their memory during the day, the hotel servants must have known at the time the plaintiff went out in the morning that his luggage had not been brought down. Counsel for the defendants argued that, at any rate, the plaintiff ceased to be a guest when he left the hotel in the morning. That, to my mind, is not a true proposition of law. I think that the relationship of host and guest continued until a reasonable time after a demand had been made for the room. I think, therefore, that the plaintiff is entitled to a verdict; but I think that he is only entitled to recover to the extent of £30, for the reasons given by the Master of the Rolls.

**FRY, L.J.**—On the questions that arise in this case as to the burden of proof, I agree with what has been said by the Master of the Rolls and **BOWEN, L.J.**; but, with regard to what is the true inference to be drawn from the facts, I differ from them, and agree with the learned judge who tried the case.

It is quite clear that, on arriving at the hotel, the plaintiff was told he could not have a bedroom. He was told by the manageress that the hotel was full, but that there was one room vacant which was engaged by a lady and gentleman who were expected to arrive during the day, and that the plaintiff could then utilise it for the purpose of washing and dressing. The plaintiff might, perhaps, have insisted on engaging the room for the day until the persons who had engaged it arrived. The usual thing is to engage a room for the night, and not for the day. However, I say nothing as to what his rights would have been if he had insisted on his right to engage the room for the day. But he did nothing of the kind. He was quite free to go to another hotel. He accepted the offer of a room to wash and dress in that was made by the manageress. He would require a portion of his luggage for the purpose of dressing; and, as it was obviously convenient that it should be kept together, it was all taken to the room. He occupies the room for the purpose for which it was offered, and then comes down to the coffee-room for breakfast. Having had his breakfast, he pays for it then and there. That is not the ordinary course for a person staying in the hotel. He does not receive the ticket which, according to ordinary usage, he would have received if he had been staying at the

A hotel. After breakfast he goes away. What ought the plaintiff to have done before he left, even if he had engaged the room till the other guests arrived? Knowing that they might arrive before his return, he ought to have made some provision as to the disposal of his luggage. We all know that the people of the hotel do not interfere with a guest's luggage till they are told that it is ready.

B I think, therefore, that the true inference from all the facts is, that the plaintiff occupied the room for the purpose of washing and dressing only. He could not, in my opinion, have been charged for anything more than that. It has been suggested that he was entitled to occupy the room till the arrival of the other guests. If he was entitled to make such an arrangement he did not do so. He did not even ask at what hour the other guests were expected to arrive. On these grounds, I think that the view taken by the learned judge below was correct.

C *Appeal allowed.*

Solicitors: *F. Venn & Co.* for *Hugh Quinn*, Liverpool; *Roche & Son* for *Snowball & Lewes*, Liverpool.

[*Reported by* ADAM H. BITTLESTON, ESQ., *Barrister-at-Law.*]

D

E  
LONDON COUNTY COUNCIL v. ERITH CHURCHWARDENS  
WEST HAM CHURCHWARDENS v. LONDON COUNTY COUNCIL  
ST. GEORGE'S ASSESSMENT COMMITTEE v. LONDON  
COUNTY COUNCIL

F [HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten and Lord Morris), February 23, 27, 28, March 2, 3, May 30, September 8, 1893]

[*Reported* [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725;  
57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22;  
Ryde, Rat. App. (1891-3) 382]

G *Rates—Assessment—Rent payable by hypothetical tenant—"Hypothetical tenant"—Owner of hereditament—Percentage basis.*

H Where the rates of a hereditament are to be assessed by reference to the rent which a hypothetical tenant might reasonably be expected to pay, the owner of the hereditament, including a statutory body who owns and occupies the hereditament for the performance of its statutory functions, is to be taken into account as a possible tenant. Whether the premises are in the occupation of the owner or not the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them?

Observations on valuation on a percentage basis.

I *Rates—Rateable occupation—Beneficial occupation—Occupation of value to occupier, but no pecuniary profit.*

In determining the rateability of a hereditament it must be capable of beneficial occupation. Whether the occupation is beneficial depends on whether it is of value to the occupier, not whether it is an occupation by which a profit can be earned. Accordingly, sewage and other public works are rateable although they do not produce any profit to the undertakers occupying them.

*Mersey Docks and Harbour Board v. Llaneilian Overseers* (1) (1884), 14 Q.B.D. 770, disapproved.



*Rates—Sewer—Outfall sewer carried in embankment above ground.*

Sewers placed by a public authority under the land, the surface of which is occupied by other persons and in the ordinary course assessed to the poor rate has long been deemed to be free from rateability, but where an outfall sewer was carried in an earthen and concrete embankment, of an average height of 21 feet, on land belonging to the sewage authority, it was **held** to be undistinguishable from any other erection on land specially suitable for the purposes of the occupier, and, as such, was rateable.

**Notes.** Applied: *Leicester Corp. v. Beaumont Leys and Barrow-on-Soar Union Assessment Committee* (1894), 63 L.J.M.C. 176; *Imperial Institute of the United Kingdom v. St. Mary Abbots, Kensington and St. George's Union* (1895), Ryde & K.Rat. App. 1. Distinguished and Explained: *Sculcoates Union v. Kingston-upon-Hull Dock Co.*, [1895] A.C. 136. Considered: *Lancaster Port Comrs. v. Barrow-in-Furness Overseers*, [1897] 1 Q.B. 166. Distinguished: *Lambeth Overseers v. L.C.C.*, [1897] A.C. 625; *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1900] 1 Q.B. 143. Applied: *Soan's Museum Trustees v. St. Giles and St. George's Vestry* (1900), 16 T.L.R. 440. Considered and Explained: *Ystradyfodwg and Pontypridd Main Sewerage Board v. Newport Assessment Committee*, [1901] 1 K.B. 406. Considered: *Royal Medical Benevolent College v. Epsom Union* (1902), Ryde & K.Rat. App. 82; *Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted*, [1907] 1 K.B. 490. Applied: *Davies v. Seisdon Union*, [1908] A.C. 315. Considered: *Great Central Railway v. Banbury Union, Sheffield Union v. Great Central Railway*, [1909] A.C. 78; *Jones v. West Derby Union* (1911), 75 J.P. 375; *West Kent Main Sewerage Board v. Dartford Assessment Committee*, [1911] A.C. 171; *Liverpool Corp. v. Chorley Union Assessment Committee*, [1911-13] All E.R.Rep. 194; *Metropolitan Water Board v. Chertsey Assessment Committee*, [1916] A.C. 337; *Port of London Authority v. Orsett Union*, [1920] All E.R.Rep. 545; *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] All E.R.Rep. 191; *Hackney Borough Council v. Metropolitan Asylums Board* (1924), 131 L.T. 136; *Kingston Union Assessment Committee v. Metropolitan Water Board*, [1926] All E.R.Rep. 1; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585; *Westminster Corp. v. Southern Rail. Co.*, [1936] 2 All E.R. 322; *Clayton v. Kingston-upon-Hull Corp.*, [1960] 3 All E.R. 840. Referred to: *Cattewater Harbour Comrs. v. Plympton St. Mary Union Assessment Committee* (1899), 63 J.P. 297; *Oxford University v. Oxford Corp.* (1902), Ryde & K.Rat. App. 87; *Westminster Corp. v. Johnson, Same v. Fuller*, [1904] 2 K.B. 737; *Liverpool Corp. v. West Derby Union*, [1904-7] All E.R.Rep. 296; *East London Railway Joint Committee v. Greenwich Union Assessment Committee, Same v. Bermondsey Assessment Committee, Same v. Stepney Assessment Committee*, [1913] 1 K.B. 612; *Consett Iron Co. v. Durham County Assessment Committee* (1930), 99 L.J.K.B. 277; *London Playing Fields Society v. South West Essex Assessment Committee*, [1930] All E.R.Rep. 104; *St. James' and Pall Mall Electric Light Co. v. City of Westminster Assessment Committee* (1932), 147 L.T. 396; *Re Southern Rail. Co. Appeals* (1935), 152 L.T. 299; *Railway Assessment Authority v. Southern Rail. Co.*, [1936] 1 All E.R. 26; *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-Le-Street Assessment Committee*, [1937] 2 All E.R. 298; *Mitcham Golf-course Trustees v. Ereaut*, [1937] 3 All E.R. 450; *North Riding of Yorkshire County Valuation Committee v. Redcar Corp.*, [1942] 2 All E.R. 589; *Yeovil R.D.C. v. South Somerset and District Electricity Co.*, [1947] 1 All E.R. 669; *Rawlence v. Croydon Corp.*, [1952] 2 All E.R. 535; *Sheffield Corp. v. Tranter (Valuation Officer)*, [1957] 2 All E.R. 583; *Morecambe and Heysham Corp. v. Robinson (Valuation Officer)*, [1961] 1 All E.R. 721; *British Transport Commission v. Hingley*, [1961] 1 All E.R. 837; *Kingston-upon-Hull Corp. v. Clayton*, [1961] 3 All E.R. 118.

**A** As to rateable occupation, exemption of sewers, and valuation for rating, see 32 HALSBURY'S LAWS (3rd Edn.) 16, 52, 60; and for cases see 38 DIGEST (Repl.) 476, 492, 475, 609.

Cases referred to:

- (1) *Mersey Docks and Harbour Board v. Llaneilian Overseers* (1884), 14 Q.B.D. 770; 54 L.J.Q.B. 49; 52 L.T. 118; 49 J.P. 164; 33 W.R. 97; 5 Asp.M.L.C. 358, C.A.; 38 Digest (Repl.) 489, 101.
- B** (2) *Metropolitan Board of Works v. West Ham Overseers* (1870), L.R. 6 Q.B. 193; 40 L.J.M.C. 30; 23 L.T. 490; 35 J.P. 230; 19 W.R. 246; 38 Digest (Repl.) 492, 117.
- (3) *Burton-upon-Trent Corpn. v. Burton-upon-Trent Union Assessment Committee and Stretton Overseers; Same v. Egginton Churchwardens and Overseers and Burton-upon-Trent Union Assessment Committee* (1889), 24 Q.B.D. 197; 59 L.J.M.C. 1; 62 L.T. 412; 54 J.P. 453; 38 W.R. 181; Ryde, Rat. App. (1886-90) 314, C.A.; 38 Digest (Repl.) 616, 864.
- C** (4) *R. v. London School Board* (1886), 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384; 50 J.P. 419; 2 T.L.R. 633; Ryde, Rat. App. (1886-90) 225; sub nom. *London School Board v. St. Leonard, Shoreditch Assessment Committee*, 34 W.R. 583, C.A.; 38 Digest (Repl.) 616, 862.
- D** (5) *R. v. Metropolitan Board of Works* (1868), L.R. 4 Q.B. 15; 9 B. & S. 937; 38 L.J.M.C. 24; 19 L.T. 348; 33 J.P. 115; 17 W.R. 527; 38 Digest (Repl.) 492, 116.
- (6) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.
- E** (7) *West Bromwich School Board v. West Bromwich Overseers* (1884), 13 Q.B.D. 929; sub nom. *R. v. West Bromwich School Board*, 53 L.J.M.C. 153; 52 L.T. 164; 48 J.P. 808; 32 W.R. 866, C.A.; 38 Digest (Repl.) 551, 428.
- (8) *Bristol Governors of the Poor v. Wait* (1836), 5 Ad. & El. 1; 2 Har. & W. 70; 6 Nev. & M.K.B. 383; 5 L.J.M.C. 113; 111 E.R. 1067; 38 Digest (Repl.) 479, 32.
- F** (9) *Owens College v. Chorlton-upon-Medlock Overseers* (1887), 18 Q.B.D. 403; 56 L.J.M.C. 29; 56 L.T. 373; 35 W.R. 236; 51 J.P. 356, C.A.; 38 Digest (Repl.) 616, 860.
- G** (10) *Sheffield United Gas Light Co. v. Sheffield Overseers* (1863), 4 B. & S. 135; 8 L.T. 692; 27 J.P. 439; 9 Jur.N.S. 623; 122 E.R. 410; sub nom. *R. v. Sheffield United Gaslight Co.*, 32 L.J.M.C. 169; 11 W.R. 1064; 38 Digest (Repl.) 658, 1117.
- (11) *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; sub nom. *West Middlesex Waterworks Co. of Proprietors v. Hampton Overseers*, 5 Jur.N.S. 1159; 38 Digest (Repl.) 503, 182.
- H**

Also referred to in argument:

- R. v. Sculcoates Churchwardens* (1810), 12 East, 40; 104 E.R. 17; 38 Digest (Repl.) 479, 31.
- I** *Lincoln Corpn. v. Holmes Common Overseers* (1867), L.R. 2 Q.B. 482; 8 B. & S. 344; 36 L.J.M.C. 73; 16 L.T. 739; 31 J.P. 645; 15 W.R. 786; 38 Digest (Repl.) 544, 385.
- Worcester Corpn. v. Droitwich Assessment Committee* (1876), 2 Ex.D. 49; 46 L.J.M.C. 241; 36 L.T. 186; 41 J.P. 355; 25 W.R. 336, C.A.; 38 Digest (Repl.) 655, 1100.
- Liverpool Corpn. v. Wavertree Overseers* (1875), 2 Ex.D. 55, n.; 39 J.P. 101; 38 Digest (Repl.) 655, 1099.
- New Shoreham Harbour Comrs. v. Lancing* (1870), L.R. 5 Q.B. 489; 39 L.J.M.C. 121; 35 J.P. 135; 38 Digest (Repl.) 594, 739.

- Hare v. Putney Overseers* (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 29 W.R. 721, C.A.; 38 Digest (Repl.) 480, 38. **A**
- Chorlton-upon-Medlock Overseers v. Chorlton Union and Ardwick Overseers* (1882), 51 L.J.Q.B. 458; 47 L.T. 96; 46 J.P. 535, D.C.; 38 Digest (Repl.) 615, 858.
- Peterborough Corp'n. v. Stamford Union* (1883), 31 W.R. 949; affirmed sub nom. *Peterborough Corp'n. v. Wilsthorpe Overseers*, 12 Q.B.D. 1; 53 L.J.M.C. 33; 50 L.T. 189; 48 L.J. 373; 32 W.R. 548, C.A.; 38 Digest (Repl.) 656, 1101. **B**
- Dewsbury Waterworks Board v. Penistone Union Assessment Committee* (1886), 17 Q.B.D. 384; 55 L.J.M.C. 121; 54 L.T. 592; 50 J.P. 644; 34 W.R. 622, C.A.; 38 Digest (Repl.) 651, 1083.
- London Corp'n. v. Stratton* (1875), L.R. 7 H.L. 477; 45 L.J.M.C. 23; 30 L.T. 37; 40 J.P. 244; sub nom. *St. Thomas's Hospital v. Stratton*, 23 W.R. 882, H.L.; 38 Digest (Repl.) 539, 356. **C**
- Greig v. Edinburgh University* (1868), L.R. 1 Sc. & Div. 348; 32 J.P. 627, H.L.; 38 Digest (Repl.) 553, 436.
- R. v. Grand Junction Rail. Co.* (1844), 4 Q.B. 18; 4 Ry. & Can. Cas. 1; 1 Dav. & Mer. 237; 1 New Mag. Cas. 29; 1 New Sess. Cas. 203; 13 L.J.M.C. 94; 3 L.T.O.S. 123; 8 J.P. 358; 8 Jur. 508; 114 E.R. 804; 38 Digest (Repl.) 642, 1019. **D**
- R. v. Eastern Counties Rail. Co.* (1863), 4 B. & S. 58; 32 L.J.M.C. 174; 9 Jur.N.S. 1339; 122 E.R. 381; sub nom. *Eastern Counties Rail. Co. v. Great Amwell Churchwardens and Overseers*, 2 New Rep. 236; 8 L.T. 419; 27 J.P. 423; 11 W.R. 694; 38 Digest (Repl.) 639, 986. **E**
- Altrincham Union Assessment Committee v. Cheshire Lines Committee* (1885), 15 Q.B.D. 597; 50 J.P. 85, C.A.; 38 Digest (Repl.) 639, 992.
- Tyne Improvement Comrs. v. Chirton Overseers* (1859), 1 E. & E. 516; 23 J.P. 583; 120 E.R. 1002; sub nom. *R. v. Chirton Churchwardens and Overseers*, 28 L.J.M.C. 131; 5 Jur.N.S. 865; sub nom. *R. v. Tyne Improvement Comrs.*, 32 L.T.O.S. 275; 7 W.R. 242; 38 Digest (Repl.) 565, 525. **F**
- R. v. Hull Justices* (1854), 4 E. & B. 29; 2 C.L.R. 1480; 23 L.T.O.S. 231; 2 W.R. 620; 119 E.R. 12; sub nom. *R. v. Cooper*, 23 L.J.M.C. 183; 18 J.P. 695; 18 Jur. 899; 38 Digest (Repl.) 563, 506.
- Guest v. East Dean* (1872), L.R. 7 Q.B. 334; 41 L.J.M.C. 129; 26 L.T. 422; 36 J.P. 342; 20 W.R. 332; 38 Digest (Repl.) 676, 1259.
- R. v. Foundling Hospital* (1871), L.R. 7 Q.B. 83; 41 L.J.M.C. 41; 25 L.T. 562; 36 J.P. 389; 20 W.R. 92; sub nom. *Foundling Hospital Governors v. St. Pancras' Parish Assessment Committee*, Ryde, Rat. App. (1871-85), 28; 38 Digest (Repl.) 762, 1784. **G**
- Clyde Navigation Trustees v. Adamson* (1865), 4 Macq. 931, H.L.; 38 Digest (Repl.) 565, 520.
- Great Eastern Rail. Co. v. Hackney Board of Works* (1883), 8 App. Cas. 687; 52 L.J.M.C. 105; 49 L.T. 509; 48 J.P. 52; 31 W.R. 769, H.L.; 26 Digest (Repl.) 560, 2275. **H**

**Appeals** from decisions of the Court of Appeal upon Special Cases stated by courts of quarter sessions. The appeals were argued separately, but they practically involved the same point, and only one judgment was given.

In the *Erith Case* the London County Council appealed against a poor rate made for the parish of Erith, in Kent, in which they were rated as owners and occupiers of sewage outfall works, a pumping station, and appurtenances used as part of the metropolitan system of sewage. In the *West Ham Case* the West Ham Churchwardens appealed against a decision of the Court of Appeal relating to the rateability of main sewers and a pumping station owned and occupied by the county council in the parish of West Ham. In the *St. George's Case* the St. George's Assessment Committee appealed against a decision of the Court of Appeal in **I**



**A** respect of the rateability of similar hereditaments owned and occupied by the county council.

*Sir Edward Clarke, Q.C., Bosanquet, Q.C., and Avory, for the London County Council.*

*Balfour Browne, Q.C., Fullarton, Q.C., and Morton Smith for the churchwardens of Erith.*

**B** *R. T. Reid, Q.C., and J. Montefiore (Sir R. Webster, Q.C., with them) for the churchwardens of West Ham.*

*F. Meadows White, Q.C., and Danckwerts for the assessment committee of St. George's Union.*

Their Lordships took time for consideration.

**C** Sept. 8, 1893. The following opinions were read.

**LORD HERSCHELL, L.C.**—The London County Council, by whom the first of these appeals is presented, are the successors of the Metropolitan Board of Works, and owners of the outfall works, pumping station, and appurtenances, the rating of which is in question. The sewage south of the Thames is conveyed to Crossness, in the parish of Erith, and for the purpose of discharging it into the Thames the Metropolitan Board of Works purchased 37 acres of land and constructed upon it these outfall works, pumping station, and appurtenances. It was agreed

**E** “that if the land, outfall works, and pumping station in question were not in the possession of the appellants but in the hands of a private owner, and connected with the metropolitan sewage system, to be let to the appellants as tenants, they would be willing to pay a yearly rent for the same for the purpose of being used as part of, and in connection with, the metropolitan sewage system, sufficient to support the gross and net rateable value as fixed by the quarter sessions, as hereinbefore mentioned, but that except for the purposes of the metropolitan sewage system, and if the said works and premises were disconnected therefrom, and, in the hands of a tenant, applied to any other use or purpose they might be available for, the rateable value of the land and premises would be £2,678 gross and £2,143 net rateable value.”

The appellants contended :

**G** “That the said works, pumping station, and premises being only capable of beneficial occupation if used for other than the said sewage purposes should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing the said works, pumping station, and premises were not used as part of the said sewage system but were entirely disconnected therefrom and applied to any other use or purpose for which they could be made available, and that the appellants should be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works v. West Ham Overseers* (2).”

The respondents contended :

**I** “That as the appellants would have been willing to pay a rent for the said works, pumping station, and premises if they had not been the owners, they must be taken into account as hypothetical tenants from year to year in order to ascertain the rateable value of the said premises, and that the rule as laid down in the *Burton-upon-Trent Corpn. v. Egginton Churchwardens and Overseers* (3) governs this case.”

The Queen's Bench Division gave judgment for the respondents, and this decision was affirmed by the Court of Appeal. No reasons were given in either Court, as the case was regarded as governed by the decision of the Court of Appeal in *Burton-upon-Trent Corpn. v. Egginton Churchwardens and Overseers* (3).

In *West Ham Churchwardens and Overseers v. London County Council*, which

is also before your Lordships for judgment, the question was whether the London County Council were liable to be rated, and, if so, on what basis in respect of a portion of the main sewers and of the pumping station situate in the parish of West Ham. So much of the outfall mains or sewers as are in that parish are constructed in an embankment on land purchased by the Metropolitan Board of Works, comprising about 37 acres. It was agreed that if the lands, sewers, pumping station, and works were in the hands of a private person, to be let to the county council as tenants, they would be willing to pay a sum sufficient to support the gross and rateable value, as determined by the quarter sessions; and that if the land, pumping station, and works were disconnected from the metropolitan sewage system, and in the hands of a tenant applied to any other use or purpose, the gross estimated rent of the land, pumping station, and works (exclusive of sewers) was £3,125, and the rateable value £2,500. The Divisional Court of Queen's Bench affirmed the order of the quarter sessions, but the Court of Appeal took a different view. The only question determined by the Court of Appeal was whether the sewers were rateable; whether the other works were rateable or not was withdrawn from their consideration. The Master of the Rolls thought the sewers were not rateable, because, unless it were the London County Council, no tenant could be found who could give any rent for them, and that the London County Council could not be the hypothetical tenant for two reasons: first, because they had no power to take the sewers on lease; and, secondly, because they must occupy them subject to the restriction that they could make nothing by them. FRY, L.J., thought that in order that a hereditament should be rateable three conditions must be fulfilled. First, there must be an occupier; secondly, a reasonable expectation of letting from year to year to a tenant; thirdly, a reasonable expectation of letting at a rent of the kind prescribed by the Parochial Assessments Act, 1836 [repealed by Local Government Act, 1948]. He came to the conclusion that there was no suggestion of any other hypothetical tenant than the London County Council, and that they were not persons who could be deemed hypothetical tenants, inasmuch as they could not become tenants of sewers. LOPES, L.J., said that if it had not been for *R. v. London School Board* (4), to which I will refer presently, he would have thought that, being occupiers under such statutory restrictions as those by which they are affected, and bearing in mind the fact that they must suffer a loss from their occupation, the London County Council were not the kind of hypothetical tenant contemplated by the statute.

In *St. George's Assessment Committee v. London County Council*, which also stands for judgment in your Lordships' House, the question raised by the Special Case was precisely the same as that raised in the *Erith Case*. It was found as a fact that if the London County Council had not been the owners of the lands, works, buildings, pumping station, and machinery they would have been willing to pay a rent for them sufficient to support the gross and net rateable value appearing in the valuation list. It was further found that if the lands, etc., were disconnected from the main drainage system and in the hands of a tenant who applied them to any other use or purpose for which they might be available, the gross value of the premises would be £1,577, and the rateable value £1,318. The London County Council contended before quarter sessions that they ought to be rated at this lower value according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works v. West Ham Overseers* (2). The respondents contended that the assessment should be at the higher value. The Queen's Bench Division followed the *Erith Case*, which they considered identical in its facts, and upheld the higher assessment. The Court of Appeal reversed this decision. They held that the case was governed by the *West Ham Case* decided by them, the effect of which I have just stated. In their view no distinction could be drawn between the rateability of sewers and that of lands and pumping stations, which were part of the sewerage system; that if the one subject were not rateable it followed the other was not rateable either. I can see no distinction between the facts of the *Erith Case* and those of the *St. George's Case*; they appear to me to be

**A** identical. The judgments of the Court of Appeal in the two cases are, therefore, in direct conflict.

The *Erith Case* was, as I have said, not argued, because it was supposed to be governed by the decision in the *Burton-upon-Trent Case* (3). The distinction drawn between the *Burton-upon-Trent Case* (3), which was argued, and the *St. George's Case*, and, as far as I can see, the only possible distinction, was that the court held that in the *Burton-upon-Trent Case* (3) the sewage authority could have become tenants of the land and pumping stations which they owned, but it was not, in the opinion of the court, within the power of the London County Council to become tenants of the land and pumping station which belonged to them. I shall have presently to consider the validity of this distinction, but before doing so it will be convenient to call attention to the decision arrived at by the Court of Queen's Bench in 1868 upon a statement of facts identical with that which came before the Court of Appeal in the *Erith* and *St. George's Cases*.

**B** I refer to *R. v. Metropolitan Board of Works* (5). Two points were raised in that case: first, whether the main sewers of the Metropolitan Board of Works were rateable; and, secondly, whether a pumping station and other premises belonging to them were rateable. The Court of Queen's Bench (consisting of **C** COCKBURN, C.J., and LUSH, HANNEN and HAYES, JJ.) held that the sewers were not rateable. With regard to the pumping station the court came to a different conclusion. They held that it was rateable, inasmuch as it had an occupation value. The learned judge who delivered the judgment of the court said (L.R. 4 Q.B. at p. 26) that the Board

**E** "must have rented such premises, if they had not become the owners of them, and a tenant might easily be found to take them if the Board were able and willing to let them. A distinction was attempted to be drawn in favour of the pumping apparatus, as being a necessary adjunct to the sewers, and it was contended that as the sewers are not rateable this adjunct must be exempted as being part of a non-rateable subject. But we cannot accede to this view. **F** The machinery stands on land which is valuable for occupation, and which would undoubtedly be rateable in the hands of any other occupier; and its rateable quality cannot be affected by the particular use to which it is applied by the Board."

**G** It may be that the actual judgment in the *St. George's Case* is not at variance with the judgment of the Court of Queen's Bench in *R. v. Metropolitan Board of Works* (5). The *St. George's Case* was so framed that if the court were of opinion that the then appellants ought to be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works v. West Ham Overseers* (2) (to which I shall have presently to advert), and that the decision of the court of quarter sessions, holding that the London County Council were to be taken into account as possible hypothetical tenants, and that the case was governed by the principles laid down in the *Burton-upon-Trent Case* (3), was erroneous in law, **H** the order of the quarter sessions was to be quashed. The judgment in the *St. George's Case* merely quashed the order of quarter sessions; it was, therefore, right even though the pumping station were rateable unless it were, according to the contention of the parish, rateable on the basis that the London County Council were to be taken into account as possible hypothetical tenants. But the Court of Appeal distinctly rested their judgment on the ground that the pumping station was not rateable any more than the sewers, and that no distinction could be drawn between the two cases, while the Court of Queen's Bench, in *R. v. Metropolitan Board of Works* (5), no less emphatically drew such a distinction, and held the pumping station to be rateable and the sewers not. The Court of Appeal did not canvass the reasons adduced in the judgment of the Court of Queen's Bench in *R. v. Metropolitan Board of Works* (5) for differentiating the two cases. The Master of the Rolls said that he was not in the least persuaded that the view **I**



taken by the Court of Appeal differed from the view which LUSH, J., took. The other learned judges made no reference to the Queen's Bench judgment. A

I have said enough to show that the question of the rateability of these pumping stations is at present in a most unsatisfactory condition. I purpose confining myself in the first instance to the question of the rateability of these pumping stations, and to a consideration, if they be rateable, of the proper mode of assessing them, reserving for discussion at a later period the case of the sewers. The decision of this House in *Jones v. Mersey Docks* (6) marks an epoch in the law of rating. Many of the earlier decisions are tainted with the vice that they proceed upon the supposition that lands held for public purposes are on that account not rateable. The doctrine is now exploded, your Lordships' House having distinctly determined that the circumstance that land is held by a public body for public purposes does not affect its rateability. Much reliance was placed in the argument at the Bar in the present cases on the language used by BLACKBURN, J., in delivering the opinion of the judges in the *Mersey Docks Case* (6). The learned judge said (11 H.L.Cas. at p. 462): B C

"It is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate." D

The learned judge, in my opinion, did not and could not have meant that it is essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is, I think, rateable whenever its occupation is of value. At the time when the Metropolitan Board of Works purchased in the parish of Erith 37 acres of land for the purposes of their works the land was, of course, rateable. That it ceased to be so as soon as the Metropolitan Board of Works became the owners can scarcely be contended. For the purpose of discharging a duty imposed upon them by law they found it expedient to erect certain buildings upon the land and to connect them with sewers in other lands belonging to them. I am unable to see how this could produce the result that premises previously rateable ceased to be so. It is found as a fact, as I have already stated, that if the works were disconnected from the metropolitan sewage system and in the hands of a tenant applied to any other purpose for which they might be available their net rateable value would be £2,143. Suppose some other system of sewage were adopted and the pumping station were no longer applied to its present use, I do not think it could be doubted that the London County Council would be rateable in respect of it, and that its rateable value would be at least the sum thus fixed. If so, I cannot think that it is exempt from rateability, at the present time, on account of the particular use to which it is put by the owner, a use which it is clear might be abandoned at any time if it were thought expedient to do so. No obligation was imposed upon the Metropolitan Board of Works, and none is imposed on the London County Council, of maintaining in existence any particular sewage works. E F

So far I have dealt only with the question of rateability; upon what principle the assessment ought to be made, and what considerations are proper to be taken into account, are questions which, to my mind, are involved in much greater difficulty. In *Metropolitan Board of Works v. West Ham Overseers* (2) which came before the Court of Queen's Bench in 1870, the question was raised on what principle the Metropolitan Board of Works were to be assessed in respect of a pumping station. It was held that they were to be assessed upon the basis of the rent which would be paid by a hypothetical tenant from year to year, supposing the pumping station were not used for the purpose of main drainage, but was entirely disconnected therefrom, and applied to any other use or purpose for which it could be made available by a tenant. It was admitted by the learned counsel who appeared in that case for the respondents that the Metropolitan Board of Works G H I

**A** were rateable upon the basis adopted by the court. Before the quarter sessions, the parish had contended that the proper principle to apply in rating property was to treat it as if belonging to and constructed by a private owner, and in his hands to be let to the Board as yearly tenants; but this contention appears to have been abandoned before the Court of Queen's Bench.

**B** The suggestion that a public body who, in discharge of the duties imposed on them by law, have become the owners of land and buildings thereon might be themselves taken into account as possible tenants, was, so far as I am aware, first insisted on in *R. v. London School Board* (4). The Court of Appeal held that, in determining what was the rateable value of a school board building, the school board might be regarded as possible tenants, and what they would have been willing, had they not been owners, to have paid as rent for the premises might be taken into consideration. The arguments urged at your Lordships' Bar in the present case render it necessary to review this decision, and to determine whether it was sound in point of law. The rule which is to govern the assessment of premises to the poor rate was laid down by the legislature in the Parochial Assessments Act, 1836, s. 1, which provides that

**D** "No rate for the relief of the poor . . . shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. . . ."

**E** In the Act to provide for uniformity in the assessment of rateable property in the metropolis [the Valuation (Metropolis) Act, 1869, s. 4], the term "gross value" is defined as

**F** "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

**G** The term "rateable value" is defined as meaning

"the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

**H** So far as the question to be determined in this case is concerned, I do not think the terms of the Act of 1869 are important. "The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament" is the same thing as "the rent at which the same might reasonably be expected to let from year to year."

**I** It has never been doubted that the rent which is actually being paid by the occupier does not necessarily indicate what is the rent which a tenant might reasonably be expected to pay, or that an owner who is in occupation, and may not be willing to let on any terms, is none the less rateable. The tenant described by the statute has always been spoken of by the court as "the hypothetical tenant." Whether the premises are in the occupation of the owner or not, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them?

So far there can, I think, be no difference of opinion. But then arises the question: Is the owner to be regarded as one of the possible tenants in considering what rent might reasonably be expected? Bearing in mind what was the object of the legislature in prescribing this test of annual value, I cannot myself entertain any doubt that the owner ought to be thus taken into account. I entirely concur

in the decision arrived at by the Court of Appeal in *R. v. London School Board* (4). A  
 I think the circumstances of that case when examined are cogent to support the  
 view which there obtained acceptance. If the school board were to hire buildings  
 for the purpose of establishing a school, it could not be contested that these build-  
 ings would be rateable, and that the rent which the school board paid would be a  
 most important element in determining the sum at which they were to be assessed.  
 If, instead of hiring school buildings, they erect upon land similarly situate like B  
 buildings, or if they were to buy the reversion of the buildings they hired, and so  
 became the owners, why in either of these cases should the assessment be dif-  
 ferent? The premises are to them in all these cases of the same value and their  
 occupation is equally beneficial, so why should the sum at which they are to be  
 assessed to the relief of the poor differ? Again, suppose premises of occupation  
 value for agricultural purposes were to be adapted by the owner for use in connec- C  
 tion with the manufacture of some article under a patent process, which he alone  
 was licensed to use; and that in their then condition no person would be willing  
 to take them, would the premises cease to be rateable or be assessable only at a  
 nominal sum, although they might be much more valuable to the owner, and their  
 occupation much more beneficial than if they had remained fit for agriculture, and  
 in a condition to be readily let for that purpose? I cannot think so. These are D  
 illustrations. Many others might be adduced pointing in the same direction, and,  
 to my mind, conclusively showing that the object of the legislature in enacting  
 the provisions of the statute of 1836, to which I have referred, would be defeated  
 if the question what the owner would have given if the premises had been to let  
 and he had been free to take them were discarded from consideration.

The decision arrived at in the *School Board Case* (4) was followed in the *Burton-* E  
*upon-Trent Case* (3), which related to a pumping station in connection with a  
 sewage farm. In *Mersey Docks and Harbour Board v. Llanellian Overseers* (1),  
 which was earlier than either of these cases, language was used by some of the  
 learned judges which it is not easy to reconcile with the decision in the *Burton-*  
*upon-Trent Case* (3), and, indeed, I am not sure that the decisions in the two cases  
 are altogether consistent. In the *Mersey Docks Case* (1) the question to be decided F  
 was the rateability of the Mersey Docks and Harbour Board, and the principle  
 upon which they were to be assessed in respect of a lighthouse, telegraph station,  
 buildings, and lands within the parish of Llanellian. By the Mersey Docks Act  
 certain lighthouses theretofore erected, and also a system of telegraphs established  
 for the information and benefit of shipping entering the port of Liverpool, became  
 vested in the Mersey Docks and Harbour Board, to be maintained and worked by G  
 them. The lighthouse in question was one of those which had been previously  
 maintained by the trustees of the Liverpool Docks, and the lease of which for a  
 term expiring in 1863 became vested in the appellants on their incorporation. The  
 appellants afterwards purchased the freehold of the site of the lighthouse and some  
 adjoining land, and spent a considerable sum in structural improvements of the  
 lighthouse. The Master of the Rolls came to the conclusion, as a matter of fact, H  
 that under the statutes regulating the matter the Conservancy receipts applicable  
 to the maintenance of the lighthouse could never exceed the Conservancy expendi-  
 ture, and he came, as a consequence, to the conclusion that the hypothetical tenant  
 must rent them subject to the Acts of Parliament, and that, therefore, it would  
 be a profitless occupation inasmuch as no person who received the earnings could  
 make any profit therefrom. He, therefore, thought the lighthouse had no beneficial I  
 value, and that there could be no beneficial occupation. He said (14 Q.B.D. at  
 p. 786):

"That occupation was, to repeat the phrase we used a short time ago, struck  
 with sterility by the Acts of Parliament."

The phrase to which the Master of the Rolls referred was made use of in *West*  
*Bromwich School Board v. West Bromwich Overseers* (7). In that case the ques-  
 tion of the rateability of a school board in respect of a public elementary school



A belonging to them was raised for the first time. Expressions were used by some of the learned judges which do not seem to me to be quite in harmony with the views arrived at on more mature consideration of the matter in *R. v. London School Board* (4). There is, however, no conflict between the two decisions, inasmuch as the school board was held rateable. BOWEN, L.J., said (13 Q.B.D. at pp. 942, 943):

B "I will assume that in the hands of the school board [the schoolhouse in question] is not capable of being beneficially occupied; but we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and everybody's hands so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. But if the schoolhouse is not used by this

C school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands."

If land is "struck with sterility in any and everybody's hands," whether by law or by its inherent condition, so that its occupation is and would be of no value to anyone, I should quite agree that it cannot be rated to the relief of the poor. But

D I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed, and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them, and is not so occupied because they are prohibited from deriving pecuniary profit from its use.

E FRY, L.J., in *R. v. London School Board* (4), said (17 Q.B.D. at p. 742):

"The term 'sterility' has been introduced into the cases because as a general rule a profit is produced, but it does not by any means follow that because there is no profit there is no value. There could be no better illustration of this than in the present case."

F I think the learned judge here points to the true test—whether the occupation be such as to be of value. This is the language used by LORD BLACKBURN, and I have already said that the possibility of making a pecuniary profit is not, in my opinion, the test whether the occupation is of value. As *Mersey Docks and Harbour Board v. Llanelliian Overseers* (1) was much relied on by the counsel for the London County Council I feel bound to say that I cannot agree with the view there adopted—that, because no pecuniary profit could be derived from the conservancy dues to which the board were entitled in respect of their lighthouse, its occupation was not a beneficial occupation, and had no pecuniary value, or that it was in any sense which could exempt it from rateability "struck with sterility." It appears that the lighthouse had at one time actually been held by the board as tenants. During

G that period its rateability could hardly be in question. Did the board become less rateable or assessable on any different basis because they ceased to be tenants and became the owners? The lighthouse, as it appears to me, was of value to the dock board, inasmuch as it assisted to protect from danger vessels which might use their docks and pay them dock dues.

H

I think some confusion has arisen from regarding the term "beneficial occupation" as meaning the same thing as an occupation by which a profit could be earned. As was pointed out by the Court of Queen's Bench in *Bristol Governors of the Poor v. Wait* (8), this is not its meaning when used as a test of rateability. The governors of the poor of Bristol had taken certain property outside the limits of their city for the purpose of putting out their poor, either simply to lodge them or to employ them at their discretion. In holding the governors rateable LORD DENMAN, C.J., in delivering the considered judgment of the Court of Queen's Bench, said (5 Ad. & El. at pp. 7, 8):

I

"The absence of 'beneficial occupation' was also much insisted upon, and it was contended that that is the true criterion to ascertain whether property be

rateable or not. It is not to be denied but that this phrase 'beneficial occupation' has been in frequent use, and, generally speaking, it serves tolerably well to convey rather a popular notion than to give a certain rule for deciding the question of rateability in every instance. Because, if by beneficial be meant profitable, or anything like it, the expression is obviously fallacious."

There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings, where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must, of course, be considered. But I do not think this class of cases affords any guide to the assessment of such hereditaments as those with regard to which your Lordships have now to lay down the proper principle of rating.

Owing to a statement made in the course of the argument at the Bar, I wish, in order to avoid possible misconception, to add a few words as to the method which ought to be followed when it is manifest that an owner would be willing to pay a higher rent than could be obtained from any other tenant. It was said that a practice prevails of taking 5 per cent. on the cost in the case of buildings as a basis for arriving at the rental. Such a rule of thumb may be all very well where the premises would be likely to find competing tenants, but it is not by any means necessarily applicable where it is thought that the owner would be likely to give a higher rental than anyone else. It would often be obvious that he would never be willing to pay the rent arrived at in such a fashion, inasmuch as it would be more advantageous for him to become the owner. There are many other circumstances, too, which may affect the answer to the question what the owner of premises would have been willing to give if instead of becoming the owner he had become the tenant of them. In all cases of the description of which I am speaking the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which is believed the owner would really be willing to pay for the occupation of the premises.

Having given my reasons for thinking that the judgment of the Court of Appeal in the *Burton-upon-Trent Case* (3) was correct, and that the principles there laid down are in accordance with the law, I turn now to the point which it was thought differentiated the *St. George's Case* from the *Burton-upon-Trent Case* (3)—namely, that neither the Metropolitan Board of Works nor the London County Council could, under the statutes which gave them their powers, have become tenants of the pumping stations, of which they were and are the owners. The point was first glanced at in the judgment of the Master of the Rolls in *R. v. London School Board* (4). The learned judge said (17 Q.B.D. at p. 740):

"If, by the terms of any statute, it [the School Board] could not legally be tenant it would be excluded from the calculation."

The view thus suggested was adopted by the Court of Appeal as the ground of their decision in *Owens College v. Chorlton-upon-Medlock Overseers* (9). The appellants were the governors of Owens College. The property rated consisted of land purchased by them for the college and college buildings erected and provided by them under the Owens College Act, 1870. The governors were empowered to acquire and hold land as a site for the college, and other land not exceeding 200 acres. They were also empowered to grant leases of the lands vested in them, except the site of the college. The college could not be carried on as a collegiate institution at a profit in a commercial sense. The lands had been purchased at an expense of £25,000 and upwards, and the buildings had cost more than £125,000. The respondents had assessed the governors of the college at a rateable value of

**A** £3,285. The Case Stated found that, if let for any purposes to which (without considerable structural alterations) they were capable of being turned, they would not let for more than £1,300 per annum gross rental.

Upon the basis of a rateable value thus arrived at, the college authorities were willing to be assessed. The Master of the Rolls said that, if the college could be considered as possible tenants, that valuation would be wrong. The test for the determination of the Case seemed to him to be whether they could legally be tenants of the site for the purposes of the Act, for if, said the learned judge (18 Q.B.D. at p. 407),

“they could not, can it be right to say that what they would give for rent should be taken into account.”

**C** After giving his reasons for thinking that the site which the governors were authorised to take was what they were to acquire as owners in fee simple, the learned judge proceeded (*ibid.*):

“If so, it appears to follow that they ought not to be taken into consideration as hypothetical tenants. Can it be supposed that the governors are seeking to become tenants of a site when the Act of Parliament says they cannot be tenants? It seems to me that the proposition involves the answer to it.”

**D** The other learned judges concurred in this view. BOWEN, L.J., said (*ibid.* at p. 409):

“It seems to me that they ought to be excluded from the class of persons who might reasonably be expected to give a rent for the premises, because they cannot, as matters stand, ever become tenants of the premises for the purposes of a site for the college; a fetter is already imposed upon them, and they can never now hold the premises except as owners in fee simple.”

**E** FREY, L.J., said (*ibid.* at p. 411):

“It seems to me that the result is that the land is dedicated for ever as the site of a building for the college, and that the appellants are incapable of hiring that land for the purposes of the college, and therefore that the contention is well founded that, being prohibited from hiring the land, they cannot be taken into consideration as possible tenants.”

**F** I have stated fully the reasons which led the learned judges to the conclusion that the governors of Owens College were to be left out of account as possible tenants when determining the annual value of the premises occupied by them; and I have most carefully considered these reasons with all the respect which is justly due to the views of the learned judges who concurred in them; but I am unable to share the opinion which they expressed. The conclusion arrived at is in its result sufficiently startling. Two public bodies might have erected buildings similar in all respects upon land similar in situation and of equal value; and these buildings might be occupied in the same way and applied to the same purposes; and yet, if one of these bodies had power, under the statute constituting it, to hire such buildings, and the other had no such power, the rateable value of the buildings might, and almost certainly would, be different; that is to say, the buildings would have a different annual value, for the words in the statute of 1836, which followed the expression “annual value,” only provide a means of arriving at what is the annual value of the premises. Why should the annual or the rateable value of the premises for the purposes of the poor law depend upon the statutory power of the owner to take them supposing he had not been the owner? I am unable to discover any satisfactory reason for this difference, and none seems to me to be suggested by the judgments in the *Owens College Case* (9).

**I** I do not think the distinction drawn can be confined to premises belonging to and occupied by public bodies for public purposes. A private individual might receive money under an obligation to erect with it a building upon a particular site to be occupied by him during his lifetime, and with a prohibition against letting to anyone else. If the principle adopted in the *Owens College Case* (9) be a sound



one, such an owner would, I presume, be equally excluded from consideration. No attempt was made to show that it was reasonable or just that the distinction drawn in that case should affect the rateability of premises, or their assessment to the poor rate; it appears to have been thought a necessary consequence of the application to such a case of the rule for the assessment of property laid down by the statute of 1836. No doubt, if this were so, the conclusion reached was a right one, however unsatisfactory or even unjust it might be, that the rateability or assessment of premises in other respects similar, and occupied for similar purposes, should depend upon whether the owner could have taken the premises which he occupied as tenant or was only enabled to become the owner of them.

But having regard to the language used in the statute, and the construction which has been put upon it, I do not myself feel the difficulty by which the Court of Appeal seem to have been pressed. An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay may be taken into account when inquiring what is its annual value—that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be among the possible tenants, although, as a matter of fact, he could not be so, it seems to me no more violent hypothesis to conceive him as among the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so. Having regard to the scope and object of the enactment in the statute of 1836, I can see no sufficient reason why, if in the one case he may be regarded as the hypothetical tenant, he may not equally be so regarded in the other. It seems to me that a contrary conclusion ought not to be arrived at unless the provisions of the statute inexorably require it.

For these reasons I am of opinion that the judgment in the *St. George's Case* cannot be supported, even on the assumption that the Court of Appeal rightly held that the London County Council were only empowered to become the owners, and could not, in fact, have become the tenants of the pumping stations in question. It follows that, in my opinion, the judgment in *London County Council v. Erith Churchwardens* ought to be affirmed, and the appeal dismissed with costs, while in *St. George's Assessment Committee v. London County Council* the judgment must be reversed, with the usual consequence as to costs.

I now turn to the separate case of the rateability of the main outfall sewers in the parish of West Ham. But before dealing with the particular facts relating to the main sewers in that parish, I desire to consider the case generally of the main sewers formerly vested in the Metropolitan Board of Works, and now in the London County Council. It was held, in *R. v. Metropolitan Board of Works* (5), as I have said, that the sewers were not rateable. The ground of the decision was thus put by LUSH, J., who delivered the judgment of the court (L.R. 4 Q.B. at p. 26):

“We are of opinion that they are not rateable, on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the board for the use of them; the rates which they are empowered to levy are for the expense of construction and maintenance, and nothing more. Their occupation yields no profit to the board, as occupiers, either actual or potential.”

The effect of this decision was not to establish an exemption of property which down to that time had been rated. By s. 135 [repealed by Public Health (London) Act, 1936] of the Metropolis Management Act, 1855, the main sewers then vested in the Commissioners of Sewers of the City of London and in the Metropolitan Commissioners of Sewers were vested in the Metropolitan Board of Works, and there was at the same time conferred on them the power to construct other sewage

**A** works to prevent the sewage within the metropolis passing into the river Thames near the metropolis.

The Case Stated by the court of quarter sessions in *R. v. Metropolitan Board of Works* (5) found, as a fact, that neither the late Commissioners of Sewers nor the Metropolitan Board of Works had ever been rated to the relief of the poor in respect of the sewers. It appears, therefore, that for a very long period, both **B** before and since the decision in *R. v. Metropolitan Board of Works* (5), this particular subject has not been treated as rateable. I cannot regard as altogether satisfactory, in view of the fuller consideration which has since been given to the matter, the grounds upon which the Court of Queen's Bench rested the non-rateability of these sewers; the judgment seems to assume that there can only be a beneficial occupation where it is such as to yield a profit to the public body **C** occupying the premises. I have already said that, in my opinion, the true test is whether the occupation is of value, and not whether it is one by which pecuniary profit can be made. But it would undoubtedly be a serious matter that a hereditament which has for so long a period been deemed free from rateability should now, for the first time, be subjected to it. And there is this peculiarity about the particular subject with which I am dealing—until the sewer was made no rateable **D** subject-matter existed where the sewer now is. If its use as a sewer were abandoned its rateability would cease, for it is obvious that no person would be willing to take it at any rent. It is not like the case of land previously rateable which has been adapted to purposes different from those for which it was previously employed, and whose rateable character would not on that account be affected. I cannot pretend that the law of rating is at present in a satisfactory condition, or **E** that, by the application of well-settled principles, the rateability of public bodies in respect of property such as that with which your Lordships are dealing can be rested upon a sound and consistent basis.

In *Sheffield United Gas Light Co. v. Sheffield Overseers* (10), BLACKBURN, J., after quoting the observation of WIGHTMAN, J., in *R. v. West Middlesex Waterworks* (11), that there appeared so much difficulty in satisfactorily applying the **F** parochial principle of rating by estimating the rent which a tenant would give for the subject-matter in such a case as that before him, as practically to amount nearly, if not entirely, to an impossibility of doing so satisfactorily, and after stating that the whole subject-matter appeared to be involved in so much difficulty and uncertainty that the court had taken much time in considering whether they could not place the rules as to the rating of these companies on more intelligible **G** and satisfactory principles, capable of uniform application, added (4 B. & S. at p. 146):

“We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject, and would at the same time be capable of being satisfactorily worked; and we are strongly **H** impressed with the importance of not unsettling the law as established by past decisions, where we cannot lay down a rule which is not open to exception. On the whole, therefore, we feel that our only course, until the legislature shall think fit to interfere, is to adhere to the case of *R. v. West Middlesex Waterworks Co.* (11).”

I entirely concur with the learned judge in deeming it inexpedient to interfere **I** in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very peculiar one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and has been sanctioned by judicial authority.

So far, I have referred to the case of sewers under land, the surface of which was occupied by other persons, and in ordinary course assessed to the poor rate. But the particular case of the outfall sewer in West Ham is an exceptional one; that

sewer is not constructed underground. Thirty-seven acres of land were purchased by the Metropolitan Board of Works for the purpose of this portion of the outfall sewer. The land so purchased had down to the time of its purchase been assessed to the poor rate. The sewer is carried in an earthen and concrete embankment erected upon the land at an average height of twenty-one feet above the general surface of the land adjoining. The work thus constructed, therefore, differed from the mere creation of a sewer below the surface of land which continued afterwards, as before, liable to assessment, but was an adaptation to the purposes of the board of land already occupied and rated. I confess I see the utmost difficulty in distinguishing such an erection as this upon the surface of land from any other erection specially suitable for the purposes of a particular occupier, which might render it of less value for occupation by other persons not requiring it for that special purpose. And if in general owners who occupy land in order to discharge a duty imposed on them by statute may be regarded as among the hypothetical tenants, I cannot find any sound basis on which to rest a distinction in favour of the Metropolitan Board of Works or their successors, the London County Council, in respect of this particular use of the land which they own.

It was, I am aware, held by the Court of Queen's Bench in the year 1870 that there was no distinction, for rating purposes, between a sewer underground and one carried upon an embankment, but I have already stated to your Lordships the only ground on which the exemption of the sewers generally can, in my judgment, be rested, and I have pointed out the distinction which exists between an underground sewer and an adaptation of land already rateable to a particular purpose. LUSH, J., stated that the rateable quality of land was not to be determined by what it once was, or by what it might thereafter become, but by what it was at the time the rate was made. I quite agree with this, but if it be the law that the owner of a hereditament may be regarded as among the hypothetical tenants, that rule would seem as applicable to the particular erection, whose rateability is the matter in question, as to any other. For these reasons, I am of opinion that, even if the sewers are in general exempt from rateability, the particular sewer work in the parish of West Ham cannot be so treated, and that the judgment of the Court of Appeal must, therefore, be reversed, and the judgment of the Queen's Bench Division restored, and I move your Lordships accordingly.

**LORD WATSON, LORD ASHBOURNE, LORD MACNAGHTEN, and LORD MORRIS** concurred, LORD ASHBOURNE stating that he had only been present at the argument of the first case, and that his opinion was, therefore, confined to that case.

*Appeal in Erith case dismissed: appeals in West Ham and St. George's cases allowed.*

Solicitors: *W. A. Blaxland; Pyke & Parrott for J. & J. C. Hayward, Dartford; A. A. Banes; W. J. Fraser.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]



## Re RICHERSON. SCALES v. HEYHOE (No. 2)

[CHANCERY DIVISION (Chitty, J.), June 13, 14, 1893]

[Reported [1893] 3 Ch. 146; 62 L.J.Ch. 708; 41 W.R. 583]

**B** *Administration of Estates—Administration action—Legal personal representative of deceased person interested under will—Proceedings in absence of representative—Order dispensing with representative—R.S.C., Ord. 16, r. 46—R.S.C., Ord. 55, r. 6.*

An order was made on a summons in administration proceedings in the absence of S.J.S. who, as personal representative of a deceased person, had an interest in the matter disposed of adverse to that of the parties appearing on the summons. Correspondence had previously taken place between the solicitors of S.J.S. and those of the trustees who issued the summons, and, though she had not been made a party, a copy of the order had been served on her solicitors. S.J.S. now asked for a declaration that she was not adversely bound by the order.

**D** **Held:** (i) under R.S.C., Ord. 16, r. 46, it was necessary, to render an order of the court binding on the estate of a deceased person, that it should appear on the face of the order either that the court, having had its attention called to the point, had decided to proceed in the absence of the legal personal representative of the deceased's estate, or had appointed some person to represent it; accordingly, as the order should have been drawn up either dispensing with the representative or appointing some person to represent the estate, S.J.S. was not bound by it: (ii) this rule was not affected by reason that where the court did not require other parties to be served with the summons under R.S.C., Ord. 55, r. 6, there was no necessity for expressing that on the face of the order.

**E** **Notes.** As to representation in actions for administration, see 30 HALSBURY'S LAWS (3rd Edn.) 316 et seq.; and for cases see DIGEST (PRACTICE) 731 et seq. **F** For R.S.C., Ord. 16, r. 46, and R.S.C., Ord. 55, n. 6, see the ANNUAL PRACTICE (1963) 361 and 1521 respectively.

Case referred to in argument:

*Curtiss v. Caledonian Fire and Life Insurance Co.* (1881), 19 Ch.D. 534; 51 L.J.Ch. 80; 45 L.T. 662; 30 W.R. 125, C.A.; 23 Digest (Repl.) 220, 2616.

**G** **Action** in the administration of the estate of the testator by the plaintiff against the trustees of the will and the representatives of William Scales for (inter alia) a declaration that any part of an order of Aug. 11, 1890, made on a summons in chambers, which was detrimental to her interest, either in her own right or as representing the estate of Sarah Scales, was not binding on her.

By his will, dated July 15, 1863, the testator, John Richerson, gave all his residuary personal estate to trustees on trust to pay one moiety of the annual dividends or interest thereof to his nephew, William Scales, for life, and the other moiety of such dividends or interest to his niece, Susan Scales, for life, and in case William Scales or Susan Scales should leave any lawful issue him or her surviving, then the testator directed that all such residuary personal estate should after the decease of the survivor of William Scales and Susan Scales, be equally divided between such lawful issue in equal shares; but in case neither of them should leave any lawful issue him or her surviving, then the testator directed that all such residuary personal estate should be equally divided between all his next-of-kin that might be living at the decease of the survivor of William Scales and Susan Scales, according to the statute for the distribution of the estates and effects of persons dying intestate. The testator died on Sept. 13, 1864, and his sister Sarah Scales, the mother of William and Susan Scales, was his heiress-at-law, and sole next-of-kin. The plaintiff, Sarah Jane Scales, was the only daughter of John Richerson Scales, a son of Sarah Scales, who predeceased her. Sarah Scales died

intestate in 1872, leaving William Scales, Susan Scales, and the plaintiff, Sarah Jane Scales, her next-of-kin. Susan Scales died in 1879. A

Questions arose under the testator's will, and in 1890 an originating summons was taken out by the acting trustees of the will, against William Scales, as sole defendant, asking, among other things, whether William Scales was entitled on the death of Susan Scales to the whole of the income of the residuary personal estate of the testator during his life. By an order of Aug. 11, 1890, on this summons by the judge in chambers, it was declared that William Scales was entitled as from the death of Susan Scales by implication during his life to the moiety of the income of the residuary personal estate of the testator bequeathed to Susan Scales during her life as well as to the other moiety of such income. William Scales died in October, 1890, after the plaintiff had commenced her action, and his representatives claimed this income for his estate from the trustees. Though the plaintiff, Sarah Jane Scales, was not made a party to this summons, a correspondence had taken place on the subject between her solicitors and those of the trustees, and a copy of the order made on the summons was served on her solicitors. She had in July, 1890, commenced the present action against the trustees, claiming the appointment of new trustees and the execution of the trusts of the will and by her amended statement of claim, after adding the representatives of William Scales as defendants, she also claimed a declaration that she was not adversely bound by the order made on this summons. B

*Levett, Q.C.*, and *Sargant* for the plaintiff.

*Farwell, Q.C.*, and *Kenyon Parker* for the representatives of William Scales.

*Byrne, Q.C.*, and *Marcy* for the trustees of the will. C

**CHITTY, J.**—The plaintiff was not a party to the proceedings on the original summons. No fault is to be imputed to the trustees on this account; for, although they were aware that the plaintiff had some claim in the matter, she did not insist upon being made a party, and the summons was heard and disposed of in her absence. The question is, whether the plaintiff is bound by the order made upon the summons. It is true that she had not at the date of the order on the summons clothed herself with her right as legal personal representative of her grandmother, Sarah Scales, the testator's sole next-of-kin; but it is the common practice of the court to allow the person entitled to take out representation to be added as a party, and in the event of its being shown that the deceased's estate is entitled to some interest, the order does not go till after letters of administration have been taken out. D

In my opinion, the plaintiff is not bound by the order of Aug. 11, 1890. I think that, on the true construction of R.S.C., Ord. 16, r. 46, it is necessary that the order of the court should state that the judge has proceeded in the absence of any person representing or entitled to represent the deceased's estate, or has appointed some person to represent it, and my opinion is founded on the language of the order itself. There need not be a separate order to this effect, but it must appear on the face of the order that the court dispensed with the representative. This is apparent from the terms of the rule. "The order so made, and any order consequent thereon," applies, of course, to the case where the court appoints some person to represent the estate, and equally applies, in my opinion, where the court proceeds in the absence of a representative. But there must be a *constat* on the face of the order that the judge's attention was drawn to the fact, and that he decided to proceed. E

On a summons under R.S.C., Ord. 55, the court is not bound to have before it all the persons whose interests may be affected by the order as in an old suit in Chancery. That is one of the advantages of the order, and the decisions show clearly that, where the court does not require other parties to be served with the summons under R.S.C., Ord. 55, r. 6, there is no necessity for its expressing this on the face of the order. But R.S.C., Ord. 55 was subsequent in date to R.S.C., Ord. 16, r. 46, and affords no ground for varying that rule. Under that rule I F

**A** think the decision of the court to proceed must be shown on the face of the order. It has been the constant practice to draw up orders, either dispensing with the representative, or appointing some person to represent the estate. Although, therefore, I am deciding the point for the first time, my decision is not a new one, but is in accordance with the established practice.

*Order accordingly.*

**B** Solicitors: *Morgan, Price & Mewburn*; *E. Robinson*, for *Grigson & Robinson*, Watton, Norfolk; *Barlow & James*, for *A. J. Winter*, Swaffham.

[*Reported by H. M. CHARTERS MACPHERSON, ESQ., Barrister-at-Law.*]

**C**

## FARQUHARSON v. MORGAN

**D**

[COURT OF APPEAL (Lord Halsbury, Lopes and Davey, L.JJ.), January 15, February 2, 1894]

[Reported [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152;  
58 J.P. 495; 42 W.R. 306; 10 T.L.R. 240; 9 R. 202]

**E**

*Prohibition—Ground for granting writ—Want of jurisdiction apparent on face of proceedings—Consent to exercise of jurisdiction by applicant—Agricultural Holdings Act, 1883 (46 & 47 Vict., c. 61), s. 24.*

Where want of jurisdiction is apparent on the face of proceedings the grant of a writ of prohibition is of course, and the applicant cannot be precluded by any consent or acquiescence in the exercise of the jurisdiction.

**F**

The lease of a farm provided that the procedure contained in s. 7 to s. 28 of the Agricultural Holdings Act, 1883, should apply to all claims for compensation under the lease. On determination of the lease, the tenant's claim for compensation, which included matters both within and not within the Act of 1883, was referred to arbitration, and the arbitrator awarded compensation for matters both within and not within the Act. The tenant obtained an order in the county court to enforce the award under s. 24 of the Act of 1883. The landlord, who had acquiesced in the exercise of the county court jurisdiction, applied for a writ of prohibition against the enforcement of the award, which the Queen's Bench Division refused on the grounds of discretion.

**G**

**Held:** as the want of jurisdiction was apparent on the face of the award by the inclusion of claims which were not within the Act of 1883, the writ of prohibition must be granted against the enforcement of that part of the award which was not within the Act of 1883 and the landlord was not precluded by having acquiesced in the county court jurisdiction.

**H**

**Notes.** The Agricultural Holdings Act, 1883, has been repealed and s. 24 is now replaced by s. 71 of the Agricultural Holdings Act, 1948: see 28 HALSBURY'S STATUTES (2nd Edn.) 81. The Arbitration Act, 1889, has been repealed and replaced without amendment by The Arbitration Act, 1950, s. 4 (1) of which replaces s. 4 of the 1889 Act; see 29 HALSBURY'S STATUTES (2nd Edn.) 93.

**I**

Considered: *Alderson v. Palliser*, [1901] 2 K.B. 833. Applied: *Re Cundall and Vavasour* (1906), 95 L.T. 483. Considered: *Kensington Income Tax Comrs., Ex parte de Polignac*, [1917] 1 K.B. 486; *Simpson v. Crowle*, [1921] All E.R.Rep. 715; *Smythe v. Wiles*, [1921] 2 K.B. 66; *St. Magnus, etc., Parochial Church Council v. London Diocese Chancellor*, [1923] P. 38; *Westminster Bank, Ltd. v. Edwards*, [1942] 1 All E.R. 470. Referred to: *Lee v. Cohen* (1894), 71 L.T. 824; *R. v. Tristram*, [1902] 1 K.B. 816; *Hunter v. Stadtische Hochseefischerei*



*Gemeinnützige Gesellschaft* (1925), 133 L.T. 488; *Mansfield v. Robinson*, [1928] All E.R.Rep. 69; *R. v. Comptroller-General of Patents, Ex parte Parke, Davis & Co.*, [1953] 1 All E.R. 862. A

As to grounds for the grant of the writ of prohibition, see 11 HALSBURY'S LAWS (3rd Edn.) 114 et seq.; and for cases see 16 DIGEST (Repl.) 416 et seq.

Cases referred to :

- (1) *Buggin v. Burnett* (1767), 4 Burr. 2035; 98 E.R. 60; 16 Digest (Repl.) 438, 2437. B
- (2) *Ricketts v. Bodenham* (1836), 4 Ad. & El. 433; 5 L.J.K.B. 102; 111 E.R. 850; sub nom. *Bodenham v. Ricketts*, 1 Har. & W. 753; 6 Nev. & M.K.B. 170, 537; 16 Digest (Repl.) 429, 2314.
- (3) *Yates v. Palmer* (1849), 6 Dow. & L. 283; Rob. L. & W. 87; Cox, M. & H. 314; 14 L.T.O.S. 109; 16 Digest (Repl.) 435, 2397. C
- (4) *London Corpn. v. Cox* (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 W.R. 44, H.L.; 16 Digest (Repl.) 416, 2184.
- (5) *Knowles v. Holden* (1855), 24 L.J.Ex. 223; 25 L.T.O.S. 102; 19 J.P. 580; 16 Digest (Repl.) 135, 176.
- (6) *Broad v. Perkins* (1888), 21 Q.B.D. 533; 57 L.J.Q.B. 638; 60 L.T. 8; 53 J.P. 39; 37 W.R. 44; 4 T.L.R. 775, C.A.; 16 Digest (Repl.) 417, 2185. D
- (7) *Worthington v. Jeffries* (1875), L.R. 10 C.P. 379; 44 L.J.C.P. 209; 32 L.T. 606; 23 W.R. 750; 16 Digest (Repl.) 418, 2190.
- (8) *Roberts v. Humby* (1837), 3 M. & W. 120; 6 Dowl. 82; Murp. & H. 331; 150 E.R. 1081; sub nom. *R. v. Bath Court of Requests Comrs., Roberts v. Humby*, 7 L.J.Ex. 45; 16 Digest (Repl.) 432, 2354.
- (9) *Marsden v. Wardle* (1854), 3 E. & B. 695; 23 L.J.Q.B. 263; 18 J.P. 648; 18 Jur. 578; 2 W.R. 455; 2 C.L.R. 1707; 118 E.R. 1302; 13 Digest (Repl.) 491, 1194. E
- (10) *Jones v. James* (1850), 1 L.M. & P. 65; Cox, M. & H. 290; Rob. L. & W. 197; 19 L.J.Q.B. 257; 14 J.P.Jo. 271; 16 Digest (Repl.) 137, 198.
- (11) *Mouflet v. Washburn* (1886), 54 L.T. 16; 2 T.L.R. 295, D.C.; 16 Digest (Repl.) 139, 215. F
- (12) *Jones v. Owen* (1848), 5 Dow. & L. 669; 2 Saund. & C. 348; 1 Cox, M. & H. 176; 18 L.J.Q.B. 8; 12 L.T.O.S. 153; 13 Jur. 261; 16 Digest (Repl.) 135, 174.

Also referred to in argument :

- Denton v. Marshall* (1863), 1 H. & C. 654; 1 New Rep. 242; 32 L.J.Ex. 89; 7 L.T. 689; 27 J.P. 345; 9 Jur.N.S. 337; 11 W.R. 268; 158 E.R. 1046; 16 Digest (Repl.) 430, 2322. G

**Appeal** by H. R. Farquharson from an order of the Divisional Court (CHARLES and WRIGHT, JJ.), discharging a rule nisi for a writ of prohibition to the county court of Dorsetshire, on the ground that, under the circumstances the Court had a discretion to refuse the prohibition. H

The appellant, Farquharson, let to the respondent, Morgan, a farm by a lease, in which it was provided that the clauses of the Agricultural Holdings Act, 1883, relating to "procedure," should apply as well to any claims of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the Agricultural Holdings Act, 1883. The lease provided for certain allowances and compensation being made to the outgoing tenant at the expiration of the lease in respect of various matters which were not the subject of allowance or compensation under the Act of 1883. The lease was determined on March 25, 1891, and the respondent claimed allowances and compensation in respect of matters within the Agricultural Holdings Act, 1883, and in respect of matters not within that Act. These claims were referred to arbitration and an award was made. I

The respondent made an application to the county court to enforce the award under s. 24 of the Agricultural Holdings Act, 1883. It was apparent that the

**A** award was bad because it awarded a lump sum in respect of all claims, and by consent of both parties it was remitted to the umpire. An amended award was made which on its face showed the matters in respect of which the sums thereby awarded to the respondent were given. Some of these sums were awarded in respect of matters within the Act of 1883, and some in respect of matters not within that Act. The appellant appealed to the county court against this amended  
**B** award, and his appeal was dismissed. He thereupon appealed to the Queen's Bench Division when the matter was remitted to the county court to be re-heard. Upon the re-hearing in the county court the award was wholly affirmed, and the respondent subsequently applied for an order enforcing the whole award under s. 24 of the Agricultural Holdings Act, 1883. The county court judge made an order to that effect. The appellant then applied for and obtained a rule nisi for a prohibition to the county court against enforcing the award under s. 24 of the Act of 1883.  
**C** Upon argument this rule was discharged by a Divisional Court. The appellant now appealed to the Court of Appeal.

*Danckwerts* for the appellant.

*A. Clavell Salter* for the respondent.

*Cur. adv. vult.*

**D** Feb. 2, 1894. **LORD HALSBURY.**—In this case, with every disposition to decline to interfere with the course of litigation, and with a strong desire to prevent a persistent litigant from proceeding further, and with the conviction that, if it is possible for a person to render himself incapable of applying for a prohibition, this appellant has done so, I have striven to see whether we could not refuse  
**E** this application, but I am constrained to say that the writ of prohibition must issue, so far as the application relates to any claim which is outside of the Agricultural Holdings Act, 1883. It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record it is immaterial how the matter is brought before the superior court, for the superior court must interfere to protect the prerogative of the Crown by prohibiting the  
**F** inferior court from exceeding its jurisdiction. That is to say, where the want of jurisdiction appears upon the libel, as in an ecclesiastical court, or upon the face of the record, and does not depend upon a mere matter of fact, and a cause is entertained by an inferior court which is clearly beyond its jurisdiction, no consent of parties will justify the superior court in refusing a prohibition.

Looking, then, at the present case and at what appears upon the face of the record, and considering the provisions of the Agricultural Holdings Act, 1883, and what has been done in the county court, it is impossible to doubt that the county court judge, in seeking to give execution under the Agricultural Holdings Act, 1883, in respect of the matters which were outside of that Act, was exceeding his jurisdiction. The things in respect of which there is jurisdiction under the Agricultural Holdings Act, 1883, are set out in that Act and by s. 24, the county court judge  
**H** may order the compensation awarded in respect of those things to be recovered in the same way as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable. In this case, therefore, the position is this, that the parties seek to give the judge jurisdiction to put the powers of the court as to execution into force in respect of other matters which are not within the Act. Under these circumstances I repeat that I am unable to resist the conclusion that  
**I** the writ of prohibition must issue; but considering the course which this litigation has taken, I think that the appellant should have no costs, except in this court.

**LOPES, L.J.**—This case raises the much vexed question whether the grant of prohibition is discretionary, or whether it is demandable of right. It seems to me that there has always been recognised a distinction between what I will call a latent want of jurisdiction, e.g., something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, e.g., a want of jurisdiction apparent on the face of the proceedings. While in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion

whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that where the want of jurisdiction is patent the grant of the writ of prohibition is of course.

LORD MANSFIELD, in *Buggin v. Burnett* (1), held, that the court was not bound to grant a prohibition to a party who had acquiesced in the proceedings of the court below, except where the absence of jurisdiction was apparent on the face of the proceedings. In *Bodenham v. Ricketts* (2) LORD DENMAN laid down the rule in the same terms as LORD MANSFIELD, and, about the same time, the same rule was adopted in a considered judgment of the Court of Queen's Bench in *Yates v. Palmer* (3). In the elaborate opinion of the judges, delivered by WILLES, J., to the House of Lords in *London Corpn. v. Cox* (4), it is said (L.R. 2 H.L. at p. 279):

"upon application being made in proper time upon sufficient materials by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court";

and in the same case it is said (*ibid.* at p. 283):

"where the defect is not apparent, and depends on some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction (*Knowles v. Holden* (5); yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to interpose except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant."

It was held in that case, that the writ was not of course, inasmuch as there might be circumstances which would justify the court in refusing it, such as undue delay, insufficient materials, or misconduct, or laches by the party applying for it; but there is nothing in the case contravening the rule I have mentioned where the absence of jurisdiction is apparent on the face of the proceedings; in fact there is an express exception of such cases.

In 1888, in *Broad v. Perkins* (6), the question whether in the circumstances of that case the court had any jurisdiction to refuse a writ of prohibition was directed to be argued before the full Court of Appeal, and LORD ESHER, M.R., delivering the judgment of the full court, repeated the opinion of WILLES, J., in *London Corpn. v. Cox* (4), which I have cited.

The result of the authorities appears to me to be this, that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that where the absence or excess of jurisdiction is not apparent upon the face of the proceedings, it is discretionary with the court to decide whether the party applying has not, by laches or misconduct, lost his right to the writ to which under other circumstances he would be entitled. The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by LORD DENMAN in *Bodenham v. Ricketts* (2), to be for the sake of the public, because "the case might be a precedent if allowed to stand without impeachment"; and I would add for myself, because it is a want of jurisdiction of which the court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken.

If it were possible for him to do so, it is abundantly clear that the appellant has by his conduct precluded himself from claiming the interposition of the court in his favour. That he has acquiesced in the proceedings is beyond dispute. I cannot imagine a stronger case of acquiescence. But I am of opinion that the



A award on the face of it discloses a want of jurisdiction. It contains and deals with matters which are not the subject of the Agricultural Holdings Act, 1883, matters outside that Act and which cannot be enforced under s. 24 of that Act. In such circumstances most reluctantly I am compelled to hold that the writ of prohibition must issue, and that this appeal must be allowed.

B **DAYEY, L.J.**—There are two principles which are engrained in our law. One is that parties cannot by contract oust the jurisdiction of the Queen's courts. This has been somewhat modified by the power given to the court by s. 11 of the Common Law Procedure Act, 1854 (now s. 4 of the Arbitration Act, 1889), to give effect to an agreement to refer disputes to arbitration subject to certain well-known conditions; but, subject to this power, it is no defence to an action to allege that the parties have agreed to refer the question in dispute to arbitration, or to provide for its settlement in some other mode. The other principle is correlative to the first—that the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess. To do so would be a usurpation of the prerogative of the Crown, and it has always been the policy of our law, as a question of public order, to keep inferior courts strictly within their proper sphere of jurisdiction: (*Worthington v. Jeffries* (7)). It follows that a party, notwithstanding that he has contracted to have the dispute decided, or a decision in the matter enforced, by a court not possessing by law jurisdiction, may refuse to be bound by his contract and object to the jurisdiction, subject to the provisions embodied in the Arbitration Act, 1889, so far as applicable. It also follows that you cannot give jurisdiction by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority.

E In the present case the appellant who applies for a prohibition, has contracted by the lease of Nov. 29, 1888, that the clauses of the Agricultural Holdings Act, 1883, relating to procedure, and contained in ss. 7 to 28 (both inclusive), shall apply as well to any claims of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the said Act.

F The lease makes provision for certain allowances and compensation being made to an outgoing tenant at the expiration of the lease as to various matters which are not the subjects of allowance or compensation under the Act. An amended award has been made dealing as well with matters which are properly subjects of allowance or compensation under the Act as with matters in respect of which allowance or compensation can only be claimed under the provisions of the lease; and the amended award on the face of it shows the matters in respect of which the sums thereby awarded are given. On Sept. 24, 1893, the present respondent made an application to the county court to enforce the award, and the judge, though he had doubts whether he had jurisdiction, made an order to that effect. The present appellant applied to the High Court for a prohibition against the county court enforcing the award or proceeding further with the application. A Divisional Court has dismissed that application on the grounds that under the circumstances the court had a discretion to refuse the prohibition on the application of the present appellant.

H The jurisdiction of the county court in the matter is statutory, and is conferred by the Agricultural Holdings Act, 1883, s. 24 of which is in the following terms:

I "When any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable."

It is obvious that this section only applies to money agreed, or awarded, or ordered on appeal, to be paid in respect of matters within the Act, and gives no jurisdiction over awards as to other matters made pursuant to a contractual submission or with the consent of parties. Indeed it was not, and could not be, denied that, so far as

the award related to matters outside the Act, the county court judge had no jurisdiction to enforce the award, and the appellant was prima facie entitled to the prohibition. But it was argued that the granting of a prohibition is discretionary, and that the applicant was estopped or precluded by his conduct from claiming a prohibition. Reliance was placed on a well-known passage in the judgment of WILLES, J., in *London Corpn. v. Cox* (4) (L.R. 2 H.L. at p. 279), which has been cited by LOPES, L.J. This passage has been adopted by the full Court of Appeal as a correct statement of the law, in *Broad v. Perkins* (6). It will, however, be observed that the judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of an applicant which he might have brought forward in the court below, but has kept back without excuse, i.e., where an applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the court.

To the same effect is LORD MANSFIELD's judgment in *Buggin v. Burnett* (1), where he says (4 Burr. at p. 2037) :

"If it appears upon the face of the proceedings that the court below had no jurisdiction, a prohibition may be issued at any time either before or after sentence, because all is a nullity; it is coram non judice. But where it does not appear upon the face of the proceedings, if the defendant below will lie by or suffer that court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below."

This passage was quoted by PARKE, B., in *Roberts v. Humby* (8) in which case the court granted a prohibition at the instance of a party to the proceedings in a case where the want of jurisdiction appeared on the face of the proceedings even after execution in the inferior court.

The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is explained by COLERIDGE, J., in *Marsden v. Wardle* (9) (3 E. & B. at p. 701). The judge is there evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with the cases in which it is apparent on the face of the proceedings. In the county court it is true there is no record strictly speaking, but the distinction does not, I think, depend on the existence of a formal record, but is one of substance, whether the defect is apparent or depends on evidence. In the present case the jurisdiction invoked is the creation of a statute not even conferring jurisdiction in general terms, but confined to a particular defined subject-matter. The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction is, whether the case falls within the defined ambit of the statute, and it is his duty to decline to make an order as judge if and so far as the matter is outside the jurisdiction, and, if he does not do so, he may (if a judge of an inferior court) be restrained by prohibition. In the present case the limits of the jurisdiction appeared on the face of the statute, and the fact of the excess appeared on the face of the amended award which the court was asked to enforce.

I am, therefore, of opinion that the appellant is not precluded from relying on the excess of jurisdiction in the county court either by his covenant in the lease or by the previous proceedings in relation to the award. In *Jones v. James* (10), which was cited on behalf of the respondent, it is to be observed that it was doubtful whether the court had exceeded its jurisdiction, and ERLE, J., seems to have treated the matter as an irregularity in practice which might be cured by the defendant's waiver; and *Mouflet v. Washburn* (11) seems to have been a case of the same character: see *Jones v. Owen* (12). The summons asks for a prohibition against the county court judge enforcing the whole award, but at the Bar counsel

A for the appellant limited the prohibition asked for to so much of the award as dealt with matters outside the Agricultural Holdings Act, 1883. Although I think that the appellant is not precluded from asking for a prohibition, yet he is doing so in breach of his contract, and I think there should be no costs in the court below, but the appellant should have the costs of the appeal.

*Appeal allowed.*

B Solicitors: Rowcliffes, Rawle & Co., for J. Trevor Davies, Sherborne; Field, Roscoe & Co., for Brennand, Blandford.

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]

C

## Re HOWARD'S SETTLED ESTATES

[CHANCERY DIVISION (Stirling, J.), February 12, 13, 18, 1892]

D

[Reported [1892] 2 Ch. 233; 61 L.J.Ch. 311; 67 L.T. 156;  
40 W.R. 360; 36 Sol. Jo. 293]

E

*Settled Land—Improvement—Sums borrowed for improvements—Security by rentcharges—Capital spent in buying up rentcharges—"Redeeming" or "otherwise providing for payment thereof"—Merger for benefit of inheritance charged—Recoupment out of capital money by tenant for life for instalments paid out of income—Improvement of Land Act, 1864 (27 & 28 Vict., c. 114), s. 49, s. 60—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 28—Settled Land Acts (Amendment) Act (50 & 51 Vict., c. 30), s. 1.*

F

Between 1881 and 1885 the tenant for life borrowed sums of money under the Improvement of Land Act, 1864, for improvements, authorised by s. 25 of the Settled Land Act, 1882, on his estates, and those sums were secured by rentcharges in the form prescribed by that Act. Between 1883 and 1885 the settlement trustee bought up the rentcharges out of capital money of the settlement fund requiring investment. In 1888 those parts of the settled estates on which the improvements had been executed were sold and, under the powers of the Settled Land Act, 1882, the rentcharges were shifted to other portions of the estate.

G

**Held:** (i) the capital money expended in buying up the rentcharges was an investment under s. 60 of the Improvement of Land Act, 1864, and was not expended in "redeeming" the rentcharges "or otherwise providing for the payment thereof" within the meaning of s. 1 of the Settled Land Acts (Amendment) Act, 1887, and the rentcharges were not merged for the benefit of the inheritance charged therewith; (ii) s. 1 of the Settled Land Acts (Amendment) Act, 1887, was not retrospective so as to enable the tenant for life to recover from capital for the instalments previously paid by him out of income, and, accordingly, the tenant for life could only recover from capital for those instalments which accrued due after the passing of the Act of 1887 and after the time when he first raised the question and ceased to pay them on Mar. 25, 1899.

H

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**Notes.** The Settled Land Acts, 1882 to 1890 (i.e. including the Settled Land Acts (Amendment) Act, 1887) have been replaced with amendments by the Settled Land Act, 1925. For s. 1 and s. 2 of the Act of 1887, see now s. 73 (i) (xiii) and s. 88 of the Act of 1925 (23 HALSBURY'S STATUTES (2nd Edn.) 162, 193).

Distinguished: *Re Sandbach*, [1951] 1 All E.R. 971. Referred to: *Re Dalison's Settled Estate*, [1892] 3 Ch. 522; *Re Earl of Stafford and Maples* (1895), 65 L.J.Ch. 124.

As to redemption of improvement rentcharges, see 23 HALSBURY'S LAWS (3rd



Edn.) 130 et seq.; and for cases see 30 DIGEST (Repl.) 316 et seq. For s. 49 and s. 60, respectively, of the Improvement of Land Act, 1864, see 13 HALSBURY'S STATUTES (2nd Edn.) 516, 521. A

Cases referred to:

- (1) *Re Knatchbull's Settled Estate* (1885), 29 Ch.D. 588; 54 L.J.Ch. 1168; 53 L.T. 284; 33 W.R. 569; 1 T.L.R. 398, C.A.; 30 Digest (Repl.) 316, 65. B
- (2) *Re Lord Sudeley's Settled Estates* (1887), 37 Ch.D. 123; 57 L.J.Ch. 182; 58 L.T. 7; 36 W.R. 162; 4 T.L.R. 139; 30 Digest (Repl.) 331, 215.
- (3) *Re Lord Egmont's Settled Estates* (1890), 45 Ch.D. 395; 59 L.J.Ch. 768; 63 L.T. 608; 38 W.R. 762; 6 T.L.R. 461, C.A.; 30 Digest (Repl.) 332, 222.
- (4) *Re Hotchkin's Settled Estates* (1887), 35 Ch.D. 41; 56 L.J.Ch. 445; 56 L.T. 244; 35 W.R. 463; 3 T.L.R. 401, C.A.; 30 Digest (Repl.) 332, 225. C

Also referred to in argument:

*Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 31 Digest (Repl.) 546, 6678.

### Adjourned summons.

The applicant, Philip John Canning Howard, tenant for life of the Corby and Coniscliffe estates in the counties of Cumberland and Durham, asked (i) that it might be declared that, having regard to the provisions of the Settled Land Act, 1887, all capital moneys applied by the defendant, Henry Stourton, the surviving trustee of the settlement, in the purchase of specified rentcharges should be deemed to have been applied in payment for improvements authorised by the Settled Land Act, 1882, and that accordingly the tenant for life or other person for the time being beneficially entitled to possession of the estates was under no liability to make any repayments to the trustee in respect of the rentcharges or any of them, and that all such rentcharges should be deemed to have merged in or for the benefit of the inheritance charged therewith; (ii) that the trustee should be ordered to pay and transfer to the tenant for life all moneys and investments in the hands or under the control of the trustee, and representing any part of the repayments theretofore made by the tenant for life to the trustee in respect of the rentcharges or any of them; and (iii) in case the judge should be of opinion that the capital moneys so applied could not be deemed to have been applied in payment for such improvements, then that proper directions might be given for the redemption or making other provision of or for the rentcharges by the trustee by means of further capital moneys in his hands and comprised in the settlement. D  
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Between 1881 and 1885 the tenant for life borrowed from the Lands Improvement Company six separate sums of money, under the powers of the Improvement of Land Act, 1864. The loans were raised for the purpose of effecting certain improvements on the estates and were secured by six rentcharges for twenty-five years, created by the Inclosure Commissioners under s. 49 of the Improvement of Land Act, 1864, charged on the inheritance of the estates and payable half-yearly, and made in the prescribed form under the Act which contained no provision for the redemption of the rentcharges. At various times in and previously to 1885, acting under s. 60 of the Improvement of Land Act, 1864, the trustee bought up the rentcharges out of trust moneys in his hands for investment in real estate. Subsequently to such respective purchases the tenant for life paid the instalments of the respective rentcharges to the trustee who repaid to him so much of the instalments as represented interest, but retained and invested as capital of the settlement funds so much of the instalments as represented capital. In 1888 the parts of the settled estates on which the improvements had been effected, with other parts, were sold; and on the occasion of such sale the rentcharges were, under the powers of the Settled Land Act, 1882, shifted from the portions of the estate which were sold to other portions thereof. The tenant for life paid the rentcharges up to 25 Mar., 1889. G  
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The court assumed for the purpose of this case that the improvements effected

A by the loans were improvements within the meaning of s. 25 of the Settled Land Act, 1882.

Carson for the tenant for life.

R. J. Parker for the settlement trustee.

B Feb. 18, 1892. **STIRLING, J.**, stated the facts, and continued.—Under s. 21 (2) of the Settled Land Act, 1882, capital money arising under the Act may be applied “in discharge, purchase, or redemption of encumbrances affecting the inheritance of the settled land or other the whole estate the subject of the settlement.”

C and under sub-s. (3) “in payment for any improvement authorised by this Act.” The nature of the improvements is described by s. 25, and s. 26 regulates the mode in which the capital money is to be applied for the purpose of the improvement. Section 28 provides that

D “the tenant for life and each of his successors in title having under the settlement a limited estate or interest only in the settled land shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair at his own expense every improvement executed under the foregoing provisions of this Act”;

E and by s. 22 (2), the application of the capital money for the purposes of the Act is to be made according to the direction of the tenant for life. Under that Act the question arose in *Re Knatchbull's Settled Estate* (1), whether charges created under the Improvement of Land Act, 1864, could be paid out of capital moneys under the Settled Land Act, 1882, and it was held that they could not. That being the state of the law, the Settled Land Acts (Amendment) Act, 1887, was passed. Section 1 provides :

F “Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge whether temporal or perpetual has been or may be created in pursuance of any Act of Parliament with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge or otherwise providing for the payment thereof shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.”

Section 2 provides :

G “Any improvement in payment for which capital money is applied, or deemed to be applied, under the provisions of the preceding section shall be deemed to be an improvement within the meaning of s. 28 of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.”

H Then, by the last clause, s. 3, the Act is to be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884.

I The question which I have to decide is, first, whether what was done prior to the passing of the Act of 1887 can be undone, so to speak—in other words, whether I can give effect to the application contained in the first two paras. of the summons; and secondly, whether as regards all instalments of the rentcharge which have not been paid, a prospective order can be made. The Act of 1887 takes a peculiar form. It does not say that these shall be deemed to be encumbrances within the meaning of s. 21 (2) of the Act of 1882. It says that

“... any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.”

The object of that seems to have been to introduce the provisions of s. 28 of the Settled Land Act, 1882, which is done by s. 2 of the Act of 1887, and to impose upon the tenant for life the duty of keeping up and maintaining the improvements

which have been effected, not under the Settled Land Act, 1882, but under the Act of 1864. A

Does this section apply to what has been done in the present case? Between the years 1882 and 1887, the rentcharges were transferred to the trustees of the settlement, who paid the consideration money no doubt out of capital money within the meaning of the Act of 1882. But did that constitute an expenditure of capital money in "redeeming" the rentcharge, "or otherwise providing for the payment thereof?" It was not an expenditure in "redeeming" the rentcharge, because it was an expenditure of capital money by way of investment under s. 60 of the Act of 1864, and the rentcharge remained on foot, and remained payable by the tenant for life in accordance with the terms of the Act. The only difference introduced was, that payment was now made to the trustee of the settlement, and not to the persons in whose favour the rentcharges were originally created. Then, was it an expenditure of money "or otherwise providing for the payment of the rentcharges"? The payment still remained to be made, and was made by the tenant for life under the provisions of the Act of 1864; and it seems to me, therefore, that the application, so far as it relates to past transactions, is not brought within the language of the Act of 1887. Again, can I make an order directing the trustee to recoup to the tenant for life out of capital money, the payments made by him between 1882 and 1887? That is not providing for the payment of those instalments of the rentcharges, for they have already been paid by the tenant for life. I do not think, therefore, that such an order falls within the terms of the Act of 1887. That, in my opinion, disposes of the case. B  
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I wish to add, however, that I am not satisfied that s. 1 of the Act of 1887 was meant to be retrospective, so as to bring within its operation payments made before the passing of the Act. It no doubt is clearly meant to apply to improvements made either before or after the passing of the Act of 1887. It clearly applies also to rentcharges created both before and after the passing of the Act. But when we come to the previous dealing with the application of the moneys, the language is no longer distinct and clear as it ought to be in order that the enactment may have a retrospective effect. In the first part of s. 1 of the Act of 1887 it is provided that: E  
F

"Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act and a rentcharge whether temporal or perpetual has been or may be created . . ."

But then it goes on: G

"any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied . . ."

not to be or to have been, as one would have expected if the object of the legislature had been to make the section retrospective. I think, therefore, that the application contained in the first two paras. of the summons does not fall within the powers conferred by the Act of 1887. H

Then arises the question whether I can direct that provision should be made for the payment of the rentcharge so far as it remains unpaid, from the time when the Act passed. It is settled by the decisions in *Re Lord Sudeley's Settled Estates* (2) and *Re Lord Egmont's Settled Estates* (3) that such provision may be made where the rentcharge remains subsisting on a portion of the estate which has been improved; but counsel for the trustee very properly called my attention to the fact that the portion of the settled estate which had been improved had been sold, and he referred me to the expressions of doubt that are contained in the judgments of the various members of the Court of Appeal in *Re Hotchkin's Settled Estates* (4) whether under the Act of 1882 capital money could be applied in paying for improvements on lands which were no longer in settlement. I have read carefully those judgments, and unquestionably there would be great doubt, if we were simply dealing with the Act of 1882, whether that could be done. But we are dealing with the Act of 1887, and the proposed application seems to me to be within the I



**A** language of the Act. An improvement has been effected, a rentcharge has been created with the object of paying off moneys advanced for the purpose of defraying the expenses of such improvement; and, that being so, any capital money expended in providing for the payment thereof is to be deemed to be applied in payment for an improvement authorised by the Act of 1882.

**B** I think that the proposed application falls within the language of the Act, and I can see no reason why, in justice, it should not in this respect be granted. What has been done is this: the rentcharges have been transferred to other portions of the estate, and the improved portion of the estate has been sold free from those rentcharges. I have no doubt that a good price was got, and that the persons entitled in remainder under the settlement have benefited by the improvements which have been made, in this way, that an increased price has been got for the estate by reason of those improvements having been effected. I cannot see, therefore, that there is anything which ought to prevent the tenant for life applying successfully to have capital moneys expended in providing for the payment of these improvements, in accordance with the Act of 1887. Therefore, I think that on para. (iii) of the summons an order ought to be made directing that the instalments of the rentcharge which have accrued due since Mar. 25, 1889, when the question first arose, and remain unpaid, should be provided for out of capital money.

*Order accordingly.*

Solicitors: *Few & Co.*

[*Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.*]

**E**

**F**

## MORRIS v. DELOBBEL-FLIPO

[CHANCERY DIVISION (Stirling, J.), February 19, 27, March 4, 11, 1892]

[Reported [1892] 2 Ch. 352; 61 L.J.Ch. 518; 66 L.T. 320;  
40 W.R. 492; 36 Sol. Jo. 347]

**G** *Bill of Sale*—"Agreement by which right in equity to personal chattels or a charge or security thereon conferred"—*Agreement authorising retention of goods in hands of agent as security for advances to principal*—*Bills of Sale Act, 1878* (41 & 42 Vict., c. 31), s. 4—*Bills of Sale Act (1878) Amendment Act, 1882* (45 & 46 Vict., c. 43), s. 3.

**H** The defendant, a manufacturer in France, employed the plaintiff as agent to sell his goods in England. By an agreement in writing, dated Dec. 26, 1890, it was provided that the defendant would pay the expenses of the London agency up to £2,200 a year, and that, if the plaintiff should be compelled to make advances either for general expenses or otherwise, he should be "secured by the stock of goods which shall be in his hands" which the defendant engaged should never fall below a fixed value. The agency was determined by the defendant, wrongfully as the plaintiff contended, and the plaintiff claimed to be entitled to the security of the goods in his hands against advances for expenses which he had made. The defendant contended that the agreement was one by which a right in equity to personal chattels or to any charge or security thereon was conferred so as to be a bill of sale, and that it was void for non-registration, and he sought to remove the goods in the hands of the plaintiff without satisfying the plaintiff's claim for advances.

**I**

**Held:** the agreement merely entitled the plaintiff to retain goods which came into his hands and conferred no power to take possession of any goods, so that there was an agreement coupled with possession which gave rise to a legal

right and not to an equitable right, and, therefore, the agreement was not a bill of sale within s. 3 of the Bills of Sale Acts and was not void for non-registration.

**Notes.** Considered: *Wrightson v. McArthur and Hutchinsons* (1919), Ltd.; [1921] All E.R.Rep. 261. Referred to: *Lord's Trustee v. Great Eastern Railway*, [1908] 2 K.B. 54; *Mercantile Bank of India, Ltd. v. Chartered Bank of India, Australia and China and Strauss & Co.*, [1937] 4 All E.R. 651; *Dean v. Prince*, [1954] 1 All E.R. 749.

As to agreements by which a right in equity to chattels is conferred being bills of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 266 et seq.; and for cases see 7 DIGEST (Repl.) 20 et seq. For s. 4 of the Bills of Sale Act, 1878, and s. 3 of the Bills of Sale Act (1878) Amendment Act, 1882, respectively, see 2 HALSBURY'S STATUTES (2nd Edn.) 558, 575.

Cases referred to:

- (1) *Re Townsend, Ex parte Parsons* (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest (Repl.) 23, 104.
- (2) *Newlove v. Shrewsbury* (1888), 21 Q.B.D. 41; 57 L.J.Q.B. 476; 36 W.R. 835, C.A.; 7 Digest (Repl.) 11, 45.
- (3) *Reeves v. Barlow* (1884), 12 Q.B.D. 436; 53 L.J.Q.B. 192; 50 L.T. 782; 32 W.R. 672, C.A.; 7 Digest (Repl.) 15, 67.
- (4) *Holroyd v. Marshall* (1860), 2 De G.F. & J. 596; 30 L.J.Ch. 385; 7 Jur.N.S. 319; on appeal (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- (5) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490; 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Morr. 246, C.A.; 7 Digest (Repl.) 22, 96.
- (6) *Robinson v. Macdonnell* (1816), 5 M. & S. 228; 105 E.R. 1034; 37 Digest 170, 129.
- (7) *Mills v. Charlesworth* (1890), 25 Q.B.D. 421; 59 L.J.Q.B. 530; 63 L.T. 508; reversed on appeal sub nom. *Charlesworth v. Mills*, [1892] A.C. 231; 61 L.J.Q.B. 830; 66 L.T. 690; 56 J.P. 628; 41 W.R. 129; 8 T.L.R. 484; 36 Sol. Jo. 411, H.L.; 7 Digest (Repl.) 23, 105.
- (8) *Reeves v. Capper* (1838), 5 Bing. N.C. 136; 1 Arn. 427; 6 Scott, 877; 8 L.J.C.P. 44; 2 Jur. 1067; 132 E.R. 1057; 21 Digest (Repl.) 594, 820.
- (9) *Meyerstein v. Barber* (1866), L.R. 2 C.P. 38; 36 L.J.C.P. 48; 15 L.T. 355; 12 Jur.N.S. 1020; 15 W.R. 173; 2 Mar.L.C. 420; on appeal (1867), L.R. 2 C.P. 661; 36 L.J.C.P. 289; 16 L.T. 569, Ex. Ch.; affirmed sub nom. *Barber v. Meyerstein* (1870), L.R. 4 H.L. 317; 39 L.J.C.P. 187; 22 L.T. 808; 18 W.R. 1041; 3 Mar.L.C. 449, H.L.; 37 Digest 168, 111.
- (10) *Hilton v. Tucker* (1888), 39 Ch.D. 669; 57 L.J.Ch. 973; 59 L.T. 172; 36 W.R. 762; 4 T.L.R. 618; 7 Digest (Repl.) 22, 100.

Also referred to in argument:

- Re Hall, Ex parte Close* (1884), 14 Q.B.D. 386; 54 L.J.Q.B. 43; 51 L.T. 795; 33 W.R. 228; 7 Digest (Repl.) 21, 93.
- Re Cunningham & Co., Ltd., Attenborough's Case* (1885), 28 Ch.D. 682; 54 L.J.Ch. 448; 52 L.T. 214; 33 W.R. 387; 1 T.L.R. 227; 7 Digest (Repl.) 21, 95.
- Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206; 61 L.J.Ch. 11; 64 L.T. 787; 39 W.R. 684; 7 Digest (Repl.) 21, 94.

**Motion** for an interim injunction.

The plaintiff, as agent, brought an action against the defendant, the principal, claiming an injunction to restrain the defendant from interfering with the rights of the plaintiff in respect of certain goods in his hands under an agreement in writing dated Dec. 26, 1890. The defendant contended that the agreement was a bill of sale and void for non-registration. It was agreed that, if the agreement

A was a bill of sale, the case would be disposed of. Accordingly, it was on this question that the case was argued and decided, and on which it is reported.

The defendant, Delobbel-Flipo, was a manufacturer at Roulaix in the republic of France, and the plaintiff, Morris, was employed by him to act as his agent for the sale of his goods in England. After the commencement of the agency the terms were reduced into writing by an agreement, in the French language. By B this agreement, dated Dec. 26, 1890, it was agreed that the plaintiff should be the general agent of the defendant in England at a salary of £240 per annum, and £10 per quarter in addition, and a commission of four per cent. on the amount of business done above £18,000 after Jan. 1, 1891. And the agreement contained a clause of which the following is a translation :

C "[The defendant] will supply all the expenses of the London agency which may reach the sum of £2,200 sterling per annum, including the rent of the agency, and if [the plaintiff] is compelled to make advances either on account of general expenses or for any other business, he will be covered and secured by the stock of goods which shall be in his hands, and which [the defendant] engages never to allow to fall below 100,000 francs."

D The agreement was expressed to last for seven, fourteen, or twenty-one years. The defendant purported to determine the agreement of Dec. 26, 1890, and at the time of such determination there were goods of the defendant to a considerable value in the hands of the plaintiff; and the plaintiff had also claims against the defendant in respect of advances which had been made by him, and which he claimed to have secured under the agreement of Dec. 26, 1890, upon the goods so in his hands. The defendant contended that the agreement was one by which a right in equity to personal chattels, as a charge or security thereon was conferred and was E a bill of sale under s. 4 of the Bills of Sale Act, 1878, and s. 3 of the Bills of Sale Act (1878) Amendment Act, 1882, and was void for non-registration.

By s. 3 of the Bills of Sale Act, 1878, it was provided :

F "This Act shall apply to every bill of sale executed on or after the first day of January, 1879 (whether the same be absolute or subject or not to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

By s. 4 of the same Act a bill of sale was defined to include (among other things) :

G "Any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred."

Section 3 of the Bills of Sale Act (1878) Amendment Act, 1882, provided that the expression "bill of sale" in that Act should have the same meaning as in the Act of 1878, except that the later Act should not apply to any documents which might be given "otherwise than by way of security for the payment of money." By s. 9 H of the same Act a bill of sale given by way of security for the payment of money is void unless made in the form contained in the schedule to the Act.

Buckley, Q.C., and Rose Innes for the plaintiff.

Hastings, Q.C., and Mulligan for the defendant.

I STIRLING, J., stated the facts and continued : The whole of the facts relating to this case have not yet been investigated; but the motion has been argued on a point of law which it is said is decisive of the case, viz., that the agreement on which the plaintiff relies is void under the Bills of Sale Act (1878) Amendment Act, 1882. It was contended on the plaintiff's behalf that the terms of the agency were arranged and agreed before they were reduced to writing, and that the plaintiff could rely on those terms, apart from the document of Dec. 26, 1890. I think this contention cannot prevail. The terms of the agency have been reduced to writing, and the written document is the only evidence of the agreement. That is settled by *Re Townsend, Ex parte Parsons* (1) and *Newlove v. Shrewsbury* (2).



The document in question in the present case is not a bill of sale in the ordinary sense; but a stringent enactment has been passed to which I must give effect if the case is within it. Section 3 of the Bills of Sale Act (1878) Amendment Act, 1882, throws us back for the definition of a bill of sale upon the Bills of Sale Act, 1878; and it is contended on behalf of the defendant that the document is a bill of sale because it is an agreement "by which a right in equity to personal chattels or a charge or security thereon is conferred" within the meaning of s. 4 of the Bills of Sale Act, 1878. The meaning of those words was considered in *Reeves v. Barlow* (3). BOWEN, L.J., in delivering the judgment of the Court of Appeal in that case said (12 Q.B.D. at pp. 441, 442):

"The learned counsel for the appellant contended that the previously exempted case of such building agreements was directly met by the new words which the Act of 1878 for the first time introduced into the interpretation clause, and that the present agreement must be registered as being an agreement by which a right in equity to personal chattels is conferred. On the part of the respondent it was urged that a right to after-acquired property was not a right to personal chattels within the meaning of the Act of 1878. It is not necessary to pronounce an authoritative decision on this very grave point (as to which see, per LORD CHELMSFORD, *Holroyd v. Marshall* (4), because, in our judgment, whatever right is conferred by the clause of the building agreement now under discussion is not a right in equity at all but a right at law. Down to the time when the building materials were brought upon the landlord's premises there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before."

In *Re Hardwick, Ex parte Hubbard* (5) it was laid down by the Court of Appeal that the words of s. 4 were intended to bring within the Act documents which create a right in equity as distinct from a right at law. It was there held that where goods were pledged as security for a loan and delivered to the pledgee, a document signed by the pledgor recording the transaction and regulating the rights of the pledgee as to the sale of the goods is not a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882. As to the question whether the documents conferred a "right in equity to personal chattels," BOWEN, L.J., said (17 Q.B.D. at p. 700):

"The answer is that these documents do not confer any right in equity, but only regulate the exercise of a legal right. I think that those words were intended to bring within the Act documents which create a right in equity as distinct from a right at law."

It is, therefore, necessary in the present case to inquire whether the document of Dec. 26, 1890, creates a right in equity or a right at law. For the defendant, it was contended that the right was in equity only, and *Holroyd v. Marshall* (4) was relied on. In that case a security was created on certain machinery, implements, and things specified in a schedule and fixed in a particular mill, and there was a covenant that all machinery, implements, and things which during the continuance of the security should be fixed or placed in or about the mill, in addition to, or in substitution for, the said premises or any part thereof, should during

A such continuance be subject to the trust, powers, provisos, and declarations there-inbefore declared and expressed concerning the premises. The debtor, who remained in possession, sold or exchanged some of the old machinery and introduced new machinery; but no assignment of such new machinery was executed, nor was any act done by or on behalf of the secured creditors to constitute a formal taking of possession of the added machinery.

B It was held in the House of Lords, overruling the decision of LORD CAMPBELL, L.C., that in equity the added machinery was subject to the security, and that the secured creditors were entitled to it as against an execution creditor of the debtor's. LORD CAMPBELL in his judgment said (2 De G.F. & J. at pp. 602, 603):

C "I am of opinion that notwithstanding the equitable title of the plaintiffs to this property, as they had not perfected their title to it by any intervening act before possession taken under the execution, the judgment creditor is to be preferred. Till possession taken by the plaintiffs, they had only *jus ad rem*. The property remained in the judgment debtor, and the machinery was part of his goods and chattels liable to be taken under the *feri facias*. My judgment rests upon LORD BACON's maxim:

D 'Licet dispositio de interesse futuro sit inutilis tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu.' "

LORD CHELMSFORD, in giving judgment in the House of Lords, went into the question of right at law or in equity. He said (10 H.L.Cas. at p. 216):

E "At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed is altogether void, *Robinson v. Macdonnell* (6). But where future property is assigned, and after it comes into existence possession is either delivered by the assignor or is allowed by him to be taken by the assignee, in either case there would be the '*novus actus interveniens*' of the maxim of LORD BACON, upon which LORD CAMPBELL rested his decree, and the property would pass."

F And again he says (*ibid.* at pp. 219, 220):

G "The judgment of LORD CAMPBELL, resting, as he says, upon LORD BACON's maxim, determines that some subsequent act is necessary to enable 'the equitable interest to prevail against a legal interest subsequently bona fide acquired.' It is agreed that this maxim relates only to the acquisition of a legal right to future property. It can be extended to equitable rights and interests (if at all) only by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law, property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, it is not disputed that the moment the property comes into existence the agreement operates upon it."

H Therefore the distinction drawn by LORD CHELMSFORD appears to be that an assignment (for value) of future property without possession creates an equitable title only; but if possession is actually taken of the property when it comes into existence, then a legal interest is acquired.

I In the present case no right is created of any kind in any goods unless and until they reach the hands of the plaintiff. The agreement between him and the defendant is one of agency, and consequently not one of which specific performance would be decreed by a court of equity. It confers no power to take possession of any goods, it merely entitles the plaintiff to retain possession of the things come to his hands. Until goods are delivered to the plaintiff there is no contract relating to any specific goods at all; if the defendant refused to send goods to the plaintiff, the remedy would be in damages only, and not by way of specific performance.

But when the goods come to the possession of the plaintiff, then, according to the distinction drawn in *Holroyd v. Marshall* (4), there is a state of things, viz., an agreement coupled with possession, which gives rise to a legal right. It gives rise to no right in equity as distinguished from a right at law. And consequently, according to the principle laid down in *Reeves v. Barlow* (3) and *Ex parte Hubbard* (5), the document of Dec. 26, 1890, cannot be regarded as a bill of sale. A

The decision of the Court of Appeal in *Mills v. Charlesworth* (7) was much relied on on behalf of the defendant. In that case the owner of goods that had been seized under a fi. fa. agreed with the defendant that the defendant should pay out the sheriff, that the goods should be pledged to the defendant as security for his advance, and that the sheriff's officer should hold the goods on behalf of the defendant. The agreement was reduced into writing, and signed by the owner of the goods, and the sheriff acquiesced, and his officer retained the custody of the goods on behalf of the defendant. LORD ESHER, M.R., was of opinion that the document there in question was not a bill of sale, but the majority of the court thought otherwise. Their decision, however, as it seems to me, turned upon the fact that there was no physical change in the possession of the goods. When the judgment of LINDLEY, L.J., is looked at it seems plain that this is the ground upon which it rests. He says (25 Q.B.D. at p. 425): B

"In this case, however, there was no physical change of possession of the goods. In point of law possession of goods may be changed by agreement without any physical change in their position, or in the position of the person who actually guards them. The right to possession may be transferred by agreement, and the character in which the custodian holds them may be changed by attornment. This was established by *Reeves v. Capper* (8), *Meyerstein v. Barber* (9), and *Hilton v. Tucker* (10); and in my opinion that which took place did amount in point of law to a change of possession of the goods. But the agreement by which this change in possession was effected was reduced into writing, and cannot be proved apart from the writing. Without the writing Charlesworth cannot prove his right to possess as against Wilson, the owner of the goods." C

And again (*ibid.* at p. 426): D

"If the decision in *Ex parte Hubbard* (5) is extended to cases of pledges created by agreement, and without any physical change in the custody of the goods, the Bills of Sale Act will become of little, if any, use." E

In the present case it is essential, in order that the plaintiff's right may arise, that the goods should have come into his possession, that is, that they should be physically in his hands. In my opinion, therefore, the document is not void as a bill of sale. F

Solicitors: *Hugh Rose Innes*; *W. Morley*.

*Order accordingly.*

[Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.] G

H



## ZIERENBERG AND ANOTHER v. LABOUCHERE

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), May 30, June 1, 1893]

[Reported [1893] 2 Q.B. 183; 63 L.J.Q.B. 89; 69 L.T. 172; 57 J.P. 711; 41 W.R. 675; 9 T.L.R. 487; 4 R. 464]

*Libel—Justification—Plea in general terms—Particulars—Need of full and precise particulars of matters alleged in plea—Disclosure of names of witnesses—Discovery—Right to order before well-pleaded defence.*

In an action for libel where the defamatory statement is of a general character and the defence is a plea of justification in general terms, particulars to support such a plea must be given stating specific instances with the same precision as in an indictment. The defendant cannot object to give such particulars on the ground that they will disclose the names of his witnesses, or on the ground that he should not be compelled to give particulars before getting discovery, since, ordinarily, a defendant cannot ask for discovery until there is a well-pleaded defence.

**Notes.** Distinguished: *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington*, [1895] 2 Q.B. 148. Considered: *Waynes Merthyr Co. v. Radford*, [1896] 1 Ch. 29. Applied: *Wootton v. Sievier*, [1911–13] All E.R.Rep. 1001. Distinguished: *Gaston v. United Newspapers* (1915), 32 T.L.R. 143. Considered: *Godman v. Times Publishing Co.*, [1926] 2 K.B. 273; *Ross v. Blakes Motors, Ltd.*, [1951] 2 All E.R. 689. Referred to: *Arnold and Butler v. Bottomley*, [1908] 2 K.B. 151; *Goldschmidt v. Constable & Co.*, [1937] 4 All E.R. 293.

As to when discovery will be granted before particulars, see 12 HALSBURY'S LAWS (3rd Edn.) 21 et seq.; and for cases see 18 DIGEST (Repl.) 30 et seq. As to necessity for particulars where, in a libel action, the defence is justification of a general charge, see 24 HALSBURY'S LAWS (3rd Edn.) 93; and for cases see 32 DIGEST 99 et seq. As to the degree of particularity required in particulars, see 30 HALSBURY'S LAWS (3rd Edn.) 19 et seq.; and for cases see DIGEST (Pleading) 188 et seq.

Cases referred to:

- (1) *J'Anson v. Stuart* (1787), 1 Term Rep. 748; 99 E.R. 1357; 32 Digest 18, 88.
- (2) *Hickinbotham v. Leach* (1842), 10 M. & W. 361; 2 Dowl.N.S. 270; 11 L.J.Ex. 341; 152 E.R. 510; 32 Digest 93, 1245.
- (3) *Newman v. Bailey* (1776), 2 Chit. 665; 32 Digest 92, 1239.
- (4) *Holmes v. Catesby* (1809), 1 Taunt. 543; 127 E.R. 944; 32 Digest 93, 1242.
- (5) *Leitch v. Abbott* (1886), 31 Ch.D. 374; 55 L.J.Ch. 460; 54 L.T. 258; 50 J.P. 441; 34 W.R. 506, C.A.; 18 Digest (Repl.) 35, 287.
- (6) *Jones v. Stevens* (1822), 11 Price, 235; 147 E.R. 458; 32 Digest 92, 1236.
- (7) *Sachs v. Spielman* (1887), 37 Ch.D. 295; 57 L.J.Ch. 658; 58 L.T. 102; 36 W.R. 498; Digest (Pleading) 192, 1623.

Also referred to in argument:

*Gourley v. Plimsoll* (1873), L.R. 8 C.P. 362; 42 L.J.C.P. 244; 29 L.T. 130; 21 W.R. 683; 32 Digest 92, 1234.

**Appeal** by the defendant from an order of the Divisional Court (CAVE and LAWRENCE, J.J.) affirming an order for further and better particulars made by MATHEW, J., at chambers.

The plaintiffs, who were husband and wife, brought this action for an alleged libel published by the defendant in "Truth." The libel contained many separate defamatory statements and, so far as is material, the defamatory statements were, that the plaintiffs were "charity swindlers" and "impostors" in respect of a "home" instituted and carried on by them; that the "home" was a "monstrous swindle"; and that the plaintiffs had "perpetrated frauds upon those who contributed money to the support of this monstrous swindle." The defendant pleaded

a general justification that the statements complained of were true in substance and in fact. The plaintiffs applied at chambers for an order that the defendant should give particulars of his plea of justification, and KENNEDY, J., made an order that the defendant should give particulars of (inter alia) how and in what way the plaintiffs were "charity swindlers" and "impostors," and the home was a "monstrous swindle," and of the facts and matters relied on in support of such allegations, and when they occurred; also of the "frauds" which the plaintiffs "have perpetrated upon those who have contributed money to the support of this monstrous swindle," and of the "extent" thereof, and if he intends to rely upon particular instances of the persons so defrauded, and of the facts and matters relied on in support of such allegation, and when they occurred; and that, unless such particulars were delivered, the defendant should be precluded from giving any evidence in support of his plea of justification, or to the extent to which such particulars were not delivered.

The defendant delivered particulars in respect of the above matters, as follows:

"The plaintiffs, by the annual reports, prospectuses, and appeals issued by them to the subscribers and the public, represented the St. James's Home as a home for female inebriates, and invited subscriptions and donations for the home on the ground that it was a home for female inebriates, and such subscriptions and donations as were paid were paid upon the faith of that representation and invitation, whereas in fact the home was conducted and managed as a commercial undertaking and in such a way as to further the success of the undertaking rather than the welfare of the inmates, and so that the plaintiffs could benefit themselves by the carrying on of the home. . . . No proper system of books or accounts, showing the receipts and expenditure of the home, were kept, and no proper vouchers were submitted to the auditors for the purpose of preparing the annual balance sheets, and the balance sheets do not show the real or entire receipts or expenditure of the home, and the plaintiffs by means of the home were enabled to live free of expense to themselves, and they appropriated for their own purposes moneys received for or earned by the home, and they caused statements to appear in the annual balance sheets of the home of cash supplied by the female plaintiff and loans made by the male plaintiff which were not in fact supplied or lent out of their own moneys but in reality out of the moneys of the home; and the time when the aforesaid facts and matters occurred was the whole time the home had been open since its institution in 1876. The plaintiffs have obtained the whole of the subscriptions and donations received for the home by the false representations above stated, and by concealing from donors and subscribers the facts and matters stated above."

The plaintiffs applied for further and better particulars, and an order made by a master ordered that the defendant should give further and better particulars setting out the receipt of moneys appropriated by the plaintiffs for their own purposes and not accounted for as such, and of the persons from whom and the dates when such moneys were received, and in what way the expenditure of the home was not shown by the balance-sheets; and of the "frauds perpetrated upon those who have contributed money to the support of this monstrous swindle"; and it was ordered that unless the defendant delivered such particulars he should be precluded from giving any evidence in support of his plea of justification of which particulars were ordered. This order was affirmed by MATHEW, J., and by the Divisional Court, and the defendant appealed.

*R. T. Reid, Q.C., and J. E. Bankes* for the defendant.

*Sir Edward Clarke, Q.C., and C. C. Scott* for the plaintiffs.

*Cur. adv. vult.*

June 1, 1893. **LORD ESHER, M.R.**—In this case the plaintiffs have brought an action against the defendant charging him with having libelled them, and in

- A their statement of claim have set out that which is said to be the libel. The alleged libel is the publication of matter which contains many separate statements, each of which the plaintiffs say is libellous. The defendant has pleaded, not in respect of any separate statement, but as to the whole, that it is true in substance and in fact, that is a general justification. Thereupon the plaintiffs said that the defendant was bound to give particulars of his justification. The plaintiffs
- B might have taken out a summons asking for particulars generally, but they have said that they only desire particulars as to certain matters, pointing out what they are. Upon that the defendant made no objection to the application that he should give particulars. The plaintiffs, as to some of the statements complained of, are satisfied that the particulars which have been given are sufficient, but as to others, two in particular, they say that either no particulars at all have been given, or insufficient particulars, and that they are simply the same as saying over again that the defendant justifies. The plaintiffs, therefore, require further and better particulars. The defendant has taken several objections to this, and what we have to decide is whether the defendant is bound to give further particulars, and whether he is bound to give the further particulars which have been asked for. That is the question before us.
- D The defendant has raised a further point, and says that the particulars which have been given are sufficient, and that the plaintiffs have asked for too minute particulars; and then a still further point that, even though he must give the particulars asked for, he ought not to be ordered to give them now, but to be allowed to get discovery before pleading such particulars. We have to decide upon all these points. The defendant has pleaded a plea of justification to the whole
- E libel, and has not separated any part of the libel and said that, as to the rest of the libel, he does not justify. Strictly, therefore, the defendant is bound to prove a justification as to the whole, and, if he fails to justify every part of the libel, his plea is bad, and the plaintiff is entitled to damages as if there were no plea of justification. Perhaps that is too strict a view to take at the present day, because, now, if a defendant is charged with publishing a libel consisting of several statements, and the statements are separate, he might be allowed to separate them and to plead a separate plea of justification as to each or as to some of them. Taking that more lenient view, if one treats the separate statements as separate libels, the defendant may be allowed to say that he justifies as to each separate statement. In that case we must see what will be the result of saying that further particulars must be given of the plea of justification of one or more of the statements.
- G That a general plea of justification of a libel is insufficient without particulars has been settled law from early times. In *J'Anson v. Stuart* (1), which is the leading case upon this point, the headnote is as follows (1 Term Rep. 748):
- "To print of any person that he is a swindler is a libel, and actionable. A justification of such a charge must state the particular instances of a fraud by which the defendant means to support it."
- H If you call a man a swindler, and he sues you for libel, you cannot plead merely that he is a swindler, and such a plea is bad if the particular circumstances of fraud are not set out. In that case *ASHURST, J.*, says (1 Term Rep. at p. 752):
- "When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea; then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them, for the plaintiff cannot come to the trial prepared to justify his whole life."
- I That passage in the judgment supports the headnote. Then, also, *BULLER, J.*, really says the same, and I will not read his judgment. That is the leading case upon this subject. At that time it was necessary to put the particulars in the plea itself. Afterwards the rules of pleading were enlarged and a defendant was allowed to plead generally in his plea; but he was not allowed to go to trial upon such a plea if the plaintiff desired to have particulars, but was bound to give



particulars to the same extent as he was formerly bound to plead particulars in the plea. The defendant was bound "to state those facts specifically to give the plaintiff an opportunity of denying them." Almost precisely the same rule upon this subject was laid down by PARKE, B., in *Hickinbotham v. Leach* (2), where he says (10 M. & W. at p. 363):

"It is a perfectly well established rule in cases of libel or slander, that, where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. That is settled by *J'Anson v. Stuart* (1), *Newman v. Bailey* (3), and *Holmes v. Catesby* (4)."

In the same case ALDERSON, B., during the argument, said (*ibid.*): "the plea ought to state the charge with the same precision as in an indictment." That is to say, the particulars, if not in the plea of justification, must be as precise as would be necessary in the case of an indictment. Treating, therefore, the statement in this libel with which we have to deal as if it were a separate statement and justified separately, we must now see if sufficient particulars have been given.

The defendant has said that the plaintiffs are "charity swindlers"; that is a general statement; he has been asked to give particulars, that is, for particular instances of swindling. The defendant gives particulars as follows:

"The instances are that they appropriated for their own purposes moneys received for or earned by the house, and that they caused statements to appear in the annual balance sheets of loans, etc."

Is that sufficient? No doubt the defendant thereby states that he means to justify in that way. No instances whatever are given. Those particulars are almost as general as the plea itself; no names, no dates, and no figures are given. Those particulars are not sufficient. In the old days, if it did not give sufficient instances, the plea was bad; according to the practice of the present day, if the particulars do not give sufficient instances the plea is bad as to that part of the libel. Being, therefore, of opinion that the statements in these particulars are not sufficiently precise as to the instances, we must agree with the Divisional Court that further particulars must be given to entitle the defendant to justify these statements, and that, if he does not give sufficient particulars, then the plea of justification as to that part of the libel is bad, and the defendant cannot justify as to that part at the trial, so that as to that part the action will be undefended. I am, therefore, of opinion that, particulars being now given in place of the instances which were formerly necessary to make a plea of justification good, these particulars must now be given in the way in which they have been ordered, and that the defendant, if he does not give sufficient further particulars will be shut out from his defence of justification as to that part of the libel.

It has been urged that the particulars which the plaintiff asks for are too minute, and that the defendant if he gives them must give the names of his witnesses. If these particulars are such as the defendant ought to give, he cannot object to give them because they will disclose the names of his witnesses. There is, therefore, nothing wrong in asking for those particulars. It may be that the defendant cannot give all the names, but we have only to say whether the order is a right order; the defendant, when he answers, must give all the names which he knows; if he can swear that he does not and cannot know some of them, then will be the time to say whether he will be excused from doing so. I think that the particulars ordered are not too minute.

Then we come to the main question. The defendant must somehow or other give the particulars. It has been argued that he ought not to be compelled to give them now, but that he ought to be allowed to get discovery by means of interrogatories and inspection of documents before he is called upon, in effect, to plead. This is a case where no relation existed before the action between the plaintiff and the defendant which would entitle the defendant to any discovery. There is not any relation of principal and agent, or of partners, or of trustee and cestui qui

**A** trust; there is not any relation whatever between the parties except that of plaintiff and defendant in an action of tort. Can the defendant, under those circumstances, be entitled to discovery before he has fixed the issues by his pleading? I am of opinion that he cannot. Generally speaking, neither a court of equity nor a court of common law would order discovery to be made before pleading, where no relation existed between the parties which would authorise the making of such an order, merely for the purpose of enabling a party to find out whether he had any case or not. In such a case they would be called fishing interrogatories and fishing discovery. They were never allowed except under very special circumstances, such as when one party was keeping back something which the other side ought to know. In this case the plea is a bad plea, and in effect is no plea at all, and therefore the rule that no discovery can be had until there is a good plea upon the record, or a good cause of action shown by a plaintiff, applies. Here the plea of justification, from want of sufficient particulars, is not a good plea of justification, and, therefore, a plea by the defendant justifying the libel—that is, a general plea with particulars—has not yet been well pleaded as a defence. Until there is a well-pleaded defence the defendant cannot ask for discovery at all as to this separate libel. No special or particular circumstances under which discovery should be allowed have been proved or alleged. It is, therefore, wrong to say that the obligation upon the defendant to give particulars does not arise until he has obtained discovery. I think that, both upon principle and authority, the defendant's contention, that he is not bound to give the particulars now, is untenable.

A case was cited—*Leitch v. Abbott* (5)—decided by COTTON and BOWEN, L.JJ., which is said to show the contrary, and that a new rule of law is the result of the Judicature Acts. In that case there was a relation between the parties before action which did authorise an order for discovery; that is pointed out in the judgment, and the judgment is founded upon the fact that such a relation did exist. That case, then, is no authority against the rule which I have stated, but is in consonance with it, and shows that there must, generally speaking, be some previously existing relation between the parties to entitle a party to obtain discovery before pleading. The decision of the Divisional Court was right and this appeal must be dismissed.

**BOWEN, L.J.**—I am of the same opinion. The Master of the Rolls has stated the law applicable to this case so lucidly and fully that I will not add anything.

**KAY, L.J.**, read the following judgment. The argument in this case, in one view of it, seems to involve the question whether mere suspicion can justify a libel. It is urged that the so-called particulars, which are in terms as general as the libel complained of, ought not to be made more definite at present because, until the defendant has obtained discovery from the plaintiff, he may not be able to give particulars in any better form. The defendant in a libel action may plead a justification; but it is no justification to plead simply that the alleged libel is true. That, as has been pointedly said, is not justification, but is merely repeating the libel: *J'Anson v. Stuart* (1). Accordingly the practice required that the plea should state facts which justified the defendant in publishing the language complained of. This is clear from the decision in *Hickinbotham v. Leach* (2), and the authorities referred to in that case—*Jones v. Stevens* (6), *Newman v. Bailey* (3), *J'Anson v. Stuart* (1), and *Holmes v. Catesby* (4).

**I** It is said that the modern practice is not to state the facts relied on as a justification in the pleading; but to add them in particulars. I presume this is done under R.S.C., Ord. 19, r. 6 and r. 7; but then the particulars should be as explicit as the plea was required to be before. If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive, that he ought not to have published the libel, and cannot plead any justification for having done so.

The case of a charge of fraud against an agent, or a breach of trust against a trustee, by pleading only, where no libel has been published otherwise, is essentially

different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the court in requiring the defendant to make discovery before the plaintiff is called on to give particulars because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made: *Leitch v. Abbott* (5); *Sachs v. Spielman* (7). But to apply this practice to the case of libel would be to sanction the publication of a libel, when the libeller knew no facts justifying the libellous statement, because he believed he could, by the process of discovery, elicit such facts.

It is urged that, if the facts are stated before discovery is given, the discovery will be limited to those particular facts so alleged. I am not satisfied that this will necessarily be so. I can conceive a case in which a libel in general terms may be justified by certain facts stated in the particulars, and that there may be power to obtain discovery of other analogous facts which may support the justification. But, even if it were so limited, that is no reason why the particulars should not be as definite or explicit as the defendant can make them. It seems to me a much less evil, if it be an evil, to confine the discovery to the particular facts adduced as a justification, than to give the smallest sanction to a libel unsupported by facts which justify the publication. There is another obvious reason for requiring precise particulars, namely, that the plaintiff may know the case he has to meet, etc., what acts it is alleged have been committed which justify the general charge against him; but this is a consideration not peculiar to libel cases.

I am of opinion that the particulars complained of are too general; that they are not particulars at all, but a mere repetition of part of the libel, and that further and better particulars ought to be given. There remains the question whether the penalty, if better particulars are not given, is not as it now stands, too large. A libellous statement, as to which no particulars are given, ought not to be allowed to be justified at all. But where some facts are stated in the particulars by way of justification, which may or may not be sufficient, it is argued that the defendant should not be prevented from relying on them at the trial, simply because he has added a general statement which in itself is not sufficient. However, I am not satisfied that this argument applies in the present case. I do not think that any facts are stated as a justification in this case as to the particulars complained of, and, therefore, the penalty imposed is not too large.

**LORD ESHER, M.R.**—Of course I did not intend, in anything which I said, to impugn in any way the propriety of a defendant, in such a case as this pleading the general plea of justification; and if the plaintiff were not to ask for particulars, he could not afterwards complain that the plea was only general. The plaintiff must ask for particulars, as, under the old system, if a plea of justification was general, and the plaintiff did not demur, but pleaded over, then the plea would have been a sufficient plea, and could not have been objected to at the trial.

*Appeal allowed.*

Solicitors: *Lewis & Lewis; Pritchard, Englefield & Co.*

[Reported by J. H. WILLIAMS. ESQ., Barrister-at-Law.]



A

## SIDEBOTHAM v. HOLLAND

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), December 13, 20, 1894]

B

[Reported [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62;  
43 W.R. 228; 11 T.L.R. 154; 39 Sol. Jo. 165; 14 R. 135]

*Landlord and Tenant*—Yearly tenancy—Termination—Notice to quit terminating on anniversary of commencement of tenancy.

C

By an agreement in writing dated May 19, 1890, the landlord agreed to let a beerhouse to the tenant "as yearly tenant commencing on May 19, 1890, at the clear yearly rent of £45, the sum of £4 7s. 6d. as the apportioned part up to June 24 next being paid on the signing thereof, and the future rent to be paid by equal quarterly payments in advance if demanded on the usual quarter days." On Nov. 17, 1893, the landlord gave the tenant notice to quit the premises "on May 19 next."

D

**Held:** on the construction of the agreement the tenancy commenced on May 19, 1890, and not on June 24, 1890; there was no distinction between tenancies which commenced, "at," "on," "from" or "on and from" a particular date; it was immaterial whether the letting was from one of the usual quarter days or from some other day; and, although a six months' notice to quit on May 18 would have been correct, the notice to quit on May 19, the anniversary of the day on which the tenancy commenced, was valid.

E

**Notes.** Considered: *Re Lancashire and Yorkshire Bank's Lease, Davis & Son v. Lancashire and Yorkshire Bank*, [1914-15] All E.R.Rep. 851; *Mcggeson v. Groves*, [1916-1917] All E.R.Rep. 1127; *Croft v. William F. Blay, Ltd.*, [1918-19] All E.R.Rep. 1105; *Savory v. Bayley* (1922), 38 T.L.R. 619; *Brakspear v. Barton*, [1924] 2 K.B. 88. Applied: *Newman v. Slade*, [1926] 2 K.B. 328. Considered: *Winchester Court, Ltd. v. Holmes*, [1941] 2 All E.R. 542. Applied: *Grate v. Miller*, [1947] 2 All E.R. 45. Considered: *Bathavon R.D.C. v. Carlile*, [1958] 1 All E.R. 801. Referred to: *Dixon v. Bradford and District Railway Servants' Coal Supply Society*, [1904] 1 K.B. 444; *Raihes v. Ogle*, [1920] All E.R.Rep. 424; *Simmons v. Crossley*, [1922] 2 K.B. 95; *Wallis v. Semark*, [1951] 2 T.L.R. 222.

F

G

As to the date of expiration of notice to determine a tenancy from year to year, see 23 HALSBURY'S LAWS (3rd Edn.) 519; and for cases see 31 DIGEST (Repl.) 487 et seq. For the Apportionment Act, 1834, see 13 HALSBURY'S STATUTES (2nd Edn.) 852.

Cases referred to:

H

(1) *Doe d. Holcomb v. Johnson* (1806), 6 Esp. 10, N.P.; 31 Digest (Repl.) 491, 6166.

(2) *Sandill v. Franklin* (1875), L.R. 10 C.P. 377; 44 L.J.C.P. 216; 32 L.T. 309; 39 J.P. 311; 23 W.R. 473; 31 Digest (Repl.) 490, 6165.

(3) *Clayton's Case* (1585), 5 Co. Rep. 1a; 77 E.R. 48; 31 Digest (Repl.) 490, 6155.

I

(4) *R. v. St. Mary, Warwick (Inhabitants)* (1853), 1 E. & B. 816; 1 C.L.R. 192; 22 L.J.M.C. 109; 21 L.T.O.S. 74; 17 J.P. 552; 17 Jur. 551; 1 W.R. 307; 118 E.R. 642; 42 Digest 962, 358.

(5) *Ackland v. Lutley* (1839), 9 Ad. & El. 879; 1 Per. & Dav. 636; 8 L.J.Q.B. 164; 112 E.R. 1446; 31 Digest (Repl.) 581, 7013.

(6) *Right d. Flower v. Darby* (1786), 1 Term. Rep. 159; 99 E.R. 1029; 31 Digest (Repl.) 483, 6086.

(7) *Doe d. Robinson v. Dobell* (1841) 1 Q.B. 806; 1 Gal. & Dav. 218; 10 L.J.Q.B. 242; 5 Jur. 434; 113 E.R. 1340; 31 Digest (Repl.) 492, 6179.

(8) *Kemp v. Derrett* (1814), 3 Camp. 510, N.P.; 31 Digest (Repl.) 490, 6161.

- (9) *Doe d. Cornwall v. Matthews* (1851), 11 C.B. 675; 138 E.R. 640; 31 Digest (Repl.) 488, 6132. **A**
- (10) *Roe d. Durant v. Doe* (1830), 6 Bing. 574; 4 Moo. & P. 391, 531; 8 L.J.O.S.C.P. 227; 130 E.R. 1402; 31 Digest (Repl.) 483, 6096.
- (11) *Papillon v. Brunton* (1860), 5 H. & N. 518; 29 L.J.Ex. 265; 2 L.T. 326; 157 E.R. 1285; 31 Digest (Repl.) 505, 6305.
- (12) *Page v. More* (1850), 15 Q.B. 684; 117 E.R. 618; 31 Digest (Repl.) 608, 7237. **B**
- (13) *Morgan v. Davies* (1878), 3 C.P.D. 260; 39 L.T. 60; 26 W.R. 816; 31 Digest (Repl.) 483, 6097.
- (14) *Doe d. Strickland v. Spence* (1805), 6 East, 120; 2 Smith, K.B. 255; 102 E.R. 1232; 2 Digest (Repl.) 12, 40.
- (15) *Doe d. Shore v. Porter* (1789), 3 Term Rep. 13; 100 E.R. 429; 31 Digest (Repl.) 483, 6087. **C**
- (16) *Doe d. Spicer v. Lea* (1809), 11 East, 312; 103 E.R. 1024; 31 Digest (Repl.) 489, 6145.
- (17) *Doe d. King v. Grafton* (1852), 18 Q.B. 496; 21 L.J.Q.B. 276; 19 L.T.O.S. 108; 16 Jur. 833; 118 E.R. 188; 31 Digest (Repl.) 491, 6168.

Also referred to in argument:

- Doe d. Buddle v. Lines* (1848), 11 Q.B. 402; 17 L.J.Q.B. 108; 10 L.T.O.S. 390; 12 Jur. 80; 116 E.R. 527; 31 Digest (Repl.) 493, 6186. **D**
- Hartcup & Co. v. Bell* (1883), 1 Cab. & El. 19; 31 Digest (Repl.) 286, 4207.
- Cutting v. Derby* (1776), 2 Wm. Bl. 1075; 96 E.R. 633; 31 Digest (Repl.) 605, 7198.
- Poole v. Warren* (1838), 8 Ad. & El. 582; 3 Nev. & P.K.B. 693; 1 Will. Woll. & H. 518; 3 Jur. 23; 112 E.R. 959; 31 Digest (Repl.) 501, 6259. **E**
- Clayton v. Blakey* (1798), 8 Term. Rep. 3; 101 E.R. 1234; 30 Digest (Repl.) 491, 1347.
- Pugh v. Duke of Leeds* (1777), 2 Cowp. 714; 98 E.R. 1323; 30 Digest (Repl.) 484, 1273.
- Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; 55 L.J.Ch. 801; 54 L.T. 582; 34 W.R. 669, C.A.; 12 Digest (Repl.) 137, 854. **F**
- Wood v. Beard* (1876), 2 Ex.D. 30; 46 L.J.Q.B. 100; 35 L.T. 866; 41 J.P. 213; 31 Digest (Repl.) 48, 2070.
- Doe d. Phillip v. Benjamin* (1839), 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Woll. & H. 96; 8 L.J.Q.B. 117; 112 E.R. 1356; 30 Digest (Repl.) 461, 1029.
- Marshall v. Berridge* (1881), 19 Ch.D. 233; 51 L.J.Ch. 329; 45 L.T. 599; 46 J.P. 279; 30 W.R. 93, C.A.; 30 Digest (Repl.) 402, 447. **G**

**Appeal** by the plaintiff landlord from a decision of BRUCE, J., in an action of ejectment brought by the landlord against the tenant, the principal question being whether the notice to quit was valid or not. Judgment was given for the tenant.

By an agreement in writing dated May 19, 1890, between the landlord Thomas Sidebotham and the tenant Ellen Holland, the landlord agreed to let and the tenant to take the beerhouse known as the Grapes Inn, at Weaste, Salford, as yearly tenant commencing on May 19, 1890, at the clear yearly rent of £45, the sum of £4 7s. 6d. as the apportioned part up to June 24 next being paid on the signing, and the future rent to be paid by equal quarterly payments in advance if demanded on the usual quarterly days of payment, the first payment being considered as due in advance if demanded on June 24 next, and each succeeding quarterly payment to become payable in advance if required upon the first day of such quarter. On Nov. 17, 1893, the tenant was served with the following notice bearing that date: **H**

"As solicitor for . . . your landlord, I hereby give you notice to quit and deliver up the peaceable and quiet possession to him on May 19 next of the Grapes Inn and premises in your occupation, . . . and which you now hold of him as tenant under agreement dated May 19, 1890." **I**

The tenant refused to quit, and the present action was brought. The tenant relied upon the following grounds: (i) that, in consideration of her advancing £100 to

- A the landlord in September, 1892, he promised that, although she was but a yearly tenant, she should remain in possession until November, 1893; (ii) that by the agreement the tenancy commenced on June 24, and that the six months' notice served on Nov. 17, 1893, to quit on May 19, 1894, was more than a month prior to June 24, and therefore bad; (iii) that, if the tenancy commenced on May 19, as the landlord alleged, the notice to quit was equally invalid, because it was not
- B a notice to quit expiring upon the last day of some year of the tenancy.

*McCall, Q.C., and Roskill* for the landlord.

*J. W. Mansfield and E. F. Spence (Shee, Q.C., with them)* for the tenant.

*Cur. adv. vult.*

Dec. 20, 1894. **LINDLEY, L.J.**, read the following judgment with which **LORD**

- C **HALSBURY** concurred. The express statement in this agreement, that the tenancy is to commence on May 19, is too clear and unambiguous, to warrant any inference which might otherwise have been drawn from the stipulation that the rent is to be paid by equal quarterly payments in advance if demanded on the usual quarter days. In the absence of any express statement as to the commencement of the tenancy, it might have been held to commence on June 24: see *Doe d. Holcomb v. Johnson* (1); *Sandill v. Franklin* (2). It is true that, if the tenancy commences on May 19, the last quarterly payment to be made in advance on the previous Lady Day will not be a full quarter's rent, but only a proportionate part of it—viz., an apportioned part of it for the time which will intervene between Lady Day and May 19. But this circumstance only shows that the agreement is not very accurately drawn. The inaccuracy does not justify the conclusion that
- D the tenancy did not commence on the day expressly mentioned for its commencement—viz., on May 19, 1890—and that the time which intervened between that day and June 24, was not part of the tenancy.

Treating the tenancy, then, as commencing on May 19, 1890, the question is whether a notice to quit on May 19, 1894, given by the landlord on Nov. 17, 1893, is a good notice. It is a six calendar months' notice to quit on the anniversary

- F of the day on which the tenancy commenced. Why, then, is it bad? The notice is said to be bad because it expires one day too late. The contention is that, as the tenancy commenced "on" May 19, and not "from" May 19, the notice should have been to quit on May 18, and not on May 19. Having regard to the decision in *Clayton's Case* (3), I think that, although the agreement was signed on May 19, and the tenant can hardly in fact have been in possession the whole of that day,
- G yet, in point of law that day must be treated as the first day of the tenancy and as part of the term for which the house was agreed to be let. The tenancy cannot, therefore, be treated as commencing on May 20 to the exclusion of May 19. One year from that day would expire at midnight of the next May 18: see *R. v. St. Mary, Warwick* (4); *Ackland v. Lutley* (5). If, therefore, notice to quit on May 18 were given, it would no doubt be good. Indeed, it is well settled that a
- H notice ought to expire on the last day of the current year: see *Right d. Flower v. Darby* (6); *Doe d. Robinson v. Dobell* (7). But, although a half-year's notice to quit on May 18 would be correct, it does not follow that a notice to quit on May 19, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not.

I have looked at all the decisions which were referred to in the argument and at many more, and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case. The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be, and are, disregarded as out of place.

There are several decisions in which notices like the present have been held sufficient. In *Kemp v. Derrett* (8) a yearly tenancy began on Oct. 29; it was



determinable at any time on a three months' notice to quit. LORD ELLENBOROUGH A said (3 Camp. at p. 511):

"I am quite clear that the notice should have expired on Jan. 29, April 29, July 29, or Oct. 29."

Again, in *Doe d. Cornwall v. Matthews* (9) a yearly tenancy commenced on May 7, 1850; a six months' notice to quit on May 7, 1851, was held good. The rent was payable quarterly, but none was ever paid. *Roe d. Durant v. Doe* (10) and *Papillon v. Brunton* (11) are again cases in which the tenancy began on (or perhaps from) a usual quarter day; the notice was to quit on the anniversary of that day, and the notice was held good. In those cases a notice to quit on the day before the anniversary would be bad: see *Page v. More* (12). In *Right d. Flower v. Darby* (6) and *Morgan v. Davies* (13) the notices were too short, and were bad on that ground, but no one suggested that they were bad because they were notices to quit on the anniversary of the day on which the tenancy commenced. In *Page v. More* (12) a notice to quit on the right day was bad; but it was given by the landlord, and it was to quit at noon, which was too soon. B

In BLYTHEWOOD AND JARMAN'S CONVEYANCING (4th edn.), vol. 3, at p. 276, the rule is thus laid down: C

"It—i.e., the notice to quit—must generally be a half-year's notice, and must expire at the period of the year at which the tenancy commenced; and it is immaterial whether the letting was from one of the general quarter-days or from any other day." D

For these propositions several authorities are cited, the more important of which I have noticed when considering the validity of a notice to quit given in time and expiring on the anniversary of the commencement of a tenancy. I can find no distinction ever drawn between tenancies commencing at a particular time or on a particular day or from the same day. "At," "on," "from," or "on and from" are for this purpose equivalent expressions. Any distinction between them for such a purpose as this is far too subtle for practical use: see *Doe d. Strickland v. Spence* (14). In an action for double rent it is, however, necessary to be more particular: see *Page v. More* (12). So it is when the number of days has to be counted. In the absence of authority compelling me to decide differently, I hold the objection that the notice was bad because it was a notice to quit on May 19, instead of May 18, is untenable. E

Then it was said that where the tenancy is not from one of the usual quarter-days there must be 183 clear days between the day on which the notice is given and the day on which the tenancy expires. There were, however, 183 days in this case if the time is reckoned in the usual way—that is, counting in one of the extremes and excluding the other; and I can find no case which decides that both extremes must be excluded. In WILLIAMS' NOTES TO SAUNDERS' REPORTS (5th Edn.), vol. 1 at p. 276 c, it is said that a half-year's notice must consist of 182 days, except when the rent is payable on the usual quarter feast days, when notice on one feast day to quit on the next but one is sufficient. If 182 days' notice are enough, it is plain that this notice was long enough. F

Lastly, it was urged that the notice was bad because the landlord had promised for valuable consideration not to turn the tenant out before 1895. This is the tenant's real defence to this action. Unfortunately, however, the promise was a verbal one; it was not to be performed within a year, and the Statute of Frauds, 1677, s. 4 [see now the Law Reform (Enforcement of Contracts) Act, 1954] precludes the tenant from enforcing it. Under these circumstances it is impossible to hold the notice bad on this ground. G

An argument was advanced that this verbal agreement created a new lease until November, 1895, and that the term created by the written agreement of 1890 was impliedly surrendered. But it is familiar law that whether an agreement operates as a demise or as an agreement only depends on the intention of the parties. In this case it is plain that no new lease was ever thought of or intended by either H I

A party, and it would not be right to invent one in order to get the tenant out of the difficulty in which the absence of a written agreement places her. In my opinion, therefore, the appeal ought to be allowed, and judgment be entered for the landlord, with costs here and below.

B **A. L. SMITH, L.J.**, stated the facts and the grounds of defence and read the following judgment. As to the first defence, the tenant though denying the promise, also set up the Statute of Frauds, 1677, and if ss. 1, 2, and 4 of that statute had been pleaded in the reply instead of only s. 4 (though, from the course this case took at the trial, it must, I think, be treated as if all three sections had been pleaded), the point upon the statute is a good one, and BRUCE, J., was right in deciding against the tenant upon this point.

C As to the second ground of defence, I am of opinion that BRUCE, J., was mistaken in holding that the tenancy commenced on June 24, 1890. He appears to have arrived at this conclusion notwithstanding the express terms of the agreement that the defendant should become tenant "as yearly tenant commencing on May 19, 1890," because he thought that, if he held otherwise, the tenant being under obligation to pay rent in advance, she might have to pay rent between May 19 and June 24, when she had been turned out on May 19. But it has been pointed out that the Apportionment Act, 1834, would apply; and even if it did not, as a six months' notice was necessary, when the quarterly rent payable in advance became due, the tenant would obviously refuse to pay rent for the period during which the notice to quit would prevent her occupying the premises, viz., between May 18 and June 24. I cannot doubt that under the agreement by its express terms the tenancy commenced on May 19, 1890. I cannot hold, as I was invited to do by counsel for the landlord, that when a written agreement states that a person shall become a yearly tenant "commencing on May 19," that it means that he shall become such tenant "commencing on the day after May 19th" or, in other words, as the landlord contends, "commencing from May 19."

F This being so, the third defence arises, which is certainly technical, viz., that, although a full six months' notice to quit has been given for May 19, which was the anniversary of the day upon which the tenancy commenced, it is nevertheless a bad notice to quit, because it is not a notice expiring on the last day of the year of the tenancy, but upon the day after. It appears, upon looking into the old authorities, that at one time what was to be considered a reasonable notice to quit was not settled, but subsequently it became settled law that in cases of yearly tenancies half a year's notice, expiring at the period of the year at which the tenancy commenced, was the reasonable notice to be given, and in *Doe d. Shore v. Porter* (15) LORD KENYON, over one hundred years ago, laid it down that a tenant from year to year cannot be dispossessed without a six month's notice ending at the expiration of a year of his tenancy; and, indeed, I take this to be familiar knowledge. It has also been settled that the notice to quit must be given half a year before the expiration of the then current year of the tenancy, except when the rent is payable on one of the usual feast days, in which case what TINDAL, C.J., in *Roe d. Durant v. Doe* (10) calls "a customary" half-year's notice, will suffice, if given on or before one of the feast days in the earlier half of the tenancy, to quit on the feast day at the conclusion of the tenancy, though there may be fewer than 182 days between the two feast days. No point was taken in that case, nor as far as I have been able to discover in any other of the cases upon feast day tenancies, that the notice was bad because it terminated upon the anniversary of the commencement of the tenancy; but the point taken was, that the tenant had not had a full six months' notice. *Morgan v. Davies* (13) deals with these feast days tenancies, and is to the like effect.

I The complaint in the present case is not that too few days have been allowed to elapse between the giving of the notice upon Nov. 17, 1893, for May 19, 1894,

for that is not the fact; but it is said that, as the tenancy commenced on May 19, the notice does not expire upon the last day of the year of the tenancy, for as it commenced upon May 19, it expired at midnight upon May 18. It was held in *Doe d. Spicer v. Lea* (16) that where a notice to quit at New Michaelmas would be good because the tenancy had then commenced, it was bad if given for Old Michaelmas, which was twelve days later than New Michaelmas, though it had been given in ample time for New Michaelmas, LORD ELLENBOROUGH observing that, if it might be given for Old Michaelmas instead of New Michaelmas, it might as well be given for any other time. In *Doe d. King v. Grafton* (17) LORD CAMPBELL in giving judgment stated (18 Q.B. at p. 501) that,

"on an ordinary yearly letting the six months' notice must expire at the end of the year;"

and ERLE, J., said (*ibid.* at p. 502):

"The authorities determine that, where premises are taken on a yearly tenancy, the term must expire with the year."

That case does not necessarily determine the question whether a notice for the anniversary of the day upon which the tenancy commenced is, or is not, a good notice to quit.

I can find no case, nor has any been cited, in which a full six months' notice to quit, given on the anniversary of the day upon which the tenancy commenced, has been held to be invalid, and, indeed, *Kemp v. Derrett* (8) and *Doe d. Cornwall v. Matthews* (9) are to the contrary effect so far as they go. In the first case LORD ELLENBOROUGH held that, when a person became tenant on Oct. 29, 1810, a notice to quit on Oct. 29 was good; and in the latter case *Doe d. Holcomb v. Johnson* (1) is referred to by JERVIS, C.J., where it was held that although the tenant entered in November, as he had paid the rent from that date to the following Christmas, and afterwards at Midsummer and Christmas, the tenancy commenced from Christmas, and the notice to quit at Christmas was good. But I must point out that in neither of these cases was there a written agreement stating when the tenancy commenced, the only statement being that they commenced on the respective days, and the inference drawn was that the tenancies commenced from that day. There is no place for any such inference in the present case, for the agreement is express upon the point. It cannot be denied that the law relating to notices to quit is highly technical, but the technicalities are too deeply rooted in our law to be now got rid of, and if any case had been found showing that a full six months' notice to quit, given as in the present case for the anniversary of the day of the commencement of the tenancy, was bad, I must have given effect to it; but, as no such case has been found, I do not desire to add one more technicality to a notice to quit unless compelled to do so.

I would point out that the plaintiff has only himself to blame for the difficulties he is in in the present case. Had he added the words which are very ordinarily inserted in a notice to quit, "or at the expiration of the year of your tenancy which shall expire next after the end of one half-year from the service of this notice," and which are inserted to avoid such a point as that now taken, all would have been in order; but the words are not there. If the notice to quit in this case had been for May 20 or May 21, or any later date, I should have had no doubt but that it was a bad notice, and I own that the inclination of my opinion is that the present notice is bad because it does not expire upon the last day of some year of the tenancy; but, as LORD HALSBURY and LINDLEY, L.J., are of opinion that, inasmuch as this is a full six months' notice to quit upon the anniversary of the day upon which the tenancy commenced, it is good, though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from



A them and hold that this unmeritorious technicality must prevail. The appeal must therefore be allowed.

*Appeal allowed.*

Solicitors: *Emmett, Son, Stubbs & Melhuish*, for *Robert Innes*, Manchester; *Smiles & Co.*, for *J. H. Cooper*, Manchester.

B [Reported by W. C. Briss, Esq., Barrister-at-Law.]

C

## WOOD v. COOPER

D [CHANCERY DIVISION (Romer, J.), July 5, 1894]

[Reported [1894] 3 Ch. 671; 63 L.J.Ch. 845; 71 L.T. 222;  
43 W.R. 201; 8 R. 517]

*Landlord and Tenant—Covenant—Covenant against building—Erection of trellis-work screen.*

E *Landlord and Tenant—Covenant—Covenant against act amounting to annoyance—Annoyance to neighbour—Erection of trellis-work screen along wall between properties.*

By a lease dated Nov. 11, 1878, and made in pursuance of a building scheme, the plaintiff demised to A. B. a piece of ground for 99 years together with a dwelling-house which had been erected on it by A. B., who covenanted that he, "his executors, administrators, and assigns, would not, without the licence and consent in writing of the lessor . . . for that purpose first obtained, erect or build, or cause or permit to be erected or built, upon the said piece of ground, or upon any part thereof, any other building whatsoever . . . and also that he . . . would not do or suffer to be done on the said premises or any part thereof any act, matter, or thing which might be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor." The land was ultimately assigned to the defendant. By a lease, dated Sept. 14, 1881, the plaintiff demised a piece of land, adjoining that demised to A. B. to R. G., who covenanted for himself and his assigns to erect a dwelling-house on the land within 21 years, and also entered into covenants similar to those in A. B.'s lease. The premises were ultimately assigned to F. N., who in 1893 built a house overlooking the defendant's garden. The defendant thereupon erected a hoarding, or trellis-work screen, nearly 60 feet long and 20 feet high, close to the partition wall on his own side and about eighteen feet from the nearest part of the house built by F. N. The plaintiff brought an action for an injunction to restrain the defendant from permitting the hoarding to remain erected.

I **Held:** (i) the hoarding or screen was a "building" within the meaning of the covenant, though the case was somewhat near the border line; and (ii) the erection of the structure was an "annoyance" within the meaning of the covenant to F. N., a tenant of the lessor; the plaintiff was, accordingly, entitled to an injunction.

*Tod-Heatley v. Benham* (1) (1888), 40 Ch.D. 80, applied.

**Notes.** Referred to: *Howarth v. Armstrong* (1897), 77 L.T. 62; *Nussey v. Provincial Bill Posting Co. and Eddison*, [1909] 1 Ch. 734; *National Trust for*

*Places of Historic Interest or Natural Beauty v. Midlands Electricity Board*, [1952] 1 All E.R. 298. A

As to buildings amounting to a breach of covenant and injunctions to restrain breaches, see 23 HALSBURY'S LAWS (3rd Edn.) 595-596, 601, 623; and for cases see 31 DIGEST (Repl.) 176.

Case referred to:

(1) *Tod-Heatley v. Benham* (1888), 40 Ch.D. 80; 58 L.J.Ch. 83; 60 L.T. 241; 37 W.R. 38; 5 T.L.R. 9, C.A.; 31 Digest (Repl.) 175, 3088. B

Also referred to in argument:

*Stevens v. Gourley* (1859), 7 C.B.N.S. 99; 29 L.J.C.P. 1; 1 L.T. 33; 6 Jur.N.S. 147; 8 W.R. 85; 141 E.R. 752; 7 Digest (Repl.) 419, 324.

*Foster v. Fraser*, [1893] 3 Ch. 158; 63 L.J.Ch. 91; 69 L.T. 136; 57 J.P. 646; 42 W.R. 11; 9 T.L.R. 502; 37 Sol. Jo. 561; 3 R. 635; 40 Digest (Repl.) 347, 2803. C

*Bowes v. Law* (1870), L.R. 9 Eq. 636; 39 L.J.Ch. 483; 22 L.T. 267; 34 J.P. 436; 18 W.R. 640; 40 Digest (Repl.) 350, 2821.

**Action for an injunction.**

In 1878 the plaintiff, Edward Wood, the tenant for life of a freehold estate at Faling, Middlesex, with power to grant building leases, began to carry out a building scheme on the estate. A form of building lease was used, but it was subject to variations to suit particular cases. By an indenture dated Nov. 11, 1878, the plaintiff demised to Alfred Bailey, his executors, administrators, and assigns, for a term of 99 years from Michaelmas Day, 1878, a piece of ground lying on the west side of Woodville Road, a new road running north and south through the estate, with a dwelling-house on it, which had been erected by the lessee, and Bailey covenanted for himself, his heirs, executors, administrators, and assigns, with the plaintiff, his heirs and assigns, and also as a separate covenant with the person or persons for the time being in remainder expectant on the determination of the term, their heirs and assigns (the "lessor parties"), that he D

"would not, without the licence and consent in writing of the lessor parties for that purpose first obtained, erect or build, or cause or permit to be erected or built upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof any other building whatsoever, save and except a stable and coach-house [which might be erected as therein mentioned] and also that he . . . would not do or suffer to be done on the said premises or any part thereof, any act, matter, or thing which might be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor parties." E

By an indenture of July 3, 1879, the demised premises were assigned to Richard Grice for the residue of the term, subject to the lessees' covenants, and by an indenture of Sept. 2, 1887, to the defendant, subject to the covenants. By an indenture of Sept. 14, 1881, the plaintiff demised to Grice, his executors, administrators, and assigns, for a term of 99 years from Michaelmas Day, 1881, a further piece of ground, part of the said estate, and situate on the west side of Woodville Road, and immediately adjoining the northern boundary of the land comprised in the lease of Nov. 11, 1878, the lease containing a covenant by Grice, for himself and his assigns, to erect one dwelling-house on the demised land within twenty-one years, at a cost of at least £1,200, or two dwelling-houses at a cost of at least £800 each, according to plans and on sites to be approved by the lessor's architect. The lease also contained covenants by the lessee similar to those covenants in the lease of Nov. 11, 1878. By an indenture of April 27, 1888, Grice assigned the hereditaments comprised in the lease of September, 1881, to George Nesbit, who on Oct. 22, 1892, assigned them to Frederick Neale for the residue of the term subject to the lessee's covenants in the lease. In 1893 Neale obtained the approval of the lessor's architect to his plans for a house to be built, and completed the house in January, 1894. There were several windows in the side of Neale's house next G

A to the defendant's garden, and overlooking it, the boundary wall between the two properties being about 17 feet from the nearest part of Neale's house, and over 30 feet from the main wall of it. The house was occupied by Neale's family on Feb. 26, 1894, and on the next day the defendant began erecting a hoarding, or trellis-work screen, nearly 60 feet long and nearly 20 feet high on his side of the boundary wall separating his garden from Neale's, and about 18 feet from the nearest projecting part of Neale's house, and 32 feet from the south main wall thereof, and, though warned to desist, completed it.

B The plaintiff brought an action for an injunction to restrain the defendant from erecting or permitting to remain erected on the premises demised by the lease of Nov. 11, 1878, any hoarding, screen, or other erection so as to be an annoyance, nuisance, or disturbance to the neighbourhood or to Neale or any other tenant of the plaintiff, and from otherwise committing a breach of any of the lessee's covenants contained in the said lease.

*Neville, Q.C., and T. H. Carson for the plaintiff.*

*Bigham, Q.C., and Frederic Thompson for the defendant.*

D **ROMER, J.**—In my opinion what the defendant has done is a breach of his covenant, or a covenant that is binding upon him, in two respects. In the first place, although the case is somewhat on the border line, I come to the conclusion that what the defendant has put up—this screen—is a building within the meaning of the covenant which binds the lessee, not without the licence and consent in writing of the lessors, the parties to the lease, being first obtained,

E “to erect or build, or cause or permit to be erected or built, upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof, any other building whatsoever, save and except a stable and coach-house.”

F This screen is a very substantial erection, and a firm one. It seems to me that it is intended to be, and unless restrained would remain, a permanent part of the wall, close to which or against which it is erected. At any rate, it will act in the same way, as far as the plaintiff's house is concerned, as if it had been a wall added to a portion of the former existing wall. I think, undoubtedly, if it had been built of brick it would have been admitted to be a breach of the covenant, and I do not think the fact that it is made of wood, under the circumstances, makes any difference. As I have said, it is a permanent erection, and a substantial one, and intended to act as such. I think, under the circumstances, that it is a breach of the covenant to which I have just referred.

G In the second place, I have no doubt whatever in my own mind that it is a breach of the covenant that the lessee

H “will not do or suffer to be done on the premises any act, matter, or thing which might be or become an annoyance . . . to any tenant of the lessor.”

I To my mind, undoubtedly, what the defendant has done is an annoyance to Mr. Neale, the tenant of the lessor. I think, in the first place, that it does substantially interfere with the access of light to the windows on the ground floor of this building, and that notwithstanding some parts of the expert evidence; and I feel satisfied beyond that, and irrespective of that, that it causes an annoyance to Mr. Neale, the tenant, within the meaning of the words used in the covenant. It falls within the definition of the word “annoyance” in a covenant like this, which was given by the three lords justices in *Tod-Heatley v. Benham* (1).

In the first place, to adopt the language of CORRON, L.J. (40 Ch.D. at p. 94), I am satisfied by the evidence before me that reasonable people having regard to the ordinary use of the Neales' house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the defendant—it would be an annoyance and a grievance to reasonably sensible people. It is an act which is an interference



with the pleasurable enjoyment of the house, as stated by COTTON, L.J. Then, A  
to adopt the words of LINDLEY, L.J. (ibid. at p. 96), I think it does raise an objection in the minds of reasonable men, and is an annoyance within the meaning of the covenant. It raises objections within the minds of reasonable men; and, to adopt the language of BOWEN, L.J. (ibid. at p. 98), I think it is

“a thing which reasonably troubles the mind and pleasure, not of a fanciful B  
person, or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort.”

I have come to the conclusion, therefore, that this is a clear breach of the last-mentioned covenant, as well as of the first, and on both grounds I think the plaintiff C  
is entitled to succeed. The simple form will be to order the defendant to pull it down—you do not ask for damages, of course—and to pay the costs.

*Order accordingly.*

Solicitors: *Hulberts & Hussey; Simpson & Cullingford.*

[Reported by R. H. DEANE, Esq., Barrister-at-Law.] D

## RYLEY v. MASTER SHEBA GOLD MINING CO. v. TRUBSHAWE

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., Hawkins, Wills, Lawrance and Wright, JJ.), January 19, February 13, 20, 1892]

[Reported [1892] 1 Q.B. 674; 61 L.J.Q.B. 219; 66 L.J.Q.B. 219;  
66 L.T. 228; 40 W.R. 381; 8 T.L.R. 369; 36 Sol. Jo. 329]

*Practice—Writ—Specially endorsed writ—“Unliquidated demand”—Inclusion in endorsement of claim for interest—R.S.C., Ord. 3, r. 6—Ord. 14, r. 1.*

A writ was endorsed under R.S.C., Ord. 3, r. 6, with a claim for a sum of money with interest thereon at 5 per cent. per annum from the date of the writ until payment or judgment, but it did not state that the interest was due under a statute or any contract between the parties.

**Held:** the plaintiff was not seeking only to recover a debt or liquidated demand, and, therefore, the writ was not specially endorsed to enable him to obtain judgment under R.S.C., Ord. 14, r. 1. H

**Notes.** R.S.C. 1883, Ord. 3, r. 6, has been amended, and now provides that a writ may be specially endorsed in any action in the Chancery Division or Queen's Bench Division unless it includes a claim for libel, slander, malicious prosecution, I  
false imprisonment, seduction or breach of promise of marriage or a claim based on fraud.

Explained: *Gold Ore Reduction Co. v. Parr*, [1892] 2 Q.B. 14. Distinguished: *London Universal Bank v. Clanclarty*, [1892] 1 Q.B. 689. Approved: *Wilks v. Wood*, [1892] 1 Q.B. 684. Referred to: *Gerrard v. Clowes*, [1892] 2 Q.B. 11; *Dando v. Boden* (1893), 68 L.T. 90; *Riches v. Westminster Bank, Ltd.*, [1947] 1 All E.R. 469.

- A** As to summary judgment under R.S.C., Order. 14, r. 1, see 22 HALSBURY'S LAWS (3rd Edn.) 759 et seq.; as to specially endorsed writs, see 30 HALSBURY'S LAWS (3rd Edn.) 301. For cases see 35 DIGEST 190, 191; DIGEST (Practice) 278 et seq.

Cases referred to:

- B** (1) *Rhymney Rail. Co. v. Rhymney Iron Co.* (1890), 25 Q.B.D. 146; 59 L.J.Q.B. 414; 63 L.T. 407; 38 W.R. 764; 6 T.L.R. 342, C.A.; 35 Digest 184, 137.  
 (2) *Rodway v. Lucas* (1855), 10 Exch. 667; 3 C.L.R. 615; 24 L.J.Ex. 155; 24 L.T.O.S. 277; 1 Jur.N.S. 429; 3 W.R. 212; Digest (Practice) 387, 936.  
 (3) *Elliott v. Roberts* (1891), 36 Sol. Jo. 92, D.C.; 6 Digest (Repl.) 442, 3104.  
 (4) *Blood v. Robinson* (1892), 36 Sol. Jo. 203, D.C.; 6 Digest (Repl.) 442, 3105.

Also referred to in argument:

- C** *Carr v. Edwards* (1822), 3 Stark. 132, N.P.; 35 Digest 180, 98.  
*Higgins v. Sargent* (1823), 2 B. & C. 348; 3 Dow. & Ry.K.B. 613; 2 L.J.O.S.K.B. 33; 107 E.R. 414; 35 Digest 180, 99.  
*Re Clagett, Ex parte Charman*, [1887] W.N. 184; 4 T.L.R. 18, C.A.; 6 Digest (Repl.) 311, 2263.  
**D** *Gurney v. Small*, [1891] 2 Q.B. 584; 60 L.J.Q.B. 774; 65 L.T. 754, D.C.; Digest (Practice) 276, 106.  
*Reynolds v. Doyle* (1840), 1 Man. & G. 753; Drinkwater, 1; 2 Scott, N.R. 45; 4 Jur. 992; 133 E.R. 536; 26 Digest (Repl.) 253, 1927.  
*Re Maria Anna and Steinbank Coal and Coke Co., McKewan's Case* (1877), 6 Ch.D. 447; 46 L.J.Ch. 819; 37 L.T. 201; 25 W.R. 857, C.A.; 26 Digest (Repl.) 140, 1011.  
**E** *Petre v. Duncombe* (1851), 2 L.M. & P. 107; 20 L.J.Q.B. 242; 16 L.T.O.S. 394; 15 Jur. 86; 26 Digest (Repl.) 140, 1012.  
*Ward v. Eyre* (1880), 15 Ch.D. 130; 49 L.J.Ch. 657; 43 L.T. 525; 28 W.R. 712, C.A.; 35 Digest 184, 134.  
*Cook v. Fowler* (1874), L.R. 7 H.L. 27; 43 L.J.Ch. 855, H.L.; 35 Digest 177, 67.  
**F** *Waite v. Power*, cited in Annual Practice, 1892, p. 202.

**Appeals** from two decisions of CHARLES, J., in chambers.

#### RYLEY v. MASTER

- G** The defendant appealed from an order of CHARLES, J., in chambers, affirming an order of a master giving the plaintiff leave to sign judgment under R.S.C., Ord. 14, r. 1, the writ in the action purporting to be specially endorsed under Ord. 3, r. 6. The endorsement was as follows:

"The plaintiff's claim is for money paid by the plaintiff to the use of the defendant under a bill of exchange which was accepted by the plaintiff for the accommodation of the defendant, with interest thereon from the time of payment.

- H** 1891.—Nov. 13.—To amount paid Messrs. Mossop and Rolfe, solicitors for Mr. Edwin Bromwich, for principal and interest under a bill of exchange for £50, dated July 1, 1891, drawn by the defendant and accepted by the plaintiff, payable four months after date to the order of the defendant, and endorsed by him. Debt £50, and interest 1s.; £50 1s. 0d. And the plaintiff claims further interest at £5 per cent. per annum on the said sum of £50 from the date hereof till payment or judgment."

- I** *Bonner* for the defendant.  
*Walter* for the plaintiff.

#### SHEBA GOLD MINING CO., LTD. v. TRUBSHAWE

The defendant appealed from an order of CHARLES, J., in chambers, affirming an order of a master, on a summons for judgment under Ord. 14, r. 1, holding that the writ was specially endorsed and giving the defendant leave to defend on paying

£2,981 15s. 5d. into court within fourteen days, otherwise judgment. The writ purported to be specially endorsed under Ord. 3, r. 6, and was as follows: A

"The plaintiffs' claim is for the balance of money due under an agreement between the plaintiffs and the defendant dated Oct. 13, 1890, for the price of goods sold to the defendant.

Particulars: B

1890.—Oct. 17.—To 5,631 tons 3 qrs. 26 lbs. 'tailings' sold by plaintiffs to defendant, and charged for on the basis of the above-mentioned agreement, . £12,514 15s. 5d.

1890.—Oct. 14.—By cash £3,000.

1891.—Feb. 17.—£4,000.

June 17.—£2,000, £9,000. C

Balance due.—£3,514 15s. 5d.

Place of Trial. London.

Ashurst, Morris, Crisp & Co.

The plaintiffs also claim interest on the sum of £3,514 15s. 5d. from the date of this writ till payment or judgment at the rate of 5 per cent. per annum. D

And the sum of £3 3s. (or such sum as may be allowed on taxation) for costs."

*Fletcher Moulton, Q.C.*, and *James Fox* for the defendant.

*Willis, Q.C.*, and *Bremner* for the plaintiffs.

*Cur. adv. vult.* E

Feb. 20, 1892. **LORD COLERIDGE, C.J.**, read the following judgment of the court.

**SHEBA GOLD MINING CO., LTD. v. TRUBSHAWE**

The plaintiffs in this case sue for a balance of £3,514 15s. 5d. for goods sold. The writ bears a special endorsement to that effect, which, after stating the balance due, proceeds as follows: "Place of trial, London. (Signed) Ashurst, Morris, Crisp & Co." After this signature came the following words: F

"The plaintiffs also claim interest on the sum of £3,514 15s. 5d. from the date of this writ till payment or judgment at the rate of 5 per cent. per annum; and the sum of £3 3s. (or such other sum as may be allowed on taxation) for costs. If the amount claimed is paid to the plaintiffs or their solicitors or agents within four days from the service thereof, further proceedings will be stayed." G

Application has been made for judgment under Ord. 14 for the sum of £3,514 15s. 5d., together with interest at the rate of 5 per cent. from the date of the writ until judgment. The affidavits make it clear that the claim for interest is not made upon any contract to pay interest. It is no doubt founded upon the supposition that the endorsement of the claim for interest operates as a demand under the Civil Procedure Act, 1833, s. 28. H

It is admitted on both sides that this view cannot be sustained in view of the decision in *Rhymney Rail. Co. v. Rhymney Iron Co.* (1), and that in this case no interest is in fact recoverable. The affidavits make it equally clear that the plaintiffs' advisers supposed that they could recover interest, that it was intended to recover it, and that judgment was asked not only for the balance due for goods, but for interest from the date of the writ—and for interest which, if recoverable, was in the nature of unliquidated damages. Order 14 applies only when the defendant has appeared to a writ specially endorsed under Ord. 3, r. 6. We think it clear that Ord. 3, r. 6, applies only to cases in which the demand which the plaintiff seeks to recover, whether or not it be made up in part of interest, is a liquidated demand; in other words, to cases in which the interest is payable under I



**A** a contract and not by way of unliquidated damages. It was so held under words almost identical with those now under consideration, contained in the Common Law Procedure Act, 1852: *Rodway v. Lucas* (2). If any distinction can be drawn between the two enactments, it is that the words of Ord. 3, r. 6, are rather more clearly in favour of such a construction than those of the Common Law Procedure Act, 1852. When, therefore, the plaintiffs' affidavits put it beyond controversy that they were intending and hoping to recover in this action unliquidated damages on account of interest, it seems at first sight difficult to see how it can be said that in this action they are "seeking only to recover" a liquidated sum.

It has been strenuously argued, however, that the only test of what they are seeking to recover is the form of the writ itself, and that the portion of the endorsement on the writ which claims the interest is no part of the "special endorsement," which ends with the signature of the plaintiffs' solicitors following the mention of the place of trial. Each of these propositions must be examined, and it will be more convenient to take the second proposition relating purely to the matter of form first. The argument is based upon the final words of the rule, which say that the "special endorsement shall be to the effect of such of the forms in Appendix C, s. 4, as shall be applicable to the case." The forms given in Appendix C, s. 4, all end, it was said, with the signature of the solicitor, and, therefore, the "special endorsement" goes no further, and what follows does not prevent the writ from being "specially endorsed," under Ord. 3, r. 6.

We think there is a fallacy in this argument. The forms given in Appendix C, s. 4, are the forms of statements of claim generally, and are not adapted as they stand for endorsement on a writ. Every one of them ends with "delivered," which when filled up, would be "delivered by Messrs. A. and B., solicitors for the plaintiff on" such a day; words inapplicable to an endorsement on the writ. Appendix A, No. 2, gives the form of a specially endorsed writ, which after the signature proceeds "and the sum of £— (or such sum as may be allowed on taxation) for costs." "If the amount, etc." Indeed, it is clear from forms 1 and 2 of Appendix A that such an endorsement as "The plaintiff also claims interest on £3,514 15s. 5d. from the date of this writ, etc.," is no formal part of any writ at all, whether specially endorsed or not. If, therefore, any effect is to be given to it, it must be considered as part of the endorsement, and to be taken into account in determining whether it answers the description of a proper "special endorsement," although it comes after the signature. We think this is the true way of looking at it. How can it be discarded altogether? In many cases it is a very important element in the claim. The notice that the defendant may stop the action by payment within four days clearly embraces it within the expression "the sum claimed," and we think it would be a return to the worst features of a system in which form was preferred before substance if we were to say that so important a demand was to be treated as non-existent because it happened to be a kind of postscript to the rest of the claim, instead of preceding the signature.

**H** We treat it, therefore, as an essential part of the endorsement. So regarded, we think that the claim in the present case departs from the requirements of a special endorsement in two respects. (i) It does not show that the interest is claimed as being due by contract. (ii) No definite sum is claimed.

All the forms given in Appendix C, s. 4, in which interest is claimed, are cases of interest due either by express covenant or upon bills or notes. By s. 57 of the Bills of Exchange Act, 1882, the last mentioned interest is to be deemed liquidated damages; and we think that a statement of claim which demands interest, but shows no legal liability to pay it, is upon general principles defective. Again, all the forms claiming interest mention the specific sum claimed. We think this is as it should be. It is important that a man who is to be proceeded against summarily for judgment should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation. A claim for interest which is not thus specific departs in a material and important respect from the forms to which a special endorsement is required to conform.

*Elliott v. Roberts* (3) and *Blood v. Robinson* (4) do not profess to be fully reported, A  
but we take them to have proceeded upon the same lines as the foregoing remarks,  
and to be entirely in harmony with the view we have expressed.

So much for the question of form. It is satisfactory to have solid grounds of B  
substance for coming to the same conclusion. We think that the question what  
a plaintiff "seeks to recover" is not, upon an application for judgment under Ord.  
14, concluded necessarily by the endorsement on the writ, especially if it be  
ambiguous. In *Rodway v. Lucas* (2) the endorsement was undistinguishable from  
that in the present case. The application there was to set the judgment aside.  
The court held that—after judgment at any rate—the endorsement was capable of  
being construed as covering the case of interest due under a contract, and, there  
being no affidavit of merits, refused to set the judgment aside; but they added that,  
if a case should arise in which the special endorsement should be resorted to, C  
although the interest was in fact claimable only as damages, they would set aside  
the judgment with costs as an abuse of the process of the court. In other words, the  
court would disregard the form and look to the substance, and if satisfied upon  
the affidavits that, however correct the claim might be in form, the case was one  
in which the plaintiff had no business to treat the interest as a liquidated demand,  
and attempt to get the benefit of the special endorsement, they would prevent him D  
from resorting to a remedy to which he was not entitled. It seems to us that the  
present case falls precisely within this principle. No one suspects the advisers of  
the plaintiffs of an intention to strain or misapply the process of the court, but  
it is plain from their own affidavits that they have in fact been attempting to get  
judgment under Ord. 14 for unliquidated damages in the shape of interest. It E  
matters not in such a case whether the writ be right or wrong in form. It is not  
a case in which they have any business to resort to Ord. 14, and they must take  
the consequences.

#### RYLEY v. MASTER

This case is governed by the decision in *Sheba Gold Mining Co., Ltd. v. Trubshawe*. F  
That which professes to be the special endorsement shows no liability to  
pay interest, and claims no definite and specific sum. Ord. 14 is not applicable.

*Appeals allowed.*

Solicitors: *Ashurst, Morris, Crisp & Co.; Davidson & Morris; Moeran; Hughes,*  
*Hooker & Co.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.] G

## DOBBS v. BRAIN AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), May 31, June 2, 1892]

[Reported [1892] 2 Q.B. 207; 61 L.J.Q.B. 749; 67 L.T. 371; 57 J.P. 22; 41 W.R. 7; 8 T.L.R. 630]

*Administration of Estates—Administration bond—"Well and truly administer"—Legacy to infant—Loss of legacy to estate—Liability of sureties.*

By a will a legacy of £50 was bequeathed to an infant. Letters of administration with the will annexed were granted to two administratrices, who, with the defendants as sureties, executed an administration bond, by which the administratrices were bound to "well and truly administer" the personal estate and effects of the deceased, "that is to say, pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will . . ." The whole of the estate was duly administered by A., to whom the administratrices had entrusted administration, with the exception of £50 for the legacy to the infant, with which A. disappeared. The bond was then assigned by order of the Court of Probate to the plaintiff as guardian for the infant, who brought an action against the sureties for the due administration of the estate to recover the legacy.

**Held:** since the £50 had become lost to the estate, there had been a breach of the condition of the bond to well and truly administer, which rendered the sureties liable.

*Archbishop of Canterbury v. Robertson* (1), (1833), 1 Cr. & M. 690, applied.

**Notes.** The Court of Probate Act, 1857, s. 81, was repealed by the Administration of Justice Act, 1925, s. 29 (4), and 5th Schedule, and replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 167 (1).

**Considered:** *Cope v. Bennett* (1911), 105 L.T. 541; *Harvell v. Foster*, [1954] 2 All E.R. 736.

As to breach of condition of bonds, see 16 HALSBURY'S LAWS (3rd Edn.) 268; and for cases see 23 DIGEST (Repl.) 234-235. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 167, see 9 HALSBURY'S STATUTES (2nd Edn.) 781-782.

Case referred to:

(1) *Archbishop of Canterbury v. Robertson* (1833), 1 Cr. & M. 690; 2 Dowl. 78; 3 Tyr. 390; 3 L.J.Ex. 101; 149 E.R. 576; 23 Digest (Repl.) 234, 2840.

Also referred to in argument:

*Bilson v. Saunders* (1727), Bunb. 240; Cas. temp. King, 72; 145 E.R. 660; 23 Digest (Repl.) 417, 4876.

*Bullen v. Allen* (1676), Cas. temp. Finch, 264; 23 E.R. 145; 23 Digest (Repl.) 457, 5264.

*Doyley v. Tollferry* (1715), 1 Eq. Cas. Abr. 300; 21 E.R. 1060; sub nom. *Dagley v. Tolferry*, 1 P.Wms. 285; sub nom. *Dawley v. Ballfrey*, Gilb. Ch. 103, L.C.; 23 Digest (Repl.) 457, 5273.

*Cooper v. Thornton* (1790), 3 Bro.C.C. 96; 29 E.R. 430; on appeal, 3 Bro.C.C. 186, L.C.; 23 Digest (Repl.) 457, 5274.

*Re Cresswell* (1881), 45 L.T. 468; 30 W.R. 244; 28 Digest (Repl.) 533, 471.

*M'Creight v. M'Creight* (1849), 13 I.Eq.R. 314; 2 Ir. Jur. 17; 28 Digest (Repl.) 542, \*313.

*Sandrey v. Michell* (1863), 3 B. & S. 405; 32 L.J.Q.B. 100; 7 L.T. 849; 9 Jur.N.S. 968; 11 W.R. 363; 122 E.R. 153; sub nom. *Saundry v. Mitchell*, 1 New Rep. 317; 23 Digest (Repl.) 234, 2833.

*Smith v. Walton* (1832), 8 Bing. 235; 1 Moo. & S. 380; 1 L.J.C.P. 85; 131 E.R. 391; 42 Digest 928, 2.



*Stukeley v. Butler* (1614), Hob. 168; 80 E.R. 316; sub nom. *Stewkley v. Butler*, A

Moore, K.B. 880; 17 Digest (Repl.) 306, 1130.

*Kilbee v. Sneyd* (1828), 2 Mol. 186; 24 Digest (Repl.) 714, \*1752.

*Moyle v. Moyle* (1831), 2 Russ. & M. 710; 39 E.R. 565; 23 Digest (Repl.) 329, 3965.

*Bolton v. Powell, Howard v. Earle* (1851), 14 Beav. 275; 16 Jur. 24; affirmed B  
(1852), 2 De G.M. & G. 1, L.JJ.

**Appeal** from a decision of POLLOCK, B., at the trial of the action without a jury.

By his will dated Oct. 4, 1879, Jacob Curtis bequeathed a legacy of £50 to Florence Emily Probert, then and at the date of the action an infant. On his death letters of administration with the will annexed were granted in January, 1880, to his two daughters, Lucina Wellington and Hannah Maria Tingle, who executed an administration bond, which the defendants also executed as sureties. The administratrices employed their brother-in-law, Allen, to carry out the administration of the estate, and the whole of the estate was distributed and the debts and legacies paid with the exception of the legacy of £50. Allen then went to America taking the £50 and it was not known what had become of him or the money. In July, 1890, the bond was assigned by the court to the plaintiff as guardian of the infant legatee, who brought an action against the sureties for the due administration of the estate to recover the legacy. The bond was in a form drawn up under s. 81 of the Court of Probate Act, 1857, and the condition of it was that if the administratrices do,

"When lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the deceased which have or shall come to their hands, possessions, or knowledge, and the same so made do exhibit or cause to be exhibited . . . and the same personal estate and effects do well and truly administer (that is to say) do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed, as far as the personal estate and effects will thereto extend, and the law charges thereon, and further do make or cause to be made, a true and just account of their said administration when they shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of no effect or else to remain in full force and virtue."

POLLOCK, B., held that no breach of the bond had been proved and gave judgment for the defendants. The plaintiff appealed.

*Danckwerts and Hume Williams* for the plaintiff.

*Bosanquet, Q.C.*, and *J. Alderson Foote* for the defendants.

**LORD ESHER, M.R.**—In this case an action has been brought on an administration bond against the sureties on the ground of an alleged breach of the conditions of the bond by the administratrices. They did not know much about what they had to do, and entrusted the matter to their brother-in-law, and though I do not wish to find fault with them for so doing, they may have thereby incurred a legal liability. He administered the estate, and took £50, which was to be paid to an infant legatee, but which he has clearly not paid over. He went to America, and it is not known where he is, so that the £50 with which he was entrusted as agent of the administratrices is lost to the estate. The rest of the estate has been paid away, and none of it is left in the administratrices' hands. The bond has been assigned to a proper person, and the question is whether, under these circumstances, an action is maintainable against the sureties. That question depends on the true construction of the bond.

**A** The bond is one that has been drawn up by a judge of the Probate Division under the Court of Probate Act, 1857, and was intended to carry out the provisions of that Act. The intention was to enforce the carrying out of the duties of an administrator, and to ensure the protection of persons interested in the estate; in other words, the bond was intended to carry out s. 81 of the Act of 1857, which provides that every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate

“with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct.”

**C** Taking those words of the Act alone, do they include the duty of keeping the estate, after it is got in, till it is duly administered? In my judgment they certainly do, and the intention of the bond is to enforce that duty, and guard persons who are interested in the estate by means of having sureties to the bond.

Coming now to the construction of the bond, I think that it should be interpreted so as to carry out the objects of the statute. The condition of it is, that the

**D** administratrices

“do make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased, which have or shall come to their hands, possession, or knowledge, and the same do exhibit.”

If that should not be done, there would be a breach, and the sureties would be

**E** liable. The bond then goes on thus,

“and the same personal estate and effects do well and truly administer.”

That assumes that the estate has been collected, and an account taken of it, and then it is to be truly administered, and those words, standing alone, include, I apprehend, the duty of keeping the estate until it is truly administered. Then comes the order in which the estate is to be administered, the debts of the deceased, then the legacies as far as the personal estate and effects will thereto extend, and the law charges thereon, and then the residue is to be distributed. What is the meaning of that? It refers to “the same personal estate” as was mentioned before, and was intended to show the way in which due administration is to take place. The bond is a statutory one, drawn up in order to carry out the objects

**G** of an Act of Parliament, and it should be construed so as to carry out those objects. It seems, therefore, to me, that part of the duty of the administrator is to take proper care of the personal estate that he has collected until it has been distributed, and if he pays away any part of it so as to be unable to administer duly by distributing the estate in the appointed order, I think he has committed a breach of the duties imposed on him by the bond.

**H** Is there any authority in support of that statement? I think that *Archbishop of Canterbury v. Robertson* (1), which has been referred to, is an authority for that proposition. It is true that, in the judgment, LORD LYNCHURST, C.B., states the fact of the administrator's having become bankrupt after distributing part of the estate; but in the part of the judgment where the law is laid down, that fact is not relied upon. The question may perhaps arise some day, whether distribution

**I** of the estate otherwise than in the appointed order is a breach of the bond in a case where enough property exists to pay all claimants against the estate; but that question does not arise in this case. *Archbishop of Canterbury v. Robertson* (1) is an authority for this proposition, that the moment part of the estate is paid away so that all legacies which will become due cannot be paid, there is a breach of the duty to duly administer, and, if the bond is then assigned, an action may at once be brought either against the administrator or a surety. To hold otherwise would place people who have rights under a will in a position of great danger, and would be contrary to the intention of the statute. It cannot be good law to allow

an administrator to use the property of the deceased to speculate with on the Stock Exchange, and to say that, if he should lose it, he has committed no breach of duty as regards a legatee whose legacy is not due, on the ground that by the time that the legacy is due the money may be recovered by another speculation. Therefore, I think, in accordance with *Archbishop of Canterbury v. Robertson* (1), that the plaintiff has proved a breach of the condition of the bond, and that this action was rightly brought. I cannot agree with the judgment of POLLOCK, B., and I think that judgment should be entered for the plaintiff.

**FRY, L.J.**—I wish, in the first place, to consider the nature of the bond. It has four conditions: first, that the administratrices shall make, or cause to be made, a true and perfect inventory of all the personal estate and effects of the deceased which shall come into their possession or knowledge; secondly, that they shall administer the same; thirdly, that they shall make a true and just account of their administration when required; and fourthly, that they shall pay over the residue to the person or persons entitled thereto. We are mainly concerned with the second, the words of which are,

“and the same personal estate and effects do well and truly administer (that is to say), do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed as far as the personal estate and effects will thereto extend.”

With regard to the payment of the legacies, the true result of the bond is that the administrator is bound to pay them out of the personal estate of the deceased in due course of administration. Therefore, payment out of the personal estate of the deceased is part of the due administration of the estate. There is only one other reference to the bond that I wish to make. Though it is much like the form of bond given under the Statute of Distributions (1670), yet there are differences; for instance, the administration under the present form is rather more free than under the old one.

But I will now turn to the facts of the present case. The administratrices were two ladies, and the whole of the estate of the deceased was collected and came into the possession of one of them. Fifty pounds was set aside for the legacy which is the subject of this action, and after payment of the debts and the other legacies the residue was distributed. The £50 was entrusted to their brother-in-law who has gone to America taking it with him, so that the whole of the deceased's personal estate has gone. Consequently the payment of this legacy is not in any way secured on the attainment of her majority by the legatee. Is it a due course of administration of the estate to distribute the whole of it without providing for the payment of this legacy when it becomes due? The answer must be that it is not. Neither do I think that payment of this legacy by the administratrices out of their own money when it becomes due would be a due administration of the estate. Under these circumstances, I am, therefore, of opinion that there has been a breach of the condition of the bond. With regard to the latter point it was argued that there is no distinction between the estate of the deceased in the possession of the administrator and the private property of the administrator. Though the administrator is the legal owner of both, yet there is a difference between them in the eye of the law, and the conversion of the deceased's estate would be a legal wrong. The conclusion we have arrived at is strongly confirmed by *Archbishop of Canterbury v. Robertson* (1), where LORD LYNCHURST, C.B., delivering the judgment of the court, says (1 Cr. & M. at p. 712):

“When the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond, by which the administrator undertakes ‘well and truly to administer according to law,’ as will entitle the next-of-kin to have the bond put in use at their instance.”



**A** That has occurred here, as the administratrices have so applied the effects of the deceased that this sum of £50 has been lost to the estate.

There is only one other point that I wish to refer to. It may be said that our reasoning is defective because the infant may die and her legacy therefore never become payable. The answer is, that the legacy is not contingent but a vested one; but, even if it were contingent, the right to the money would, on the infant's death, vest in the next-of-kin; and the same breach would have occurred. I, therefore, think that the plaintiff is entitled to judgment.

**LOPES, L.J.**—I am of the same opinion. One of the obligations of this bond is that the administratrices shall well and truly administer the estate of the deceased, and pay the legacies by which this legacy of £50 is included. As a matter of fact, the administratrices handed the £50 over to Allen, and no one knows where he is or where the £50 are. The whole of the rest of the estate has been administered, and as this £50 has passed from the power of the administratrices, there has been a misapplication of the assets of the deceased, and, therefore, a breach of the duty imposed by the bond well and truly to administer the estate. *Archbishop of Canterbury v. Robertson* (1) seems to me to apply here, though the form of bond there used differs slightly from that in present use. The words used by LORD LYNCHURST, C.B., are applicable. He says (1 Cr. & M. at p. 708):

“The main question under these circumstances is this: Was this conduct of the administrator a breach of that part of the condition of the bond by which he undertook ‘well and truly to administer the effects of the intestate’? Now, looking at the language of the bond, nothing can be more distinct and precise than those terms of the condition. They are that he shall well and truly administer according to law the effects which shall come to his hands, and all other the effects of the intestate that shall come to the hands of any person or persons for him to be administered. It would seem difficult to entertain any doubt upon the natural construction of these words, and nothing would be a more direct infringement of the terms of the condition than the application of the effects of the intestate to his own use, and the converting them to his own purposes, so that they should be entirely lost to the estate of the intestate.”

Here the £50 have been lost to the estate of the deceased, and the fact of the bankruptcy of the administrator in that case is, I think, immaterial. It was argued that there can be no breach of the condition of the bond until the time for the payment of the legacy had arrived; but, under the words “well and truly administer,” a duty arises on the part of the administratrices to take care of the legacy until the time arrives for its payment. Then it was contended that the words “that is to say” control and limit the preceding words. In my opinion this is not so, and the following words are merely illustrative of the preceding words. It was also argued that money provided aliunde when the time arrived for the payment of the legacy would be sufficient; but in my opinion this would not do, and I think there has been a breach of the duty to take care of the personal estate of the deceased which came into the hands of the administratrices, and to pay the legacy out of that same personal estate. I agree that the decision of the court below must be reversed, and judgment should be entered for the plaintiff.

**I**

*Appeal allowed.*

Solicitors: *Wilkins, Blyth, Dutton & Hartley*, for M. F. Carter, Newnham; *Prior, Church & Adams*, for *Champney & Long*, Gloucester.

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

# Re WHITEHEAD. PEACOCK v. LUCAS

[CHANCERY DIVISION (Stirling, J.), January 13, 1894]

[Reported [1894] 1 Ch. 678; 63 L.J.Ch. 229; 70 L.T. 122;  
42 W.R. 491; 38 Sol. Jo. 183; 8 R. 142]

*Administration of Estates—Capital or income—Income of fund set apart to meet legacies vested, but not payable till future date.*

The income of a fund set apart to answer a legacy vested but not payable until a future date falls into residue as capital, and must, as between the tenant for life and the remainderman of the residue, be invested, only the income arising from such investment being paid to the tenant for life.

*Crawley v. Crawley* (1) (1835), 7 Sim. 427, applied.

*Allhusen v. Whittell* (2) (1867), L.R. 4 Eq. 295, distinguished.

*Administration of Estates—Capital or income—Unapplied income of fund to meet discretionary annuity.*

The unapplied income of a fund set apart to answer an annuity payable at the discretion of trustees belongs to the tenant for life of the residue as income.

*Cranley v. Dixon* (3) (1857), 23 Beav. 512, applied.

**Notes.** Distinguished: *Re Hawkins, White v. White*, [1916] 2 Ch. 570, Referred to: *Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E.R. 1096; *Re Payne, Westminster Bank, Ltd. v. Payne*, [1943] 2 All E.R. 675; *Re Hey's Settlement Trusts and Will Trusts, Hey v. Nickell-Lean*, [1945] 1 All E.R. 618.

As to ascertainment of income of residue, see 16 HALSBURY'S LAWS (3rd Edn.) 378-380; and for cases see 23 DIGEST (Repl.) 476. As to capital and income of annuities, see 38 HALSBURY'S LAWS (3rd Edn.) 881-883; as to gifts to testator's successor on intestacy, see 39 HALSBURY'S LAWS (3rd Edn.) 1163; and for cases see 44 DIGEST 1252-1255.

Cases referred to:

- (1) *Crawley v. Crawley* (1835), 7 Sim. 427; 4 L.J.Ch. 265; 58 E.R. 901; 40 Digest (Repl.) 711, 2059.
- (2) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 40 Digest (Repl.) 710, 2054.
- (3) *Cranley v. Dixon* (1857), 23 Beav. 512; 26 L.J.Ch. 529; 29 L.T.O.S. 119; 3 Jur.N.S. 531; 53 E.R. 201; 44 Digest 1253, 10813.
- (4) *Sitwell v. Bernard* (1801), 6 Ves. 520; 31 E.R. 1174, L.C.; 23 Digest (Repl.) 421, 4919.
- (5) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub. nom. *Lassence v. Tierney, Lassence v. Lescher*, 14 Jur. 182, L.C.; 44 Digest 554, 3715.
- (6) *Re Thomas, Wood v. Thomas*, ante p. 471; [1891] 3 Ch. 482; 60 L.J.Ch. 781; 65 L.T. 142; 40 W.R. 75; 44 Digest 208, 366.

Also referred to in argument:

*Howe v. Earl of Dartmouth, Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.

*Holgate v. Jennings* (1857), 24 Beav. 623; 53 E.R. 498; 44 Digest 204, 332.

## Originating Summons.

By her will, dated Dec. 6, 1890, Sarah Allen Abbott devised and bequeathed to her executors and trustees, T. Peacock and H. A. Dowse, all her real and personal estate on trust to sell and convert, and, after payment thereof of her debts and funeral and testamentary expenses and the legacies and annuities thereby given, to invest the residue as therein mentioned; after giving certain specific legacies, she bequeathed to her stepson, S. T. Abbott, an annuity of £50 a year during

**A** his life for his maintenance, conditional on his not returning to Europe or until he should assign, or otherwise lose the personal benefit of it or any part thereof, with power to the trustees in their uncontrolled discretion to pay or to withhold payment of the annuity as they thought fit and without being compelled to give any reason for the exercise of the discretion. The testatrix bequeathed a legacy of £3,500 to each of the eleven children of her late husband, Samuel Abbott, such legacies not to be paid to any step-child being a son who had not completed his twenty-fifth year; and she gave the ultimate residue to her sister, Mrs. Matilda Whitehead, for her life and after her death as she might by will appoint.

Mrs. Abbott died on Jan. 18, 1892, and her will was proved on Feb. 17, 1892. At the date of her death there were seven children of Samuel Abbott being sons under the age of twenty-five years, of whom one, E. H. Abbott, had since attained that age.

**C** By an order dated June 3, 1892, the court declared that, on the true construction of the will of Mrs. Abbott, and in the events which had happened, the legacies given to the sons of Samuel Abbott, except to one son, S. J. Abbott, carried interest from the date of the sons respectively attaining the age of twenty-five years, or the expiration of one year from the date of the death of the testatrix, whichever should last happen. The residue of the estate was sufficient to answer the legacies given to the sons. All the other legacies given by the will had been paid.

**D** By her will, dated Feb. 3, 1892, after appointing T. Peacock and H. A. Dowse executors and trustees, and bequeathing certain legacies and annuities, Mrs. Whitehead devised, bequeathed, and appointed (such appointment being expressed to be made in exercise of the powers given to her by Mrs. Abbott's will) her residuary, **E** real, and personal property, to her trustees on trust for sale and conversion and investment, to hold it, after providing for debts and legacies and annuities, on trust, to pay the income thereof to Rosa Ellen Lucas, the wife of William Lucas, for life for her separate use without power of anticipation, and after her death on trust for such one or more of her children by her present or any future husband as she should by deed or will appoint, and in default of and in so far as any appointment should not extend, in trust for all her children equally. The testatrix directed her trustees to invest the residue of her estate in such securities as should be by law permitted, and authorised them to retain existing investments. Mrs. Whitehead died on Nov. 19, 1892, and her will was proved on Jan. 20, 1893. Mrs. Lucas had two infant children. She had not executed the power of appointment given to her by the will of Mrs. Whitehead. The estate of Mrs. Whitehead was sufficient to pay the debts and funeral and testamentary expenses and to provide for the legacies and annuities given by the will.

**G** The executors and trustees of Mrs. Whitehead's will took out a summons for a declaration whether the following interests over which the testatrix had a power of appointment by will under the will of Mrs. Abbott as part of the residuary estate of Mrs. Abbott were to be treated as capital or income of the residuary estate of Mrs. Abbott: (a) the interim income of a fund held by the executors to meet the six legacies of £3,500 each, which were vested at Mrs. Abbott's death but were payable only as the legatees respectively attained the age of twenty-five, and did not carry interest in the meanwhile; and (b) the unapplied income from time to time of the fund held by the executors to meet the discretionary annuity of £50 a year.

**I** *Sankey* for the executors and trustees.  
*R. Dodd* for Mrs. Lucas.  
*Fossett Lock* for the children of Mrs. Lucas.

**STIRLING, J.**—In this case two questions arise under the will of Mrs. Whitehead. They both relate to funds derived by her under the will of Mrs. Abbott. The first and more important question relates to the income of the fund set aside by the executors of Mrs. Abbott's will to meet the six legacies of £3,500 [His



LORDSHIP stated the provisions of the will with reference to those legacies, and continued:] Mrs. Abbott gave the residue of her property to Mrs. Whitehead, who thus became entitled to the income of the amount of the legacies till each of the step-sons attained the age of twenty-five, which has not happened yet as regards most of them. Mrs. Whitehead, therefore, had under the will a terminable interest in the income of the legacies which she could dispose of by her will; she made her will, and gave her residuary estate to Mrs. Lucas for life, with remainder to her children. The question is, whether the income accruing from the funds set apart to answer these legacies, and which, it is not disputed, passed under the gift of the residue of Mrs. Whitehead's estate, is income to go to the tenant for life under her will, or capital which ought to be invested, and the income only arising from the investments paid to the tenant for life.

I have been referred to cases where it has been held that the income of a fund set apart to answer contingent legacies, ought to be treated as income as between a tenant for life and remaindermen. I need only refer to one of them, *Allhusen v. Whittell* (2), where a fund had been set apart to meet contingent legacies, and it was contended that the income of that fund fell into the residue as income, and not as capital. Wood, V.-C., in giving judgment, says (L.R. 4 Eq. at p. 303):

"As regards the contingent legacies, there is a great deal of force in the argument that, if these legacies become payable, they are like any other legacies no longer residue; and being no longer residue, the tenant for life ought not, upon principle, to be entitled to the income of the fund set apart to meet them, any more than to the income of any other part of the fund which may be necessary for the payment of any other legacy."

The Vice-Chancellor, therefore, was plainly of opinion that, as regarded other legacies, that is vested legacies, this doctrine did not apply. He goes on to say (*ibid.* at pp. 303, 304):

"I am not sure that the courts, in some of the authorities cited, have sufficiently adverted to this reasoning; and whether they have not too narrowly followed words rather than things when they said that this income is income of residue, because when it comes to be taken out it is no longer residue. However, I think I am bound by authority, and, upon principle, I consider the question as analogous to the cases like *Sitwell v. Bernard* (4) and others, where the court has been obliged, for the sake of not deferring to inconvenient periods the distribution of property, as it were to intervene and cut the knot. I apprehend the principle may be rested upon this, that the fund is residue until it is wanted; and if it be said that it ceases to be residue when it is not wanted, that rule may be a very simple one in one case, and a very complicated one in another."

That was undoubtedly directed to a case where the legacies were contingent, and the reasoning was based upon the fact of the contingency, and, so far as I can judge from the language of the Vice-Chancellor, he seems to have been of opinion that if the legacies had been vested his reasoning would not have applied. It seems to me that the reasoning as regards a fund set apart to meet contingent legacies does not apply in the present case where the legacies are vested, and I must treat the case as if the second testatrix, Mrs. Whitehead, had been entitled to a terminable annuity of a like amount as the interest of the fund set apart for the legacies. If that is so, the principle of *Crawley v. Crawley* (1) applies, and the fund must be dealt with in the same way as the fund in that case, and the interest which accrues on the fund, until the legatees respectively attain twenty-five years, must be treated as capital and invested, and the tenant for life under Mrs. Whitehead's will can only receive the income arising from the investments. I cannot see anything in Mrs. Whitehead's will which prevents that principle from applying. [Hrs LORDSHIP referred to the residuary clause of Mrs. Whitehead's will, and continued:]

**A** Reliance was placed by counsel for Mrs. Lucas on the trust for the benefit of Mrs. Lucas, which preceded the trusts limited to her for life with remainder to her children. That gift might, if she had had no children, have taken effect upon the principle of *Lassence v. Tierney* (5), but it does not seem to me to affect the reasoning which I think that the fund in this case should be dealt with. Then again it was said that the clause in the will which empowered the trustees to allow the

**B** testatrix's estate to remain in the state of investment in which it was at her death, showed that the intention was that Mrs. Lucas should enjoy the income as income, and in support of that I was referred to *Re Thomas, Wood v. Thomas* (6), before KEKEWICH, J. In my opinion, that case does not apply to the present. Under the clause in question the trustees would, no doubt, be justified in retaining the terminable annuity, but the clause is an administrative one only, and cannot affect

**C** the rights of the parties. This fund must be dealt with in the way I have indicated, and I answer the first question by saying that the income of the fund is to be treated as capital and invested, and the income only of these investments paid to Mrs. Lucas.

Then there is the question as to the unapplied income of the fund set apart to meet the contingent annuity, payable at the discretion of Mrs. Abbott's executors.

**D** [HIS LORDSHIP referred to that clause in Mrs. Abbott's will, and continued:] Subject to the payment of the annuity, the sum set apart to meet it forms part of Mrs. Abbott's residuary estate, and will pass under the gift of the residue in Mrs. Whitehead's will. As pointed out during the argument, this question is covered by *Cranley v. Dixon* (3), and the surplus income of the fund, if any, after providing for the annuity, must be paid to the tenant for life, and need not be

**E** capitalised. The costs of all parties must come out of Mrs. Whitehead's residuary estate.

*Declaration accordingly.*

Solicitors: *H. A. Dowse; Esmonde Dowse.*

**F**

[*Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.*]

## BRITISH SOUTH AFRICA CO. v. COMPANHIA DE MOÇAMBIQUE AND OTHERS

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Halsbury, Lord Macnaghten and Lord Morris), May 4, 5, 8, 12, 15, 16, 18, September 8, 1893]

[Reported [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604;  
10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1]

*Conflict of Laws—Foreign land—Title—Trespass—Jurisdiction of English courts.*

English courts have no jurisdiction to adjudicate on a claim to a title to foreign land or on one for damages for trespass on foreign land.

Per LORD HERSCHELL, L.C.: It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands, but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

**Notes.** Considered: *St. Pierre v. South American Stores (Gath and Chaves), Ltd.*, [1935] All E.R.Rep. 408. Distinguished: *The Tolton*, [1946] 2 All E.R. 372. Referred to: *Black Point Syndicate v. Eastern Concessions* (1898), 79 L.T. 658; *Duder v. Amsterdamsch Trusteess Kantoor*, [1902] 2 Ch. 132; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1914-15] All E.R.Rep. 24; *Re Trepeca Mines, Ltd.*, [1960] 3 All E.R. 304.

As to the jurisdiction with respect to land abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 30-33; and for cases see 11 DIGEST (Repl.) 369 et seq.

Cases referred to:

- (1) *Dowdale's Case* (1605), 6 Co. Rep. 46 b.; 77 E.R. 323; sub nom. *Richardson v. Dowdale*, Cro. Jac. 55; 14 Digest (Repl.) 354, 3436.
- (2) *Skinner v. East India Co.* (1666), 6 State Tr. 710; 11 Digest (Repl.) 369, 355.
- (3) *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; 98 E.R. 1021, Ex. Ch.; 11 Digest (Repl.) 450, 886.
- (4) *Doulson v. Matthews* (1792), 4 Term Rep. 503; 100 E.R. 1143; 11 Digest (Repl.) 370, 371.
- (5) *London Corpn. v. Cox* (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 W.R. 44, H.L.; 16 Digest (Repl.) 416, 2184.
- (6) *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; 10 B. & S. 1004; 40 L.J.Q.B. 28; 22 L.T. 869, Ex. Ch.; 11 Digest (Repl.) 451, 883.
- (7) *The M. Moxham* (1876), 1 P.D. 107; 46 L.J.P. 17; 34 L.T. 559; 24 W.R. 650; 3 Asp.M.L.C. 191, C.A.; 11 Digest (Repl.) 370, 372.
- (8) *Lord Cranstown v. Johnston* (1796), 3 Ves. 170; 30 E.R. 952; 11 Digest (Repl.) 372, 380.
- (9) *Archer v. Preston* (prior to 1682), 1 Eq. Cas. Abr. 133; 21 E.R. 938; 20 Digest (Repl.) 574, 2766.
- (10) *Lord Arglasse v. Muschamp* (1682), 1 Vern. 76; 23 E.R. 322, L.C.; 11 Digest (Repl.) 378, 413.
- (11) *Lord Kildare v. Eustace* (1686), 2 Cas. in Ch. 188; 1 Eq. Cas. Abr. 133; 1 Vern. 437; 22 E.R. 905, L.C.; 11 Digest (Repl.) 374, 389.
- (12) *Whitaker v. Forbes* (1875), L.R. 10 C.P. 583; 44 L.J.C.P. 332; 33 L.T. 258; affirmed, 1 C.P.D. 51; 45 L.J.Q.B. 140; 33 L.T. 582; 40 J.P. 436; 24 W.R. 241, C.A.; 11 Digest (Repl.) 370, 370.
- (13) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 16 Digest (Repl.) 198, 876.



- A** (14) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 293, 591.
- (15) *Britain v. Rossiter* (1879), 11 Q.B.D. 123; 48 L.J.Q.B. 362; 40 L.T. 240; 43 J.P. 332; 27 W.R. 482, C.A.; 16 Digest (Repl.) 198, 875.
- B** (16) *Tompson v. Barclay* (1831), Coop. Pr. Cas. 501; 47 E.R. 619; sub nom. *Thompson v. Barclay*, 9 L.J.O.S.Ch. 215, L.C.; 11 Digest (Repl.) 613, 423.
- (17) *Bulwer's Case* (1584), 7 Co. Rep. 1.
- (18) *Shelling v. Farmer* (1725), 1 Stra. 646; 93 E.R. 756; 11 Digest (Repl.) 369, 356.

Also referred to in argument :

- C** *Ward's Case* (1625), 1 Lat. 4.
- Jennings v. Hankyn* (1686), Carth. 11.
- Pike v. Hoare* (1763), Amb. 428; 2 Eden, 182; 11 Digest (Repl.) 370, 365.
- Rafael v. Verelst* (1776), 2 Bl. Com. 1055; 96 E.R. 621; 2 Digest (Repl.) 172, 23.
- Ilderton v. Ilderton* (1793), 2 Hy. Bl. 145; 126 E.R. 476; 11 Digest (Repl.) 498, 1182.
- D** *Carr v. Cary* (1692), 12 Mod. 34.
- Buron v. Denman* (1848), 2 Exch. 167; 6 State Tr.N.S. 525; 10 L.T.O.S. 523; 154 E.R. 450; 11 Digest (Repl.) 454, 902.
- Parker v. Crook* (1714), 10 Mod. Rep. 255.
- Livingston v. Jefferson*, 1 Brock. 203.
- E** *R. v. Burdett* (1820), 4 B. & Ald. 95; 1 State Tr.N.S. 1; 106 E.R. 873; 14 Digest (Repl.) 156, 1188.
- R. v. Keyn, The Franconia* (1876), 2 Ex.D. 63; 46 L.J.M.C. 17; 41 J.P. 517; 13 Cox, C.C. 403, C.C.R.; 1 Digest (Repl.) 127, 131.
- Rundle v. Delaware and Raritan Canal Co.*, 1 Wall. Jr. 275.
- F** *White v. Sanborn*, 6 New Hampshire Rep. 220.
- Watts v. Kinney*, 6 Hill's N.Y.Rep. 82.
- Re King & Co.'s Trade Mark*, [1892] 2 Ch. 462; 62 L.J.Ch. 153; 67 L.T. 33; 40 W.R. 580; 8 T.L.R. 593; 9 R.P.C. 350, C.A.; 43 Digest 194, 420.
- Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535; 53 L.J.Q.B. 376; 51 L.T. 210; 32 W.R. 760, C.A.; 21 Digest (Repl.) 730, 2244.
- G** *Westbury-on-Severn Rural Sanitary Authority v. Meredith* (1885), 30 Ch.D. 387; 55 L.J.Ch. 744; 52 L.T. 839; 34 W.R. 217; 1 T.L.R. 641, C.A.; 1 Digest (Repl.) 42, 309.
- Re Mills' Estate, Ex parte Works and Public Buildings Comrs.* (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 35 W.R. 65; 3 T.L.R. 61, C.A.; 11 Digest (Repl.) 267, 1518.
- H** *Attorney-General v. Stewart* (1817), 2 Mer. 143; 35 E.R. 895; 11 Digest (Repl.) 369, 354.
- Norris v. Chambers* (1861), 3 De G.F. & J. 583; 4 L.T. 345; 7 Jur.N.S. 689; 9 W.R. 794; 45 E.R. 1004, L.C.; 11 Digest (Repl.) 373, 383.
- Re Hawthorne, Graham v. Massey* (1883), 23 Ch.D. 743; 52 L.J.Ch. 750; 48 L.T. 701; 32 W.R. 147; 11 Digest (Repl.) 379, 421.
- I** *Ellis v. M'Henry* (1871), L.R. 6 C.P. 228; 40 L.J.C.P. 109; 23 L.T. 861; 19 W.R. 503; 11 Digest (Repl.) 447, 861.
- Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; 53 L.J.Ch. 435; 50 L.T. 401; 32 W.R. 573, H.L.; 11 Digest (Repl.) 374, 391.
- Earl of Derby v. Duke of Athol* (1749), 1 Ves. Sen. 201; 27 E.R. 982, L.C.; 11 Digest (Repl.) 375, 396.
- Bishop of Sodor and Man v. Earl of Derby, Earl of Derby v. Duke of Athol* (1751), 2 Ves. Sen. 337; Dick. 129; 28 E.R. 217, L.C.; 16 Digest (Repl.) 142, 247.

- Nabob of the Arcot v. East India Co.* (1793), 4 Bro.C.C. 180; 29 E.R. 841; sub nom. *Nabob of the Carnatic v. East India Co.*, 2 Ves. 56; 1 Digest (Repl.) 50, 370.
- Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444; 27 E.R. 1132, L.C.; 11 Digest (Repl.) 377, 407.
- Taylor v. Barclay* (1828), 2 Sim. 213; 2 State Tr.N.S.App. 1000; 7 L.J.O.S.Ch. 65; 57 E.R. 769; 22 Digest (Repl.) 142, 1291.
- Foster v. Vassall* (1747), 3 Atk. 587; 26 E.R. 1138, L.C.; 20 Digest (Repl.) 254, 31.
- Rogers v. Woodbury*, 15 Pick. 156.
- Barton v. Sadock* (1611), 1 Bulst. 103; 80 E.R. 800; sub nom. *Sadock v. Burton* (1610), Yelv. 202; 80 E.R. 133; 1 Digest (Repl.) 429, 851.
- Fryer v. Bernard* (1724), 2 P.Wms. 261; 24 E.R. 722, L.C.; 11 Digest (Repl.) 370, 364.
- North Indiana Rail. Co. v. Michigan Rail. Co.*, 15 Howard, 233.
- Boyse v. Colclough* (1854), 1 K. & J. 124; 3 Eq. Rep. 78; 24 L.J.Ch. 7; 24 L.T.O.S. 89; 3 W.R. 8; 69 E.R. 396; 11 Digest (Repl.) 370, 366.
- R. v. Harris* (1762), 1 Wm. Bl. 378; 3 Burr. 1330; 96 E.R. 213; 14 Digest (Repl.) 164, 1284.
- Holmes v. Barclay*, 4 La. An. 63.
- Graham v. Stevenson* (1788), 2 Hume, 250.
- Mullineux's Case* (1581), Moore, K.B. 178; 72 E.R. 516.
- Richardson v. Locklin* (1865), 6 B. & S. 777; 34 L.J.Q.B. 225; 12 L.T. 728; 13 W.R. 940; 11 Jur.N.S. 951.
- Warren v. Webb* (1808), 1 Taunt. 379.
- Bruckshaw v. Hopkins* (1776), 1 Cowp. 409.
- Scott v. Lord Seymour* (1862), 1 H. & C. 219; 32 L.J.Ex. 61; 11 W.R. 169; 158 E.R. 865; sub nom. *Lord Seymour v. Scott*, 1 New Rep. 129; 8 L.T. 511; 9 Jur.N.S. 522, Ex. Ch.; 11 Digest (Repl.) 451, 887.
- Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex. Ch.; 11 Digest (Repl.) 422, 722.
- Brown v. Gracey* (1821), Dow. & Ry.N.P. 41, N.P.; 6 Digest (Repl.) 409, 2899.
- Wey v. Rally* (1704), 6 Mod. Rep. 194; Holt, K.B. 705; 2 Salk. 651; 87 E.R. 948; 31 Digest (Repl.) 290, 4251.
- Dutch West India Co. v. Henriques Van Moses* (1728), 1 Stra. 612; 93 E.R. 733, H.L.; 13 Digest (Repl.) 191, 96.
- Castrique v. Imrie* (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 19 W.R. 1; 3 Mar.L.C. 454, H.L.; 11 Digest (Repl.) 525, 1375.
- Hart v. Herwig* (1873), 8 Ch. App. 860; 42 L.J.Ch. 457; 29 L.T. 47; 21 W.R. 663; 2 Asp.M.L.C. 63, L.J.J.; 11 Digest (Repl.) 438, 806.
- Schibsbay v. Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, 1220.
- Rousillon v. Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, 842.
- Copin v. Adamson* (1875), 1 Ex.D. 17; 45 L.J.Q.B. 15; 33 L.T. 560; 24 W.R. 85, C.A.; 11 Digest (Repl.) 509, 1246.
- Cookney v. Anderson* (1863), 1 De G.J. & Sm. 365; 2 New Rep. 140; 32 L.J.Ch. 427; 8 L.T. 295; 9 Jur.N.S. 736; 11 W.R. 628; 46 E.R. 146, L.C.; 11 Digest (Repl.) 373, 382.
- Drummond v. Drummond* (1799), 6 Bro. Parl. 601; 2 E.R. 1293, H.L.; 11 Digest (Repl.) 364, 338.
- Neal v. De Garay* (1797), 7 Term Rep. 243.
- Jackson and Crispe v. Barwick Corp.* (1668), Sid. 381.
- R. v. Johnson* (1805), 6 East, 583; 2 Smith, K.B. 591; 29 State Tr. 359; 102 E.R. 1412; 16 Digest (Repl.) 143, 250.
- Earl of Derby's Case* (1614), 12 Co. Rep. 114.

- A** *Re Hawthorne, Graham v. Massey* (1888), 23 Ch.D. 743; 52 L.J.Ch. 750; 48 L.T. 701; 32 W.R. 147; 11 Digest (Repl.) 379, 421.
- Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, ante, p. 263; [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, 51.
- B** *Keeble v. Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, 30.
- Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.
- Harvey v. Mayne* (1872), I.R. 6 C.L. 417; 43 Digest 455, k.
- C** *Thompson v. Powles* (1828), 2 Sim. 194; 2 State Tr.N.S.App. 999; 57 E.R. 761; 11 Digest (Repl.) 448, 872.
- Jones v. Garcia Del Rio* (1823), Turn. & R. 297.
- Peru Republic v. Dreyfus Bros. & Co.* (1888), 38 Ch.D. 348; 57 L.J.Ch. 536; 58 L.T. 433; 36 W.R. 492; 4 T.L.R. 333; 11 Digest (Repl.) 617, 441.
- Berne City v. Bank of England* (1804), 9 Ves. 347; 32 E.R. 636, L.C.; 22 Digest (Repl.) 142, 1290.
- D** *Peru Republic v. Peruvian Guano Co.* (1887), 36 Ch.D. 489; 56 L.J.Ch. 1081; 57 L.T. 337; 36 W.R. 217; 3 T.L.R. 848; 11 Digest (Repl.) 627, 508.
- Yrisarro v. Clement* (1826), 3 Bing. 432; 2 C. & P. 223; 2 State Tr.N.S.App. 986; 11 Moore, C.P. 308; 4 L.J.O.S.C.P. 128; 130 E.R. 579; 32 Digest 18, 98.
- E** *Martin v. Martin, Bell v. Martin* (1831), 2 Russ. & M. 507; 39 E.R. 487; 11 Digest (Repl.) 380, 430.
- Cood v. Cood* (1863), 33 Beav. 314; 3 New Rep. 275; 33 L.J.Ch. 273; 9 Jur.N.S. 1335; 55 E.R. 388; 11 Digest (Repl.) 377, 410.
- Graham v. Peat* (1801), 1 East, 244; 102 E.R. 95; 31 Digest (Repl.) 43, 2021.
- Re Holmes* (1861), 2 John. & H. 527; 70 E.R. 1167; sub nom. *Holmes v. R.*, 31 L.J.Ch. 58; 5 L.T. 548; 8 Jur.N.S. 76; 10 W.R. 39; 16 Digest (Repl.) 266, 342.
- F**

**Appeal** from a decision of the Court of Appeal (FRY and LOPES, L.JJ., LORD ESHER, M.R., dissenting), reported [1892] 2 Q.B. 358, reserving a decision of the Queen's Bench Division (LAWRANCE and WRIGHT, JJ.).

**G** The appellants, the British South Africa Co., were an English company, incorporated by Royal Charter in 1889, and the respondents, the Companhia de Moçambique, were a company founded at Lisbon in 1888 under the law of Portugal, and the other respondents were officers of that company. The respondents brought an action against the appellants for alleged trespasses on, and wrongful acts relating to their property in South Africa. The defence was that the High Court of Justice had no jurisdiction to adjudicate in such an action. In the Queen's Bench Division LAWRENCE and WRIGHT, JJ., held that the court had no jurisdiction to entertain an action brought against a person resident in England for damages for trespass on lands situated out of England where there was no court of competent jurisdiction, and gave judgment for the present appellants. The Court of Appeal, the Master of the Rolls dissenting, held the contrary, and gave judgment in favour of the respondents.

**1** *Cohen, Q.C.*, Lord Robert Cecil and Hollams for the appellants.  
*Sir Henry James, Q.C.*, Bompas, *Q.C.*, and *T. W. Chitty* for the respondents.

Their Lordships took time for consideration.  
 Sept. 8, 1893. The following opinions were read.

**LORD HERSCHELL, L.C.**—The principal question raised by the appeal is whether the Supreme Court of Judicature has jurisdiction to try an action to recover damages for a trespass to lands situated in a foreign country. It is not in



controversy that, prior to the Judicature Acts no such jurisdiction could have been exercised; but it is asserted on behalf of the respondents that the only barrier to its exercise was the technical one that the venue in such a case must be local, and that the rules made under the Judicature Acts, which have abolished local venues, have removed the sole impediment which prevented the courts entertaining and adjudicating on cases of this description. This contention has been sustained by a majority of the Court of Appeal, reversing the judgment of the Queen's Bench Division, with which, however, the Master of the Rolls agreed. A  
B

The nature of the controversy between the parties renders it necessary to consider the origin of the distinction between local and transitory actions, and the development of the law which determined the venue or place of trial of issues of fact. It was necessary originally to state truly the venue—that is the place in which it arose—of every fact in issue, whether those on which the plaintiff relied, or any matter stated by way of defence; and if the places were different, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. After the statute, 16 & 17 Car. 2, c. 8, which provided that, C

“after verdict judgment should not be stayed or reversed for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action was laid,” D

the practice arose, which ultimately became regular and uniform, of trying all the issues by a jury of the venue laid in the action, even though some of the facts were laid elsewhere. When juries ceased to be drawn from the particular town, parish, or hamlet where the fact took place, that is, from among those who were supposed to be cognisant of the circumstances, and came to be drawn from the body of the county generally, and to be bound to determine the issues judicially after hearing witnesses, the law began to discriminate between cases in which the truth of the venue was material, and those in which it was not so. E

This gave rise to the distinction between transitory and local actions that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased. It was, however, still necessary to lay every local fact with its true venue, on peril of a variance if it should be brought in issue. Where a local matter occurred out of the realm, a difficulty arose, inasmuch as it was supposed that the issue could not be tried as no jury could be summoned from the place, and it was by the general rule essential that a jury should be summoned from the venue laid to the fact in issue. It was, however, early decided that, notwithstanding the general rule, such matters might be tried by a jury from the venue in the action, and thus the difficulty was removed and the form was introduced of adding after the statement of the foreign place the words “To wit at Westminster, in the county of Middlesex,” or whatever else might happen to be the venue in the action. F  
G  
H

The point arose in the 30 & 31 Eliz. [1587-8], cited in *Dowdale's Case* (1) (6 Co. Rep. at p. 47 b.), in an action of assumpsit, on a policy of assurance. The plaintiff declared that the defendant at London

“did assure that such ship should sail from Melcomb Regis, in the county of Dorset to Abville, in France, safely, and that the said ship in sailing towards Abville, scilicet in the river of Soome in the realm of France, was arrested by the King of France.” I

The parties came to issue whether the ship was so arrested or not, and this issue was tried before the Chief Justice in London, and found for the plaintiff. It was moved in arrest of judgment that this issue, arising from a place without the realm, could not be tried, and, if it could, it was contended that the jury should come from Melcomb, “for by common intendment they may have the best knowledge

**A** of the arrest." But it was resolved that the issue should be tried where the action was brought, it being said :

"Here the promise was made here in London, which is the ground and foundation of the action; and, therefore, there is in this case of necessity it shall be tried, or otherwise it should not be tried at all."

**B** It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved, and not on the place at which the trial had to take place. It was not called a local action because the venue was local, or a transitory action because the venue might be laid in any county, but the venue was local or transitory according as the action was local or transitory. It will be seen that this distinction is material when the Judicature

**C** rule, upon which so much turns, comes to be examined. I cannot but lay great stress upon the fact that while lawyers made an exception from the ordinary rule in the case of a local matter occurring outside the realm for which there was no proper place of trial in this country, and invented a fiction which enabled the courts to exercise jurisdiction, they did not make an exception where the cause of action was a local matter arising abroad, and did not extend the fiction to such cases.

**D** The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction of the courts, but only determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local, and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction, and I cannot think that the courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and as one upon which it was proper for them to adjudicate.

The earliest authority of importance is *Skinner v. East India Co.* (2). The House of Lords in that case referred it to the judges to report whether relief could be obtained in respect of the matter mentioned in the petition, either at law or in equity, and if so in what manner. The judges answered (6 State Tr. at p. 719) :

**F** "that the matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary courts at Westminster. And as to the dispossessing him of his house and island, that he was not relievable in any ordinary court of law."

**G** Notwithstanding the opinion thus expressed, LORD MANSFIELD, C.J., in *Mostyn v. Fabrigas* (3), entertained and acted on the view that where damages only were sought in respect of a trespass committed abroad, an action might be maintained in this country, although it was one which would here be a local action. He referred to two cases which had come before him. One was an action against Captain Gambier for pulling down the houses of some sutlers. Objection was

**H** taken to the action founded on the case just referred to of *Skinner v. East India Co.* (2). LORD MANSFIELD overruled the objection on the principle that the reparation was personal and for damages, and that otherwise there would be a failure of justice, for it was on the coast of Nova Scotia where there were no regular courts of judicature, and, if there had been, Captain Gambier might never go there again, and, therefore, the reason of locality in such an action in England did not

**I** hold. The other case was that of Admiral Palliser, who was sued for destroying fishing huts on the Labrador coast, where, it was said, there were no local courts, and, therefore, whatever injury had been done there by any of the King's officers would have been altogether without redress if the objection of locality would have held. The consequence of that circumstance showed (said LORD MANSFIELD, 1 Cowp. at p. 181) that

"where the reason fails, even in actions, which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions."

It does not appear clear from the language used by LORD MANSFIELD that he would have regarded a trespass to land committed beyond the seas and outside the King's dominions as within the cognisance of our courts. A

The view acted on by LORD MANSFIELD in the two cases referred to has not been followed. It came before the Court of Queen's Bench for consideration in *Doulson v. Matthews* (4), which was an action of trespass for entering the plaintiff's house in Canada and expelling him therefrom. The decisions of LORD MANSFIELD were relied on by the plaintiff, but the action was held not to lie. BULLER, J., in delivering judgment, said (4 Term Rep. at p. 504): B

"It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action quare clausum fregit is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad; but not such as are in their nature local." C

In saying that we may not try actions here arising out of transactions abroad which are in their nature local, I do not think that the learned judge was referring to the mere technical difficulty of there being no venue in this country in which these transactions could be laid, but to the fact that our courts did not exercise jurisdiction in matters arising abroad "which were in their nature local." *Doulson v. Matthews* (4) has ever since been regarded as law, and I do not think it has been considered as founded merely on the technical difficulty that in this country a local venue was requisite in a local action. D

In *London Corpn. v. Cox* (5), that very learned judge, WILLES, J., said (L.R. 2 H.L. at p. 261): E

"And even in superior courts themselves, where the subject-matter is such as to imply a local limit of jurisdiction, the exception is peremptory; there is no necessity for a dilatory plea, nor is the objection waived by pleading in chief. Thus, if an action of trespass to land situate abroad were brought in the Queen's Bench, the defendant need not plead a dilatory plea showing what court has jurisdiction; but if the foreign locality appeared upon the count he might demur; and if it did not appear he might plead in chief or bar a denial of the trespass (which would be assumed as alleged within the jurisdiction), and at the trial the plaintiff would be non-suited or lose the verdict; and whether upon demurrer or plea the ordinary judgment would be given for the defendant: *Doulson v. Matthews* (4)." F

It is clear that WILLES, J., regarded an action of trespass to land situate abroad as outside the local limit of jurisdiction of the Court of Queen's Bench. G

The same learned judge, in *Phillips v. Eyre* (6), said (L.R. 6 Q.B. at p. 28):

"Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land; and even with respect to those not falling within that description, our courts did not undertake universal jurisdiction." H

In *The M. Mozham* (7), where injury had been caused to a pier belonging to an English company, but situated in a Spanish port, the ship, by the alleged negligent navigation of which the damage had been caused, was arrested in Spain, but was released on an agreement with the owners that their liability should be determined by proceedings in the English courts. JAMES, L.J., said (1 P.D. at p. 109) that but for the agreement come to between the parties I

"very grave difficulties indeed might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to injury done to foreign soil."



A The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards the latter, where they occur outside territorial limits, is not confined to the jurisprudence of this country.

B STORY, in his work on the CONFLICT OF LAWS, s. 551, after stating that by the Roman law a suit might in many cases be brought either where property was situate or where the party sued had his domicile, proceeds to say that

C “even in countries acknowledging the Roman law, it has become a very general principle that suits in rem should be brought where the property is situate; and this principle is applied with almost universal approbation in regard to immovable property. The same rule is applied to mixed actions, and to all suits which touch the realty.”

In s. 553, STORY quotes the following language of VATTEL :

D “The defendant’s judge [that is, the competent judge] is the judge of the place where the defendant has his settled abode, or the judge of the place where the defendant is when any sudden difficulty arises; provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends. . . . It will be perceived that in many respects the doctrine here laid down coincides with that of the common law. It has been

E already stated, that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found; that real actions must be brought in the *forum rei sitæ*; and that mixed actions are properly referable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property which are deemed local; so that they will not lie elsewhere than in the *place rei sitæ*.”

F The doctrine laid down by foreign jurists, which is said by STORY to coincide in many respects with that of our common law, obviously had relation to the question of jurisdiction, and not to any technical rules determining in what part of a country a cause was to be tried. STORY was, indeed, regarded by one of the learned judges in the court below (LOPES, L.J., [1892] 2 Q.B. at p. 420) as sanctioning the view that our rules with regard to venue in the case of local actions offered the only

G obstacle to the exercise of jurisdiction in actions of trespass to real property. The passage relied on is as follows (s. 554):

H “LORD MANSFIELD and EYRE, C.J., held at one time a different doctrine, and allowed suits to be maintained in England for injuries done by pulling down houses in foreign, unsettled regions, namely, in the desert coasts of Nova Scotia and Labrador. But this doctrine has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only.”

I By the words “untenable according to the actual jurisprudence of England,” I do not think STORY was referring to the rule which in this country regulated the place of trial in the case of local actions. Nor am I satisfied that either LORD MANSFIELD or STORY would have regarded an action of trespass to land as a suit for personal damages only if the title to the land were in issue and in order to determine whether there was a right to damages, it were necessary for the court to adjudicate upon the conflicting claims of the parties to real estate. In both the cases before LORD MANSFIELD, as I understand them, no question of title to real property was in issue. The sole controversy was whether the British officers sued were, under the circumstances justified in interfering with the plaintiffs in their enjoyment of it.

The question what jurisdiction can be exercised by the courts of any country

according to its municipal law, cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables, or real property, in the country of another. On the other hand, if the courts of a country were to claim as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated. But in considering what jurisdiction our courts possess, and have claimed a right to exercise in relation to matters arising out of the country, the principles which have found general acceptance among civilised nations as defining the limits of jurisdiction, are of great weight. It was admitted in the present case on behalf of the respondents that the court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these matters abandoned their appeal in the court below.

But it is said that the court may inquire into the title, and if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. I find it difficult to see why this distinction should be drawn. It is said, because the courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it, and compel the payment of damages founded upon such determination, why should not they equally proceed in personam against a person who, in spite of that determination, insists on disturbing one who has been found by the court to be the owner of the property? It is argued that if an action of trespass cannot be maintained in this country where the land is situate abroad a wrong-doer by coming to this country might leave the person wronged without any remedy. It might be a sufficient answer to this argument to say that this is a state of things which has undoubtedly existed for centuries without any evidence of serious mischief, or any intervention of the legislature, for even if the Judicature rules have the effect contended for, I do not think it can be denied that this was a result neither foreseen nor intended.

But there appear to me, I confess, to be solid reasons why the courts of this country should in common with those of most other nations have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication. The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases, the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of, and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages, and repossessing himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might? Such an occurrence is not an impossible, or even an improbable, hypothesis. It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands, but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

Reliance was placed on the decisions of courts of equity, as showing that our courts were ready, when no technical difficulty of venue stood in the way to adjudicate on the title to lands situate abroad. If the refusal of the common law courts to exercise jurisdiction in cases of the nature now under consideration, had

A been regarded as the result of a mere technical difficulty, I cannot help thinking that the courts of equity, which were, in early days at all events, keen to supplement the deficiencies of the common law when the requirements of justice were impeded by technical difficulties, would have found some means of affording a remedy. LORD MANSFIELD, in his judgment in *Mostyn v. Fabrigas* (3), refers to a case of an injury in the East Indies similar to that with which he had to deal

B in the case of Captain Gambier, in which LORD HARDWICKE in a court of equity had directed satisfaction to be made in damages. But in this exercise of jurisdiction he has not been followed by any judge of the Court of Chancery.

While courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here. In *Lord Cranstown v. Johnston* (8), SIR R. P. ARDEN, M.R., said (3 Ves. at p. 182) :

C " *Archer v. Preston* (9), *Lord Arglass v. Muschamp* (10), and *Lord Kildare v. Eustace* (11), clearly show that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England."

D STORY, in his CONFLICT OF LAWS, ss. 544, 545, although he says that to the extent of the decision in *Lord Cranstown v. Johnston* (8) there may, perhaps, not be any well-founded objection, nevertheless expresses the view that the doctrine of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may in some cases not find a perfect warrant in the general principles of international public law, and, therefore, it must have a very uncertain basis as

E to its recognition in foreign countries so far as it may be supposed to be founded upon the comity of nations.

The decisions of the courts of equity do not, to my mind, afford any substantial support to the view that the ground upon which the courts of common law abstained from exercising jurisdiction in relation to trespasses to real property abroad was only the technical difficulty of venue. In *Whitaker v. Forbes* (12), where an action

F was begun before, but the demurrer was heard in the Court of Appeal after, the passing of the Judicature Acts, the question arose whether the plaintiff could recover against a defendant resident in this country the arrears of a rentcharge issuing out of lands in Australia. The opinion expressed by BLACKBURN, J., in the course of the appeal in that case was much relied on by the respondents. He said (1 C.P.D. at p. 53) :

G "I do not think that this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local and transitory actions, and the question is one of venue only."

It is unnecessary to consider whether in circumstances such as gave rise to the

H action of *Whitaker v. Forbes* (12), an action might, since the Judicature Rules came into force, be maintained in the courts of this country. I do not think the dictum of the learned judge in that case can be regarded as of any great weight in determining the question with which your Lordships have to deal.

The terms of R.S.C., Ord. 36, r. 1 [see now Ord. 36, r. 10], which are relied on by the plaintiffs, are as follows: "There shall be no local venue for the trial of any

I action except where otherwise provided by statute." The language used appears to me important. The rule does not purport to touch the distinction between local and transitory actions, between matters which have no necessary local connection, and those which are local in their nature. It deals only with the place of trial, and enables actions, whatever their nature, to be tried in any country. But it is, in my opinion, a mere rule of procedure, and applies only to those cases in which the courts at that time exercised jurisdiction. It has been more than once held that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties. Thus in



*Kendall v. Hamilton* (13) it was suggested that the law laid down in *King v. Hoare* (14) had been altered by the Judicature Acts owing to the abolition of a plea in abatement. LORD CAIRNS, L.C., said (4 App. Cas. at p. 516):

"I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting by means of a plea in abatement to the non-joinder of a defendant, who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed."

Again, in *Britain v. Rossiter* (15), BRETT, L.J., said (11 Q.B.D. at p. 129):

"I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were found to be existing in the courts either of law or equity."

According to the contention of the respondents in this case the rule under consideration had the effect of conferring upon them a right of action in this country which they would not otherwise have possessed. As I have already pointed out, a person whose lands, situate in this country, were trespassed upon, always had a right of action in respect of the trespass. The rules relating to venue did no more than regulate the manner in which the right was to be enforced. But, in respect of a trespass to land situate abroad, there was no right of action, for an alleged right which the courts would neither recognise nor enforce did not constitute any right at all in point of law.

I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure made under the Judicature Acts have not conferred a jurisdiction which did not exist before. If this conclusion be well founded, I do not think that the allegation contained in the statement of claim,

"that the defendant company did and committed the Acts above mentioned and complained of with intent to injure and destroy the trade of the plaintiff company, and to deprive it of its aforesaid lands, territories, mines, minerals, and mining rights and property"

disclosed a cause of action cognisable by our courts any more than the paragraph complaining of trespass. The statement of defence alleged that the lands in question were in the possession of a certain native chief named Umtasa, who exercised sovereignty over the same, and that by a concession or treaty granted by Umtasa and his indunas or council to the defendants, they acquired the right to possession and occupation of the lands, and that the plaintiffs were wrongfully attempting to take possession of the lands, and that the defendants did the acts complained of in order to prevent the plaintiffs from so wrongfully taking possession of them. This defence was demurred to by the second paragraph of the reply. The Queen's Bench Division overruled the demurrer; but the Court of Appeal varied this judgment by ordering the demurrer to stand over until the trial of the action, to be dealt with by the judge at the trial. The Master of the Rolls thought the decision of the Divisional Court on this point correct. And I do not understand that either of the learned judges, who concurred in varying the order, doubted that, if proved, the paragraph in dispute disclosed a valid defence in point of law. *Thompson v. Barclay* (16) and other cases of the same description, in which it is said the courts have refused to recognise the sovereign rights of provinces which had revolted from a State at amity with Great Britain when their independence was not shown to have been recognised by the proper authorities in this country, appear to me to have no application to the circumstances of the present case.

- A** I do not see any sufficient ground for disturbing the judgment of the Queen's Bench Division on this point. Whether the plea can be proved, and whether the determination of any question raised by it will be for the judge and not the jury are questions which do not arise at the present time. For the reasons with which I have troubled your Lordships at some length, I think the judgment appealed from should be reversed, and the judgment of the Divisional Court restored, and
- B** that the respondents should pay the costs here and in the court below. I move your Lordships accordingly.

**LORD HALSBURY.**—Although I am unable to concur with the conclusion at which LOPES, L.J., arrived, I think he stated very clearly the only real question which is in debate. That learned judge said that, in his opinion, the courts of

**C** this country have, and always had, the inherent jurisdiction contended for—namely, the jurisdiction to try an action for trespass to land situated in a foreign country, and that the only objection to doing so arose from the technical rule of local venue. That is the question very plainly stated, and, if that be the correct view of the law, the Supreme Court of Judicature Act, 1873, having altered the technical rule, the action might be tried in England.

- D** I am, however, unable to come to the conclusion that that is correct. It is true that the phrase "local venue" is technical, and would not, I think, have been intended by the learned persons responsible for the legislation of 1873 to have been understood to refer to any question of jurisdiction at all. Rules of procedure and practice in England would not, I think, in the contemplation of anyone, touch questions of territorial or international jurisdiction. The word "venue" has come
- E** to be used as if it were literally equivalent to the word "place," but that was not the original meaning, although the idea of place is included within it. It is not accurate to speak of "venue" as though it referred to place in an unlimited sense. No two questions can be more distinct than the question whether a matter is in the jurisdiction of the English courts at all, and whether a matter undoubtedly within the jurisdiction of the courts shall be assigned for trial to particular courts
- F** in England.

There is a concurrence of opinion of most jurists, if not all, as to the distinction between what we call realty and personalty, by whatever words those things are distinguished in the jurisprudence of foreign countries, which affects very materially the right to try. VATTTEL distinguishes the questions which may properly be tried

- G** "where defendant has his settled place of abode, but always subject to this: that if the matter relates to an estate in land, or to a right annexed to such an estate, in such a case, inasmuch as property of the kind is to be held according to the laws of the country where it is situated, and, as the right of granting it is vested in the ruler of the country, controversies relating to real property can only be decided in the State in which it depends."

- H** I am quoting STORY's version (STORY'S CONFLICT OF LAWS, s. 553) of VATTTEL's language. That very learned lawyer proceeds to point out that the distinction between local and transitory actions is one which is known to the common law. I somewhat doubt whether STORY, J., intended by his language to enter into the controversy as to whether the principle expressed in the maxim "debitum et contractus sunt nullius loci" is coeval with what we know as the common law.
- I** LORD COKE undoubtedly does say so in *Bulwer's Case* (17), but, as SERJEANT STEPHEN points out it is difficult to reconcile that view with the known history of our jurisprudence in respect of the original functions of the jury, to whom was at one time committed the proof as well as the determination of a cause; and it is not consistent with the observations of GILBERT, C.B. (GILBERT'S HISTORY OF CIVIL ACTIONS, p. 84). I think that which STORY, J., intended to refer to was the actual system of our common law at the time he wrote; and undoubtedly the current of authority at that time was all in one direction.

Although the original state of our law may not be very important in respect of the controversy now before your Lordships, there is one view of it that seems to me to throw a considerable light upon the questions now in controversy. The invention of fictions and the limit within which they were permitted is discussed at length in PRYNNE'S ANIMADVERSIONS ON, AMENDMENTS OF, ADDITIONAL RECORDS TO, THE FOURTH PART OF THE INSTITUTES, a mine of learning upon the subject of legal antiquities which the diligence of the learned counsel who argued this question at your Lordships' Bar has turned to skilful account. PRYNNE boldly states that no such fiction was permitted before the date of Henry VIII, but the reasons given for the permitting of the fiction and the limitation within which it was permitted seem to me to have important bearing, and to be much more important than its date. It was a principle of pleading well understood and rigorously enforced, that a traverse must not be taken on an immaterial point. Where, therefore, the actual place of, for instance, a debt or contract, was alleged (though contrary to the fact) to be some place in England, the defendant was not at liberty to deny that the place alleged was in England, since in such matters the place was immaterial, and, according to the rigorous principles of pleading to which I have referred, any immaterial traverse was not permitted. But wherever the place was material, as the unvarying current of authorities establishes that it was in all controversies relating to land, the defendant might traverse the place, and, even if he did not, if it appeared in proof that the place was out of England, the plaintiff was non-suited.

I do not think that one authority has been cited to your Lordships to the contrary, with the single exception of LORD MANSFIELD's references to what took place before himself at nisi prius. I confess that the authority of LORD MANSFIELD appears to me to prove too much. He appears to have surmounted the difficulty of local venue in a manner which is wholly irreconcilable with the argument so much pressed upon your Lordships that the absence of precedent in the present action is accounted for throughout all English legal history by the objection that the rule of local venue formed a bar to an action being brought. But it appears to have been omitted to be considered that LORD MANSFIELD decided in the plaintiff's favour, and, so far as I can judge from the phrase used by his Lordship "which in England would be local actions," he must have decided upon the ground that, inasmuch as the action before himself was for trespass to realty abroad, the action would not be limited by the rule of local actions in England. Whether the argument be good or bad, it certainly is not one which sustains the contention that it was the law of local venue which prevented such actions being tried in England.

I further doubt very much whether the observations attributed to LORD MANSFIELD can be quite accurately recorded. His Lordship undoubtedly seems to have misunderstood *Shelling v. Farmer* (18), since he attributes to EYRE, C.J.'s decision the very reverse of what that learned judge decided. The plaintiff in that case sued for trespass to his person and to his house in the East Indies; and EYRE, C.J., rejected evidence as to the house, but permitted evidence as to himself, though LORD MANSFIELD quotes him as overruling the objection. This was in 1739. In 1774 *Mostyn v. Fabrigas* (3) was decided, and in 1792, in *Doulson v. Matthews* (4), LORD KENYON, C.J., and BULLER, J., where the question directly arose, decided otherwise. In that case, which is supposed to have settled the law, they held that, as a matter of settled practice, actions of trespass to land were local. In the opinions of the judges delivered to your Lordships' House by WILLES, J., it is stated, without any qualification, that an action of trespass to land abroad did not lie: *London Corpn. v. Cox* (5). It is difficult to construe LORD MANSFIELD's own language consistently with the view which he is supposed to have entertained; but, whatever account may be given of his Lordship's utterances, which, in respect of the matter before him in *Mostyn v. Fabrigas* (3) were undoubtedly obiter, I must say that I could not yield to his authority when it is opposed to the views of so many judges from 1667 downwards.



**A** There is one observation made by FRY, L.J., in the Court of Appeal, which appears to me to be subject to very much the same criticism which I have suggested in respect of LORD MANSFIELD's utterance, namely, that it proves too much. After describing the limitations upon the jurisdiction of the King's Courts, the lord justice says that

**B** "gradually their jurisdiction was extended, especially by the legislation and the quo warranto proceedings of Edward I, until in the lapse of time, it burst the barriers within which it was originally confined, and came to be, not inaptly, described as 'a universal jurisdiction and superintendency.'"

The lord justice was too severe a logician not to have measured the extent of the language which he thus quotes; but I am satisfied that he would himself have admitted that in thus speaking of the jurisdiction of the English courts, the words "universal" and "superintendency" must receive some limitation, and the only limitation that, to my mind, they are properly susceptible of would be by the addition of the words "over all courts and causes in England." If they were to be understood according to the exact and precise meaning of the language employed without some such limitation, they would, to my mind, be so obviously

**D** inaccurate as not to require to be further dealt with.

I am, therefore, of opinion that the judgment of WRIGHT, J., and of the Master of the Rolls was correct, and I think, therefore, that the judgment on this point should be reversed.

**LORD MACNAGHTEN.**—I concur in the motion which has been proposed, and

**E** in the reasons upon which it is founded.

**LORD MORRIS.**—I have had the advantage of reading the opinion of the Lord Chancellor, and I may say that I entirely concur in it, and could not hope usefully to add anything.

*Appeal allowed.*

**F** Solicitors: *Hollams, Son, Coward & Hawkesley; Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

**SCOTT v. BROWN, DOERING, McNAB & CO.  
SLAUGHTER AND MAY v. BROWN, DOERING, McNAB & CO.**

[COURT OF APPEAL (Lindley, Lopes and A. L. Smith, L.JJ.), July 16, 18, August 1, 1892]

B

[Reported [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782;  
57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698;  
4 R. 42]

*Contract—Illegality—Purchase of shares—"Rigging the market"—Agreement to buy shares at fictitious premium—Action to recover purchase money—Competency.*

C

The plaintiff brought an action against the defendants, stockbrokers, for rescission of a contract to purchase shares in a company, and to recover the purchase-money paid by him for them to the defendants, on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them on the Stock Exchange. At the trial it appeared from the evidence adduced on behalf of the plaintiff that he had paid the money in pursuance of an agreement between him and one of the defendants, by which the latter was to purchase the shares on the Stock Exchange at a premium in order to induce the public to suppose that the shares were at a real premium which in fact, as the plaintiff and the defendants well knew, they were not.

D

**Held:** the action was founded on an illegal contract and could not be maintained.

E

**Notes.** Considered: *Brown v. Stock Exchange Committee* (1892), 36 Sol. Jo. 752. Distinguished: *Re Thomas, Jaquess v. Thomas*, [1894] 1 Q.B. 747. Applied: *Gedge v. Royal Exchange Assurance*, [1900-3] All E.R.Rep. 179. Distinguished: *Willis v. Lovick*, [1901] 2 K.B. 195; *Gordon v. Metropolitan Police Chief Comr.*, [1908-10] All E.R.Rep. 192. Applied: *Re Robinson's Settlement, Gant v. Hobbs*, [1912] 1 Ch. 717. Distinguished: *Kregor v. Hollins* (1913), 109 L.T. 225. Applied: *North Western Salt Co. v. Electrolytic Alkali Co.*, [1913] 3 K.B. 422; *Farmer's Mart v. Milne*, [1915] A.C. 106; *Wild v. Simpson*, [1918-19] All E.R.Rep. 682. Considered: *Lipton v. Powell*, [1921] 2 K.B. 51. Applied: *Alexander v. Rayson*, [1935] All E.R.Rep. 185. Followed: *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579. Applied: *Bigos v. Bousted*, [1951] 1 All E.R. 92; *Chettiar v. Chettiar*, [1962] 1 All E.R. 494. Referred to: *Haseldine v. Hosken*, [1933] All E.R.Rep. 1; *Berg v. Sadler and Moore*, [1937] 1 All E.R. 637; *Harry Parker, Ltd. v. Mason*, [1940] 4 All E.R. 199; *Brown, Jenkinson & Co. v. Percy Dalton (London), Ltd.*, [1957] 2 All E.R. 844.

F

As to illegal contracts and recovery of money paid thereunder, see 8 HALSBURY'S LAWS (3rd Edn.) 125, 128 129, 150, 232-233; and for cases see 12 DIGEST (Repl.) 267-268, 318-320, 337; as to conspiracies to defraud, see 10 HALSBURY'S LAWS (3rd Edn.) 834-835; and for cases see 15 DIGEST (Repl.) 915-916, 1200-1201; as to agreements amounting to a criminal conspiracy, see 36 HALSBURY'S LAWS (3rd Edn.) 577; and for cases see 42 DIGEST 836-837.

G

Cases referred to:

- (1) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.
  - (2) *Pearce v. Brooks* (1866), L.R. 1 Exch. 213; 4 H. & C. 358; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614; 12 Digest (Repl.) 294, 2264.
  - (3) *Wetherell v. Jones* (1832), 3 B. & Ad. 221; 1 L.J.K.B. 139; 110 E.R. 82; 12 Digest (Repl.) 306, 2352.
- H
- I

- A** (4) *R. v. De Berenger* (1814), 3 M. & S. 67; 105 E.R. 536; 15 Digest (Repl.) 915, 8802.
- (5) *R. v. Aspinall* (1876), 2 Q.B.D. 48; 46 L.J.M.C. 145; 36 L.T. 297; 42 J.P. 52; 13 Cox, C.C. 563; sub nom. *Aspinall v. R.*, 25 W.R. 283, C.A.; 15 Digest (Repl.) 1201, 12,198.
- B** (6) *Begbie v. Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491; 33 L.T. 470; affirmed (1876), 1 Q.B.D. 679; 35 L.T. 350; 25 W.R. 85, C.A.; 12 Digest (Repl.) 267, 2057.
- (7) *Simpson v. Bloss* (1816), 7 Taunt. 246; 2 Marsh. 542; 129 E.R. 99; 12 Digest (Repl.) 311, 2399.
- (8) *Jones v. Yates* (1829), 9 B. & C. 532; 4 Man. & Ry.K.B. 613; 7 L.J.O.S.K.B. 217; 109 E.R. 198; 4 Digest (Repl.) 495, 4362.
- C** (9) *Finaz v. Nicholls* (1846), 2 C.B. 501; 15 L.J.C.P. 125; 6 L.T.O.S. 319; 135 E.R. 1042; sub nom. *Finan v. Nicholls*, 10 Jur. 50; 12 Digest (Repl.) 288, 2219.
- (10) *R. v. Hudson* (1860), Bell, C.C. 263; 29 L.J.M.C. 145; 2 L.T. 263; 24 J.P. 325; 6 Jur.N.S. 566; 8 W.R. 421; 8 Cox, C.C. 305, C.C.R.; 15 Digest (Repl.) 1195, 12,131.
- D** (11) *Taylor v. Chester* (1869), L.R. 4 Q.B. 309; 10 B. & S. 237; 38 L.J.Q.B. 225; 21 L.T. 359; 33 J.P. 709; 12 Digest (Repl.) 311, 2401.

**Applications** for new trial. Consolidated actions were tried before WRIGHT, J., and a special jury at the Guildhall on May 6 and 7, 1892.

**E** The plaintiffs, Scott, who was interested in floating the Steam Loop Co., and Slaughter, the solicitor of the company, brought actions against Brown, Doering, McNab & Co., brokers to the company, to recover money paid by the plaintiffs to the defendants on contracts for the purchase of shares in the company. One Gillespie was one of the principal promoters of the company.

**F** The following statement of facts is taken from the judgment of LOPES, L.J. : The defendants in both actions were members of the London Stock Exchange, and in December, 1890, they were brokers to the Steam Loop Co., Ltd., which had issued a prospectus inviting subscriptions for its share capital, and the defendants had previously to such issue, underwritten a part of the share capital of the company and were holders of a considerable number of shares of the company. The plaintiffs in the second action were the solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants, on the ground, among others, that, instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares.

**G** The plaintiffs in both actions relied upon a contract contained in certain letters and telegrams passing between the plaintiffs and the defendants between Dec. 6 and 9, 1890. On Dec. 6, 1890, the following telegrams passed: McNab to Scott :

"Should advise you to get 5,000 done by Trust Co. Steam Loop."

McNab to Scott :

**I** "Must have positive order from you to buy at least 500 Loop shares in market on Monday, to start market on. Gillespie and Jack doing this on understanding that you do so. This necessary to ensure public application and to start market. Reply."

McNab to Scott :

"Unless have telegram agreeing to my former wire as to market in shares I must withdraw from this business."

McNab to Scott :

"You must agree, otherwise I drop the whole thing, as without it advertise-



ments wasted and no public application; also no market in shares. Waiting reply."

Scott to Slaughter:

"McNab wires me I must give him positive order buy 500 Loop shares in market on Monday start market. Gillespie and Jack doing same condition I do. Wired no. McNab replies must, otherwise he will drop the whole business. I reply by writing him to-night. Wire what you advise."

Slaughter to Scott:

"Have agreed with McNab that the 500 Gillespie owed us may be applied market purposes. Think additional support needed. Written you fully to-night."

Scott to Slaughter:

"Am quite agreeable to what you have arranged with McNab."

On the same day McNab wrote to Scott:

"As I wired you to-day, it is an absolute necessity that somebody sends orders to buy Steam Loop in the market, otherwise who is going to start the market? Slaughter and myself are going 500 shares, Gillespie 500, Burnham 100, Jack 200, and honestly you ought to go at least 500. There is no risk in the matter. We have absolutely £47,000 underwritten, and whatever the public come in for will help the market. Then, again, unless we can get a quotation into the papers, saying the shares are at a premium, on Monday, we will never get the public on. This we can manage with practically no risk to ourselves if we combine and absolutely buy the shares. If we do not do it, the money spent on advertisements is simply thrown away. . . . If I am to go on at all I must know that some one is going to back me up in at least starting the market in the shares. If it is not done I must give up the whole business, as otherwise I will be nothing more than a fool in this business. It is a vital point, and, whatever you write me to-night, please understand that it has to be done, and I must have orders on Monday from some one in Manchester to start the market on. . . . Do give this matter your assent, and wire me early on Monday that you are good for a purchase of at least 500 shares in the market. You must excuse my having written and wired so strongly about this, but it is an absolute necessity that it has to be done. You have only to ask any one about new companies if it is not a necessity. Awaiting your reply on Monday morning."

On Dec. 7, 1890, Scott wrote in reply to Slaughter:

"As I wired you last night, I am quite agreeable that the £500 you, McNab, and I lent Gillespie shall be used to make a market, on condition that Gillespie gives you a written promise to pay the £500 in cash as soon as he has received his cash from the company. I am agreeable to this £500 also being spent in making a market, if you are."

On Dec. 8, 1890, Slaughter wrote to McNab:

"Steam Loop.—On behalf of Mr. D. Scott, I hereby authorise you to buy at a premium ordinary shares up to £500."

On the same day, Gillespie wrote to Slaughter:

"You have authorised Mr. McNab on Mr. Scott's behalf to buy at a premium ordinary shares up to £500, I write this line to confirm to you that it has been agreed between us that the £500 in cash or the £600 in shares which I have promised to Mr. Scott shall be £500 in cash, and shall be paid out of the second instalment I receive."

On Dec. 9, 1890, Brown, Doering & Co. wrote to Slaughter as follows:

"We beg to enclose contract for purchase of 429 Steam Loop shares at 6s. 7d. premium. This is your proportion of the shares bought up to-night, taking

A an average of the orders from D. Scott, Gillespie, Burnham, and Jack. We have also averaged the price of the shares. We have forwarded to the "Financial News" the contract note for shares bought to-day on your behalf—150 shares, at 8s. 4½d. premium—to get the quotation."

B WRIGHT, J., held that there was no evidence to go to the jury in support of the plaintiffs' case, and directed the jury that there must be a verdict for the defendants, and after drawing attention to the letters which passed between the parties, said :

C "I am not going in this case either to express any opinion myself, or to ask you to express an opinion as to what these particular parties did; but as the question has arisen, I do say that if persons, for their own purposes of speculation, create an artificial price in the market by transactions which are not real, but are made at a nominal premium merely for the purpose of inducing the public to take shares, they are guilty of as gross a fraud as has ever been committed, and of a fraud which can be brought home to them in a criminal court."

D The plaintiff applied for a new trial.

*Reid, Q.C.*, and *Boydell Houghton* for the plaintiffs.

*Willis, Q.C.*, and *C. Rose Innes* for the defendants Brown and Doering.

*Murphy, Q.C.*, and *P. Rose Innes* for the defendant McNab.

E The court raised the objection that the evidence appeared to disclose an illegal conspiracy, in which the plaintiffs had taken part, and were, therefore, disentitled to relief.

*Cur. adv. vult.*

Aug. 1, 1892. The following judgments were read.

F LINDLEY, L.J. My brother A. L. SMITH has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.

G Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of LORD

E MANSFIELD in *Holman v. Johnson* (1).

I In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shows conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. But his illegal contract confers no rights on him: see *Pearce v. Brooks* (2). The illegal purpose of the plaintiff distinguishes this case from *Wetherell v. Jones* (3) and others of a similar

kind. I am quite aware that what the plaintiff has done is very commonly done; A  
it is done every day. But this is immaterial. Picking pockets and various forms  
of cheating are common enough, and are nevertheless illegal. The plaintiff was  
not entitled to judgment in the court below, and he has no right to a new trial.

**LOPES, L.J.**, stated the facts set out above, said that it was unnecessary to B  
determine the holding of **WRIGHT, J.**, that there was no evidence to go to the jury  
in support of the plaintiff's case and that there was a preliminary matter to be  
considered of which the judge might and the court could and should take judicial  
notice, and continued: I have read these letters and telegrams to show what the C  
nature of the transaction was. In my judgment, it was an agreement between the  
plaintiffs and defendants to induce would-be buyers of shares in this company,  
contrary to the fact, to believe that there was a market for its shares, and that the  
shares were of greater value than they really were. Putting it shortly—an agree-  
ment to cheat the public by leading them to believe the shares had a value, which  
the plaintiffs and defendants knew they had not, and thus inducing them to become  
purchasers. Is such a transaction illegal? I am of opinion that it is, and might  
be made the subject of an indictment for conspiracy.

*R. v. De Berenger* (4) is an authority on this subject. It was an indictment for D  
conspiracy by false rumours to raise the price of the public government funds  
with intent to injure those who should purchase, and **LORD ELLENBOROUGH, C.J.**,  
said (3 M. & S. at pp. 72, 73):

"A public mischief is stated as the object of this conspiracy; the conspiracy is E  
by false rumours to raise the price of the public funds and securities; and the  
crime lies in the act of conspiracy and combination to effect that purpose, and  
would have been complete, although it had not been pursued to its conse-  
quences, or the parties had not been able to carry it into effect. The purpose  
itself is mischievous, it strikes at the price of a vendible commodity in the  
market, and if it gives it a fictitious price by means of false rumours, it is a  
fraud levelled against all the public, for it is against all such as may possibly F  
have anything to do with the funds on that particular day."

I can see no substantial distinction between false rumours and false and fictitious  
acts; the price of the shares in this case was artificial, and the premium unreal  
and nominal, to the knowledge of all parties concerned, put forward to induce  
the public to take shares, with which otherwise they would have had nothing to do.

Again, in *R. v. Aspinall* (5) it was held that an agreement to cheat and defraud G  
by means of false pretences those who might buy shares was an indictable offence.  
**BRETT, L.J.**, said (2 Q.B.D. at p. 59):

"If the second count in this indictment contains averments sufficiently stated  
which are enough to show sufficiently that the defendants unlawfully, i.e., with  
minds intending to do wrong, agreed by false pretences to cheat and defraud  
those who might buy shares in the company, it sufficiently alleges a criminal H  
conspiracy."

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal  
agreement. If the agreement is illegal, the question arises, whether the plaintiffs  
are not disentitled to recover, and whether they have not forfeited the relief which  
a court of law in other circumstances would have afforded them. *Begbie v. Phos- I*  
*phate Sewage Co.* (6) is conclusive on this point. It was an action for money had  
and received, plea never indebted, and it was held that the plaintiff could not  
recover because he was aware that no exclusive right to use the process in question  
could be obtained, and had entered into the contract with the defendants in  
contemplation of a fraud upon the shareholders of the intended company. **COCK-  
BURN, C.J.**, said (L.R. 10 Q.B. at pp. 499, 500):

"Another ground of defence insisted on is that, the money having been paid  
for the purpose of defrauding the intended shareholders, by holding out to them



A the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company, that no exclusive right existed or could be obtained, the plaintiff cannot maintain an action to recover back the money, on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. . . . Under these circumstances we are of opinion that the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover.

B The case falls immediately within the principle of the decisions in *Simpson v. Bloss* (7), *Jones v. Yates* (8), and *Fivaz v. Nicholls* (9). The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

C Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point was taken by the court and acted upon. The plaintiffs cannot and do not in this case more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

D A. L. SMITH, L.J.—The plaintiff Scott applies to this court to set aside a non-suit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Co., and for the return of £632 3s. 5d. paid thereunder to the defendants, upon the ground, among others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the £632 3s. 5d. sought to be recovered in this action was paid by the plaintiff to the defendant in pursuance of an agreement come to between the plaintiff and the defendant McNab, that McNab should therewith purchase 500 shares of the projected company when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that the shares of the company were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and WRIGHT, J., who tried the case, made some strong comments upon their conduct, but did nothing further in the matter.

H If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumours to endeavour to raise the price of the public funds on a particular day: see *R. v. De Berenger* (4). It has also been held in *R. v. Aspinall* (5) that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences: see *R. v. Hudson* (10). LOPES, L.J., has gone fully into the correspondence, but the telegram and letter of Dec. 6, 1890, from the defendant McNab to the plaintiff; the letter of Dec. 7, 1890, from the plaintiff to Slaughter, and of Dec. 8, 1890, from Slaughter to McNab, in my judgment are sufficient. These documents contain, in my judgment, conclusive proof that the plaintiff and McNab, agreed together to cheat and

defraud those who might buy shares in the company, by leading them to believe that the shares were at a genuine premium, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchase to be made with the plaintiff's £632 3s. 5d. by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case as showing the purposes for which the plaintiff and the defendant McNab had agreed that the purchases should be made. The agreement between two or more to do an illegal act has been proved.

The next question is: Was it shown that the plaintiff and McNab agreed to carry out this intention by illegal means—viz., by deceit and fraud? For if so, there can be no possible doubt that an indictable conspiracy has been committed, viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in his paying his £632 3s. 5d. to McNab to purchase shares with upon the open market, and if that had been all I agree; but the question is, was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company? I am of opinion that it was. Test it in this way. Suppose a purchaser was induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the same proposition, viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved. For the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

How does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action. This was decided in *Taylor v. Chester* (11), where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.* (6), where it was not pleaded, but, the fraud being apparent, the court would not interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to "keep up the price of the shares," which upon the evidence was shown to be "to create a fictitious premium." In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by the learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim in *pari delicto potior est conditio possidentis* applies, and this court ought not to assist the plaintiff when he seeks to recover the £632 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.

*Appeal dismissed.*

Solicitors: *C. T. Whinney; A. L. Armitage.*

[*Reported by W. C. Briss, Esq., Barrister-at-Law.*]

## JACKSON v. BARRY RAIL. CO.

[COURT OF APPEAL (Lindley, Bowen and A. L. Smith, L.JJ.), November 16, 24, 1892]

[Reported [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207]

*Arbitration—Arbitrator—Unfitness—Preclusion from keeping mind open.*

The plaintiff contracted to construct a dock for the defendant company, the contract providing that any dispute between the company and the contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be referred to the company's engineer as arbitrator. A dispute arose whether under the contract the interior of a certain embankment was to be made of stone, or whether it might be filled up with rocky marl, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. Correspondence took place between the contractor and the engineer, in which the engineer stated that, in his opinion, the contract bound the contractor to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After the reference and on the day for which the first appointment was made, the engineer wrote to the contractor, repeating his former opinion. The plaintiff brought an action to restrain the company from proceeding further with the arbitration.

**Held:** (i) considering that the arbitrator, as engineer of the company, must necessarily have already expressed an opinion on the disputed point, the fact that after the commencement of the arbitration he wrote a letter in which he repeated the same opinion did not disqualify him from acting as arbitrator unless the true inference to be drawn from the letter was that he had precluded himself by it from keeping his mind open, and from deciding according to the evidence and the advice of his legal assessor; (ii) (A. L. SMITH, L.J., dissentiente), the letter did not show that the arbitrator had precluded himself from keeping his mind open and the injunction must be discharged.

**Quære**, whether there was jurisdiction to grant an injunction.

**Notes.** The Arbitration Act, 1889, s. 19, was repealed by the Arbitration Act, 1934, s. 21, and 3rd Sched., and replaced, with amendments, by s. 9 (2) of that Act, which is now reproduced in the Arbitration Act, 1950, s. 21 (21 HALSBURY'S STATUTES (2nd Edn.) 106).

Applied: *Eckersley v. Mersey Docks and Harbour Board*, post; [1894] 2 Q.B. 667. Followed: *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835. Distinguished: *Freeman v. Chester R.D.C.*, [1911] 1 K.B. 783; *J. Aird & Co. v. Bristol Corpn.*, *Bristol Corpn. v. J. Aird & Co.* (1913), 77 J.P. 209. Referred to: *Re Nott and Cardiff Corpn.*, [1918] 2 K.B. 146; *Maclean v. Workers Union*, [1929] All E.R.Rep. 468; *Offer v. Minister of Health*, [1935] All E.R.Rep. 148.

As to jurisdiction to grant leave for revocation of authority of arbitrator and as to what constitutes misconduct on the part of an arbitrator, see 2 HALSBURY'S LAWS (3rd Edn.) 15 et seq., 57 et seq.; and for cases see 2 DIGEST (Repl.) 498 et seq.

Case referred to:

(1) *Beddow v. Beddow* (1878), 9 Ch.D. 89; 47 L.J.Ch. 588; 26 W.R. 570; 2 Digest (Repl.) 499, 476.

Also referred to in argument:

*Nuttall v. Manchester Corpn.* (1892), 8 T.L.R. 513; 2 Digest (Repl.) 488, 406.



*Scott v. Carluke Local Authority* (1879), 16 Sc.L.R. 435; 6 R. (Ct. of Sess.) 616; **A**  
2 Digest (Repl.) 521, 454.

*Pickthall v. Merthyr Tydvil Local Board* (1886), 2 T.L.R. 805; 2 Digest (Repl.)  
487, 405.

**Appeal** from a decision of KEKEWICH, J.

On Nov. 27, 1891, the Barry Rail. Co. accepted a tender by the plaintiff, Jackson, **B**  
to construct a dock for them at the price of £152,938 7s. 6d., according to a  
specification which contained the following clause :

"50. In the event of any question or dispute arising between the company  
and the contractor as to the intent and meaning of any part of this specification  
or of the drawings referred to therein, or of any further drawings to be pre-  
pared, or as to the intent and meaning of any part of the tender or schedule of **C**  
quantities and prices, or the application of the same to the account of the con-  
tractor, or as to the manner of executing the works, or the quality or description  
of the materials, implements, or plant used or required to be used in the works,  
or as to the mode of measuring the works or the computation of or payments  
for the same, or as to the interpretation, meaning, or effect of the clauses and  
conditions of the contract, or of any of them, or as to any other matter or **D**  
thing whatever connected with or arising out of the contract or incidental  
thereto, or not thereby provided for, such questions or disputes shall be referred  
to the engineer, whose decision shall be conclusive and binding on both  
parties."

Another clause provided that in the specification the word "engineer" should **E**  
mean one J. W. Barry, or other the engineer for the time being appointed by the  
company.

While the works were in progress, a question arose as to the construction of an  
embankment or breakwater. It was not disputed that it was to be faced with  
stone, but the contractor and the engineer could not agree as to the filling up.  
The engineer assented to a portion of the filling up being done with rocky marl, **F**  
but required the rest to be rubble stone, which was more expensive than filling up  
with rocky marl. It was not disputed that the engineer could direct this to be  
done, but the question arose whether the contractor was entitled to be paid for the  
stone as an extra. Correspondence took place on the subject between the plaintiff  
and Barry and on July 20 Barry wrote :

"Although the whole of the hearting of the old breakwater consists of hard **G**  
rock filling, I am willing to agree as a concession to you, that a portion of the  
hearting of the closing bank may be formed of rocky marl, the remainder of  
the closing bank being made with hard rock obtained by the excavation of  
the lock, which is to be selected and put into the closing bank, instead of being  
carried to spoil or used in any other way."

On July 22 the plaintiff wrote : **H**

"I can only say that we are saving the good stone we are now getting from  
the lock excavations for use in the internal masonry as provided in the note on  
p. 39 of the specification, and I must decline to deposit it as you wish at the  
breakwater, unless it is agreed that I shall be paid for it."

On July 25 Barry wrote : **I**

"I have received your letter of July 22, 1892, in which you refuse to deposit  
any of the stone obtained from the excavations of the lock as required by me in  
the closing bank to the western breakwater unless it is agreed that you shall  
be paid for it. I beg to say that I am willing to hear any arguments which  
you may have to adduce in support of your construction of the specification,  
but I distinctly decline to come to any agreement on the subject until the  
arguments are heard on both sides and the matter is decided. In the mean-

**A** time I call upon you to proceed with the work in accordance with my instructions."

On July 26 Barry wrote a letter stating :

**B** "The bank to the breakwater is not a tip for spoil as you seem to describe it, but is a contract work specially shown upon the contract drawing, and referred to in the specification, and was always intended to be made of hard rock from the excavation through the whole of its cross-section, until, as a concession to you, I agreed that the central part might be made of rocky marl according to a cross-section which had been sent to you, showing what I would accept."

**C** As the plaintiff still maintained that he was not bound to fill up with stone unless he was paid for it as an extra, on July 28 the company's solicitors gave notice to the plaintiff that they should forthwith apply to the engineer to fix an early day for hearing the parties and determining the dispute. They applied on the same day, and the engineer made an appointment for Aug. 2, when a meeting took place, at which the engineer appointed a lawyer to be his assessor. On Aug. 1, the plaintiff **D** commenced this action to have the construction of the specification as regards this question determined, and for an injunction to restrain the company from proceeding with the arbitration.

On July 28 the plaintiff wrote to Barry giving various reasons in support of his own construction of the specification, and containing the following statement :

**E** "Moreover, after the tender was accepted, it was I who first suggested to you the unadvisability of using marl for the heaving of the breakwater without a stone bank to protect it."

On Aug. 2 Barry replied as follows :

**F** "I have your letter of July 28. In view of the fact that this matter has now reached the stage of arbitration, I must decline to enter into any of the arguments advanced in that letter, and will content myself by saying, in order to avoid any misconstruction which might hereinafter arise from my allowing the statement to pass unnoticed, that I cannot in any way agree with your statement, that it was you who first suggested 'the unadvisability of using marl for the heaving of the breakwater without a stone bank to protect it.' On the contrary, as I have already stated in my previous letters, there was **G** never any intention to construct this breakwater in any way differently from the others, namely exclusively of stone, filling with protecting stones on the outside, and smaller protecting stones on the inside, until in December last I agreed to accept a small portion of rocky marl as a concession to you."

**H** On Aug. 10, 1892, KEKEWICH, J., granted the plaintiff an injunction restraining the defendants from further proceeding to arbitration, saying that, as the parties had chosen to refer all matters in dispute to Barry, the court could not take into consideration that he might have a strong natural bias to construe the contract in the manner most creditable to himself as being responsible for its contents, but that the clause making him arbitrator was never intended to enable him to act as such with reference to a question on which he had already come to a conclusion, and that his letters, especially that of Aug. 2, showed he did not bring an open **I** mind to the case, but had made up his mind upon it.

The defendants appealed.

*Marten, Q.C., Sir Richard Webster, Q.C., and Kenyon Parker for the defendants. The Solicitor-General (Sir John Rigby, Q.C.), Warmington, Q.C., and Mulligan for the plaintiff.*

*Cur. adv. vult.*

Nov. 24, 1892. The following judgments were read.

**LINDLEY, L.J.**—This is an appeal from an order made by KEKEWICH, J., granting an injunction to restrain the defendants, the Barry Rail. Co. and their agents, until the trial from further proceeding with a reference to arbitration before Mr. John Wolfe Barry on the question which had arisen under the agreements in the writ of summons mentioned. A

It appears by those agreements, to which I shall not have to refer at any great length, that Mr. Jackson, the plaintiff, undertook certain works for the Barry Rail. Co. The engineer was Mr. John Wolfe Barry. The agreement for the construction of the works is a very long one, and contains a great number of clauses which have become very common in contracts of this kind, and in particular there is cl. 50 which I will read. [His LORDSHIP read cl. 50.] That is part of the bargain, and it means, to put it more shortly, that if any dispute arises between the contractor and the company, or in substance—the engineer being the person to look after the contractor in the interest of the company—if any dispute arises between the contractor and the engineer, it is to be decided by the engineer. A question did arise as to whether, under the terms of the contract, the contractor was bound to use stone for a certain portion of the works which he had contracted to do, and whether, if he was bound to use it, the price of it was covered by the contract price, or was to be treated and paid for as an extra. The contractor did not deny that he was bound to put in stone if ordered by the engineer, and the engineer did order it; but the question then was, whether the contractor was bound to put in stone for the contract price, or whether, if he put in stone in obedience to the order of the engineer, that would be an extra. The engineer told the contractor his view of it, and I do not see how, considering his position, he could help expressing his view. His view was, that the contractor was bound to put in this stone, and was not at liberty to charge for it as an extra. The contractor's view was, that if he put it in he was at liberty to charge for it as an extra. That being the nature of the question which had arisen, the company proceeded to make arrangements to have it settled by arbitration, and on July 28 Barry appointed "twelve o'clock noon on Tuesday next, Aug. 2, for proceeding with the arbitration." Before that date arrived Jackson wrote a long letter to Barry enforcing his views and containing a statement which Barry did not admit to be accurate, and on Aug. 2, 1892, which it will be observed was the day already fixed for the arbitration, Barry wrote and sent to Jackson the letter which I am about to read. [His LORDSHIP read Barry's letter of Aug. 2.] B  
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It is contended by Jackson, and the judge has acceded to that contention, that the true inference to be drawn from this letter is, that Barry, who was then about to enter upon his duties as arbitrator, had not left his mind open, but had, before hearing the case, and before being advised by his legal assessor, so tied himself down by this letter as not to leave it reasonably open to him to depart from the view which he had previously taken and previously expressed. Unquestionably, if I drew the same inference from this letter, I should agree in the consequence; but I am unable to draw that inference. It appears to me that, when you look at this letter carefully, it is perfectly consistent with this letter that Barry merely repeats what he had said scores of times before, that his opinion was that the contract entitled the company to have stone without paying extra for it. I do not understand this letter as expressing, or as implying or insinuating, "I have made up my mind, and whatever my assessor may advise me I shall stick to my opinion." I think it would be a strained interpretation to come to that conclusion. Unless that is so, unless we can draw the inference that the engineer has precluded himself by this letter from keeping his mind open, and from deciding according to the evidence and according to the advice which might be given him, we ought not, in my opinion, to stop this arbitration, and I say that the more readily because, under s. 19 of the Arbitration Act, 1889, there is a method by which the contractor can, if he feels aggrieved, obtain the opinion of the court upon the true construction of the contract. Under that section the engineer can, and if directed by the court he must, state a Case for the opinion of the court upon any question of law G  
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A arising in the course of the reference, and I cannot infer from this letter that Barry was in the least reluctant to exercise that power, even without the direction of the court.

Upon these grounds I am unable to concur in the view taken by the judge, and I think the injunction ought to be discharged. I have assumed for the moment that there is jurisdiction to grant the injunction. That point was hardly pressed  
B and hardly argued, and I pass it by, simply observing that, if the point ever should come up for decision again, it must be rather more carefully considered than it has been in this case. I do not deny the jurisdiction—far from it; but, on the other hand, I wish to guard myself from passing that over as if it were a matter of course. I decide the question upon the merits. I cannot agree with the judge, and I think the appeal must be allowed, and the order discharged with costs.

C **BOWEN, L.J.**—It was an essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided, not by a stranger or a wholly unbiased person, but by the company's engineer himself. Technically the controversy is one between the plaintiff and the railway company, but  
D virtually the engineer on such an occasion must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the  
E burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced  
F views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might  
G have formed he would be ready to listen to argument, and at the last moment to determine as fairly as he could after all had been said and heard.

The question in the present appeal is whether the engineer of the company has done anything to unfit himself to act or render himself incapable of acting not as an arbitrator without previously formed or even strong views, but as an honest  
H judge of this very special and exceptional kind. I will assume (without deciding) what was assumed by both sides in the argument at the Bar, that the point before us is properly raised in such an action as the present, and consider the matter entirely on the merits. That the letter of Aug. 2 shows Barry to have had and retained up to the opening of the arbitration a rooted view that the contractor was wrong is obvious. This Barry may not have been able to avoid. Has he, then, disqualified himself from pursuing the function of such an arbitrator as the contract  
I contemplates by informing the contractor, in answer to the contractor's controversial letter, of what the contractor I am convinced well knew already—viz., that Barry wholly disagreed with him? I cannot see that the letter of Aug. 2 warrants the inference that Barry would not or could no longer do his best, when the matter formally came before him and his legal assessor, to decide honestly between his own distinct view and that of the contractor. He re-states, it is true, what he had already stated, and I daresay he thought it fair and honest towards the contractor to do so. I should agree with the judgment of KEKEWICH, J., if I thought the letter of Aug. 2 amounted to an intimation that the contractor would not be

out this agreement was passed and confirmed. All the creditors of the company had either been paid or had assented to the arrangement.

**Held:** the arrangement was not ultra vires the company, and should be sanctioned by the court.

*Re Denver Hotel Co.* (1) [1893] 1 Ch. 495, distinguished.

*Trevor v. Whitworth* (2), (1887), 12 App. Cas. 409, explained.

**Notes.** The Companies Acts, 1867 and 1877, have been repealed. The reduction of share capital is now governed by the Companies Act, 1948, ss. 66-68.

Applied: *Re London and New York Investment Corp.*, [1895] 2 Ch. 860; *Re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846. Explained: *Re Anglo-French Exploration Co.*, [1902] 2 Ch. 845. Followed: *Re Credit Assurance and Guarantee Corp.*, [1902] 2 Ch. 601; *Poole v. National Bank of China, Ltd.*, [1904-7] All E.R.Rep. 138. Applied: *Re Jewish Colonial Trust (Juedische Colonialbank)*, [1908] 2 Ch. 287; *Ex parte Westburn Sugar Refineries, Ltd.*, [1951] 1 All E.R. 881. Considered: *Re Great Universal Stores, Ltd.*, [1960] 1 All E.R. 252. Referred to: *Re Floating Dock Co. of St. Thomas*, [1895] 1 Ch. 691; *Re Barrow Hæmatite Steel Co. (No. 2)* (1901), 71 L.J.Ch. 15; *Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14; *Re Development Co. of Central and West Africa*, [1902] 1 Ch. 547; *Re Welsbach Incandescent Gas Light Co.* (1903), 89 L.T. 645; *Re De la Rue*, [1911] 2 Ch. 361; *Rowell v. Rowell*, [1912] 2 Ch. 609; *Re Showell's Brewery Co.* (1914), 30 T.L.R. 428; *Re Mackenzie & Co., Ltd.*, [1916-17] All E.R.Rep. 1018; *Campbell v. Rofo*, [1933] A.C. 91; *Carruth v. Imperial Chemical Industries, Ltd.*, [1937] 2 All E.R. 422; *Scottish Insurance Corp., Ltd. v. Wilsons and Clyde Coal Co.*, [1949] 1 All E.R. 1068; *I.R.Comrs. v. Universal Grinding Wheel Co.*, [1953] 2 All E.R. 133.

As to equality of rights attaching to shares and the power of the court to confirm a reduction of capital, see 6 HALSBURY'S LAWS (3rd Edn.) 139, 157, 166; and for cases see 9 DIGEST (Repl.) 151-152. For the Companies Act, 1948, ss. 66-68, see 3 HALSBURY'S STATUTES (2nd Edn.) 515-518.

Cases referred to :

- (1) *Re Denver Hotel Co.*, [1893] 1 Ch. 495; 62 L.J.Ch. 450; 68 L.T. 8; 9 T.L.R. 169; 41 W.R. 339; 37 Sol. Jo. 191; 2 R. 330, C.A.; 9 Digest (Repl.) 159, 925.
- (2) *Trevor v. Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745; 32 Sol. Jo. 201, H.L.; 9 Digest (Repl.) 97, 434.
- (3) *Re Ebbw Vale Steel, Iron and Coal Co.* (1877), 4 Ch.D. 827; 46 L.J.Ch. 241; 36 L.T. 308.
- (4) *Hutton v. Scarborough Cliff Hotel Co., Ltd.* B. (1865), 2 Drew. & Sm. 521; 13 L.T. 57; 11 Jur.N.S. 849; 13 W.R. 1059; 62 E.R. 717; sub nom. *Hutton v. Berry*, 6 New Rep. 376; 9 Digest (Repl.) 84, 355.
- (5) *Harrison v. Mexican Rail. Co.* (1875), L.R. 19 Eq. 358; 44 L.J.Ch. 403; 32 L.T. 82; 23 W.R. 403; 9 Digest (Repl.) 234, 1523.
- (6) *Guinness v. Land Corp. of Ireland* (1882), 22 Ch.D. 349; 52 L.J.Ch. 177; 47 L.T. 517; 31 W.R. 341, C.A.; 9 Digest (Repl.) 82, 349.
- (7) *Re South Durham Brewery Co.* (1885), 31 Ch.D. 261; 55 L.J.Ch. 179; 53 L.T. 928; 34 W.R. 126; 2 T.L.R. 146, C.A.; 9 Digest (Repl.) 84, 356.
- (8) *Re Barrow Hæmatite Steel Co.* (1888), 39 Ch.D. 582; 58 L.J.Ch. 148; 59 L.T. 500; 37 W.R. 249; 4 T.L.R. 775; 9 Digest (Repl.) 161, 949.

**Appeal** from a decision of the Court of Appeal (LINDLEY, BOWEN and A. L. SMITH, L.J.J.), affirming a decision of NORTH, J.

The facts of the case are fully set out in the opinion of LORD HERSCHELL, L.C. In the courts below it was held that the case was governed by *Re Denver Hotel Co.* (1).

*Cozens-Hardy, Q.C.*, and *Kirby* for the appellant company.

*Romer* for the respondent, a dissentient shareholder.

A Their Lordships took time for consideration.

April 16, 1894. The following opinions were read.

B LORD HERSCHELL, L.C. The appellant company on May 18, 1892, presented a petition praying that a special resolution passed and confirmed at extraordinary general meetings of the corporation might be confirmed by the court. The resolution provided for a modification of the conditions of the memorandum of association by a reduction of the capital of the company from £2,000,000, divided into 188,600 ordinary shares of £10 each, and 114,000 general founders' shares of £1 each (of which there had been issued 63,109 ordinary and 72,298 general founders' shares), to £1,691,737, divided into 160,767 ordinary shares of £10 each and 84,067 general founders' shares of £1 each, and that the remainder of the capital—namely, the 27,833 ordinary shares, numbered as therein mentioned—be paid off (the capital represented thereby being in excess of the wants of the company), and that such last-mentioned ordinary and general founders' shares respectively and all liability thereon be wholly extinguished. The company had carried on business in the United States, and a portion of its investments were in that country. These investments had been made by the directors on the advice of a committee of the board resident in America.

D Differences arose between the board of directors in England and the American committee as to the management of the business of the corporation, which rendered it impossible to carry on such business both in England and the United States with advantage. It was accordingly determined that the best course to be adopted was that the company should cease to carry on business in the United States, and it was arranged that the American investments should be made over to the American shareholders subject to the payment of £11,000 to the corporation, and that the shares held by the American shareholders should be cancelled, thus reducing pro tanto the capital of the company. This arrangement was, as I have stated, approved by the shareholders at two extraordinary general meetings. All the creditors of the company have either been paid or have assented to the arrangement.

E The interests of the shareholders alone have, therefore, to be considered. On the hearing of the petition confirmation by the court was opposed by one of their number. NORTH, J., dismissed the petition with costs, and his decision was affirmed by the Court of Appeal. The case was, in both courts, supposed to be governed by the views expressed by the Court of Appeal in *Re Denver Hotel Co.* (1) that a company could not reduce its capital by paying off some of its shareholders unless all shareholders of the same class were dealt with alike. The merits of the arrangement embodied in the resolution now in question were not entered into. The position assumed was that the court had no power to confirm it as being ultra vires.

G This renders it necessary to consider carefully what are the powers conferred by the Companies Act, 1867, and the amending Act of 1877. By the earlier of these statutes companies were for the first time empowered to reduce their capital. Section 9 provides that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum as to reduce its capital; and by s. 11 a company which has passed a special resolution for reducing its capital may apply to the court by petition for an order confirming the reduction, and on the hearing of the petition the court, if satisfied that every creditor entitled to object to the reduction has either been paid or been secured or consents, may make an order confirming the reduction. In consequence of views indicated by SIR GEORGE JESSEL, M.R., in *Re Ebbw Vale Steel, Iron, and Coal Co.* (3), that the Act of 1867 did not sanction the return of unpaid capital the Act of 1877 was passed. It was enacted by s. 3 that "capital," as used in the Act of 1867, shall include paid-up capital, and the power to reduce capital conferred by that Act "shall include a power to pay off any capital which may be in excess of the wants of the company." To the terms of s. 4 I shall have occasion to refer presently.



It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured. A

It can scarcely be denied that such a scheme as that under consideration, by which certain of the shareholders receive a part of the assets of the company equivalent to their shares therein, such shares being then cancelled, is a mode of effecting a reduction in the capital of the company. When *Trevor v. Whitworth* (2) was before this House LORD MACNAGHTEN said (12 App. Cas. at pp. 437, 438): B

“I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless their prescribed conditions and restrictions are observed. Now the Act of 1882 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power to ‘pay off any capital which may be in excess of the wants of the company,’ and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or ‘the payment to any shareholder of any paid-up capital.’ It follows that, if the operation be affected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital, within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.” C  
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I did not express myself so definitely on the point, but I said (*ibid.* at pp. 415, 416):

“Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867, provision was made enabling a company, under strictly defined conditions, to reduce its capital. Nothing can be stronger than these carefully worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be.” G

Further on I said (*ibid.* at p. 416):

“And the stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result.” H

There can be no doubt that the ratio decidendi in that case was in part, at least, this—that a company which paid away its assets for the purchase of its own shares did thereby reduce its capital, and that not in a manner authorised by the legislature. I

If, then, the scheme which the court is asked to confirm be in fact one for reduction of capital, I am, with all deference, at a loss to understand how the court in confirming it could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. Indeed, s. 4 of the Act of 1877 recognises that a scheme may involve the payment to a shareholder of a

A part of the paid-up capital, for it enacts that where the reduction of capital by the company does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the creditors of the company, unless otherwise directed by the court, shall not be entitled to object or required to consent to the reduction. In *Re Denver Hotel Co.* (1), LINDLEY, L.J., delivering the judgment of the court, said ([1893] 1 Ch. at pp. 505, 506):

B "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost, nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of s. 3 of the Companies' Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard LORD MACNAGHTEN's judgment in *Trevor v. Whitworth* (2) as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts, 1867 and 1877, it is ultra vires of a limited company to buy its own shares, even if its memorandum and articles expressly authorise it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself."

If all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder

E and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the court to refuse to confirm such a resolution, or which shows that it would be ultra vires to do so. I do not see any danger in the conclusion that the court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the legislature. The interests of creditors are not involved, and I think it was

F the policy of the legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly protected by this: that the decision of the majority can only prevail if it be confirmed by the court. This is a complete answer to the argument ably urged by counsel for the respondent that if all the

G shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the majority. There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the court, and that no such scheme ought to be confirmed unless the court be satisfied that it will not work unjustly or inequitably. But this is

H quite a different thing from saying that the court has no power to sanction it.

It was further argued that the scheme was not within the statutory powers of the company, inasmuch as these were confined to paying off "any capital which may be in excess of the wants of the company." I may observe that s. 3 of the Act of 1877, which contains these words, only enacts that the power to reduce capital conferred by the Act of 1867, "shall include" that power. But even if this is

I to be regarded (which I am far from saying that it is) as a limitation of the power to reduce capital by paying off paid-up capital, I am of opinion that, in view of the alterations intended in the method of carrying on the business of this corporation the case is one in which the reduction has been effected because the capital is in excess of the requirements of the company. Assuming that it is within the power of the court to confirm such a scheme as the present, it was scarcely contended by the respondent that there was any ground for refusing to do so, or that it involved any result either unjust or inequitable; and, indeed, in

It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured. A

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Further on I said (*ibid.* at p. 416):

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There can be no doubt that the ratio decidendi in that case was in part, at least, this—that a company which paid away its assets for the purchase of its own shares did thereby reduce its capital, and that not in a manner authorised by the legislature. I

If, then, the scheme which the court is asked to confirm be in fact one for reduction of capital, I am, with all deference, at a loss to understand how the court in confirming it could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. Indeed, s. 4 of the Act of 1877 recognises that a scheme may involve the payment to a shareholder of a



A part of the paid-up capital, for it enacts that where the reduction of capital by the company does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the creditors of the company, unless otherwise directed by the court, shall not be entitled to object or required to consent to the reduction. In *Re Denver Hotel Co.* (1), LINDLEY, L.J., delivering the judgment of the court, said ([1893] 1 Ch. at pp. 505, 506):

B "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost, nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of s. 3 of the Companies' Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard LORD MACNAGHTEN's judgment in *Trevor v. Whitworth* (2) as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts, 1867 and 1877, it is ultra vires of a limited company to buy its own shares, even if its memorandum and articles expressly authorise it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself."

If all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder  
 E and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the court to refuse to confirm such a resolution, or which shows that it would be ultra vires to do so. I do not see any danger in the conclusion that the court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the legislature. The interests of creditors are not involved, and I think it was  
 F the policy of the legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly protected by this: that the decision of the majority can only prevail if it be confirmed by the court. This is a complete answer to the argument ably urged by counsel for the respondent that if all the  
 G shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the majority. There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the court, and that no such scheme ought to be confirmed unless the court be satisfied that it will not work unjustly or inequitably. But this is  
 H quite a different thing from saying that the court has no power to sanction it.

It was further argued that the scheme was not within the statutory powers of the company, inasmuch as these were confined to paying off "any capital which may be in excess of the wants of the company." I may observe that s. 3 of the Act of 1877, which contains these words, only enacts that the power to reduce capital conferred by the Act of 1867, "shall include" that power. But even if this is  
 I to be regarded (which I am far from saying that it is) as a limitation of the power to reduce capital by paying off paid-up capital, I am of opinion that, in view of the alterations intended in the method of carrying on the business of this corporation the case is one in which the reduction has been effected because the capital is in excess of the requirements of the company. Assuming that it is within the power of the court to confirm such a scheme as the present, it was scarcely contended by the respondent that there was any ground for refusing to do so, or that it involved any result either unjust or inequitable; and, indeed, in

view of the evidence before the court, it would not have been possible successfully to maintain such a contention. For these reasons I am of opinion that the judgment appealed from should be reversed, and that the special resolution should be confirmed, and I move your Lordships accordingly. Having regard to the fact that the term "reduced" has been used in describing the company for a very considerable time, I think that they may be allowed hereafter to discontinue that addition.

**LORD WATSON.**—The appellants, who are a company limited by shares, ask the court to confirm a special resolution for the reduction of their capital, which has been passed by a statutory majority of the members. The scheme submitted for confirmation involves the cancellation of all their unissued shares, and also the application of part of the available assets of the company to the purchase and extinction of a certain proportion both of general founders' shares and ordinary shares, those being the two classes into which their nominal capital is divided. If the scheme were carried out their reduced capital would consist of the shares now held by those members whose interests are not to be purchased and extinguished. The company have practically no outside creditors; but their petition is opposed by the respondent, who owns shares of both classes. At the Bar of the House he did not maintain that, under the scheme sought to be confirmed, the shareholders of either class, whether they were bought out or continued to be members, would not each of them receive a fair and reasonable equivalent for his present interest in the company, and nothing more. He relied solely upon the plea that it is beyond the statutory jurisdiction of the courts to sanction any scheme for the reduction of capital which does not deal in precisely the same way with each and every share belonging to the same class.

If that be the law it is manifest that in some cases the result might be unfortunate. Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter, and it may be greatly for the advantage of the company that the latter alternative should be adopted. Although every member of the company were agreed as to the desirability of taking that course, if the plea of the respondent be well-founded, the court would have no power to assist them. **NORTH, J.**, dismissed the petition, and his decision was affirmed by the Court of Appeal. There is no record before us of what was said by the judges; but it appears that the case was admitted by counsel to be within the rule expressed by **LINDLEY, L.J.**, in *Re Denver Hotel Co.* (1), and that the rule was followed as a precedent binding upon them, and without discussion by the Court of Appeal.

In that case the scheme before the court for its approval embraced a transaction for the sale of one of the company's assets to a shareholder. The sale was to be in consideration of a sum of £3,000, and, as **LINDLEY, L.J.**, states, "in further consideration of his surrendering his shares to the company." **NORTH, J.**, who had refused confirmation, held that the transaction amounted in substance to the repayment of capital to part of a class of shareholders, against the wish of one-seventh of the whole; and, in those circumstances, he was of opinion that he had no power to give effect to the arrangement, although he considered it to be a beneficial one, and would have been prepared to sanction it if he had the power to do so. The Court of Appeal reversed his judgment, and confirmed the resolution. They held that the transaction was not a purchase, but a surrender of shares, which could have been effected by the company without the sanction of the court. **LINDLEY, L.J.**, said ([1893] 1 Ch. at pp. 505, 506):

"If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of

A sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of s. 3 of the Companies Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself, by buying up his shares, and we cannot regard LORD MACNAGHTEN's judgment in *Trevor v. Whitworth* (2) as intimating that any such transaction is within the statute."

I agree with the lords justices in thinking that the observations made in *Trevor v. Whitworth* (2) by LORD MACNAGHTEN were not intended to have, and have not, any direct bearing upon the construction of the powers committed to the court, with respect to reduction of capital, by the Act of 1867 and subsequent statutes. They were directed to the point that the purchase of its own shares by a company, although made on terms advantageous, is, in effect, a reduction of its paid-up capital, and is, therefore, ultra vires of the company. For the purpose of this appeal *Trevor v. Whitworth* (2) does not appear to me to go further than to affirm that the purchase of its shares by a company is one of the methods by which a reduction of its capital can be effected. It does not establish that reduction by that method is more deeply tainted with illegality than any other means by which the same result is attainable.

To my mind, the only substantial question arising in this appeal is whether these empowering statutes give jurisdiction to entertain proposals for reduction of capital in any manner whatever of which the courts may approve, or whether their jurisdiction is excluded, in the case of proposals to reduce it by the purchase of shares. Section 9 of the Act of 1867 contains the leading enactments upon this subject. It enables a company limited by shares so far to modify the conditions in its memorandum of association as to reduce its capital, if authorised to do so by its regulations as originally framed, or as altered by special resolution. Section 11 provides that a company which has passed a special resolution to that effect may apply to the court for its confirmation. Specific directions are given for the guidance of the court, with the view of protecting the interests of creditors of the petitioning company; but, in so far as concerns the interests of its members, I do not find a single expression in the Act tending to indicate that the discretion of the court to grant or refuse such an application does not extend to every possible mode of reducing capital.

The decision of the Court of Appeal in *Re Denver Hotel Co.* (1) proceeds upon the view that reduction by purchase of shares is not covered by the words of s. 3 of the Act of 1877. Assuming that view to be correct, the section does not, in my opinion, derogate from the rights already given to companies, subject to the approval of the court, by the Act of 1867. It does not profess to give a complete definition of these rights; it simply explains, and possibly extends, in some particulars, the provisions of the previous statute. Section 4 contains a proviso which appears to me to support the inference that capital may be legitimately reduced by buying out some of the members of the company. It dispenses with certain conditions required by the Act of 1867, except in cases where the reduction of capital involves "either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital." These last words appear to contemplate that repayment of paid-up capital may be made either to all or to one or more of the body of shareholders.

For these considerations I cannot, notwithstanding the able argument of counsel for the respondent, resist the conviction that the courts below were bound to entertain the present case and to dispose of it upon its merits. I see no reason to doubt that the Court of Appeal arrived at a just conclusion in *Re Denver Hotel Co.* (1), although I am by no means satisfied that the surrender made in that case was one which the company could lawfully accept without the sanction of the



court. In *Trevor v. Whitworth* (2), LORD MACNAGHTEN said (12 App. Cas. at p. 438):

"I conceive that there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction."

I concur in that opinion; and I do not think the transaction ceases to be a sale in substance when the surrender of his share forms, not the whole, but part only, of the consideration given by a shareholder in exchange for an asset of the company. Seeing that the respondent has not argued that any injustice would follow to himself or any other member of the company, I am of opinion that your Lordships ought not only to reverse the judgments appealed from, but to confirm the special resolution.

**LORD MACNAGHTEN.**—I agree. Under the Companies Act, 1862, it was not competent for a company limited by shares to reduce its capital. Such an operation would have been in contravention of one or more of the statutory conditions of the memorandum, which the Act as it then stood made unalterable. The difficulty, however, was removed shortly afterwards by legislation. The Companies Act, 1867, declares that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum, if authorised to do so by its regulations as originally framed, or as altered by special resolution, as to reduce its capital. The power is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured, or their claims must be satisfied. The public, the shareholders, and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings, and by the discretion which is entrusted to the court. Until confirmed by the court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure. With these safeguards, which are certainly not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reductions may set free.

The Companies Act, 1877, was passed mainly in order to remove certain doubts created by the decision of SIR GEORGE JESSEL, M.R., in *Re Fbbw Vale Steel, Iron, and Coal Co.* (3), which was a surprise to the profession at the time, and is, I believe, generally thought to have been incorrect. At any rate, the Act of 1877 gives no support or countenance to the construction which SIR GEORGE JESSEL, M.R., adopted; in fact, it destroys the foundation of his argument. While it dispenses with the intervention of the court in the case of reduction of capital by cancellation of shares not taken or agreed to be taken by any person, it yet reserves to the court the power of requiring the consent of creditors in the case of reduction by cancellation of lost capital, the very case in which SIR GEORGE JESSEL, M.R., thought such a requirement so unreasonable that he felt constrained to hold that the case itself was not within the Act. The Companies Act, 1877, declares that certain cases to which, in the opinion of SIR GEORGE JESSEL, M.R., the Act of 1867 did not apply, shall be included in the power conferred by that Act. It introduces some valuable amendments, and it is useful in throwing light upon the scope of the earlier Act. It is clear, for instance, from s. 4, that the court must look at the arrangements as a whole, and have regard to all the circumstances of the case, and the consequences which, to use the language of the Act, the reduction "involves." Then it is clear from the following part of the section that, in the opinion of the legislature, reduction of capital is a matter which concerns, or

A may concern, the public. The court must take everything into account before confirming the reduction. But there is not a word in the Act of 1877 from beginning to end tending to narrow the scope of the Act of 1867. The generality of the powers conferred by that Act is left wholly untouched.

B Turning to the facts of the case under appeal, your Lordships have before you an English company limited by shares and formed for the purpose of engaging in financial undertakings of every sort and description in every part of the globe. Its main purpose, however, was to make investments in English and American securities, and the operations so far have been confined to that field. The English business is under the control of the board of directors in London. The American business has been managed by some of the directors who are resident in America, acting as a committee under the supervision of the London board. For some time C past there has been friction between the London board and the American committee. The board were cautious and old-fashioned. The committee advocated a bolder policy, and demanded a freer hand. Matters were approaching a dead-lock. At last, after much negotiation, both sides arrived at the conclusion that a separation of interests was desirable. It was seen that, in the state of the market, winding-up would be disastrous to all concerned. So it was proposed that the D American shareholders who were content to follow the American committee should take over the American assets and sever their connection with the company, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment.

The proposed arrangement has been approved by special resolutions at general meetings, in which the American shareholders, apparently, took no part. The E application to the court was for an order confirming a reduction of capital to meet the arrangement. It is for the company, and for the company alone, to judge of the prudence of the course proposed. The objects of the company are wide enough to swallow up the wealth of Lombard Street, or of the city of London. But again it is for the company to determine, subject of course to the statutory provisions for the protection of creditors, whether its capital, under the circum- F stances, and in view of the policy approved by the shareholders, is or is not in excess of its present wants. It is not suggested by the one shareholder, who stands alone in opposing the application, that the majority are acting oppressively, or that the arrangement is unfair or inequitable in the ordinary sense of those words. His real objection rather seems to be that he prefers the American system of doing business, and that he has more confidence in the American committee than G in the London board.

Why should the proposed arrangement not be carried into effect? The House has not the advantage of any judgment on the question, either in the court of first instance or in the Court of Appeal. It seems to have been conceded in both courts that the case was governed by the judgment of the Court of Appeal in *Re Denver Hotel Co.* (1), the actual decision in which does not touch the question, H although there are some observations of LINDLEY, L.J., who delivered the judgment of the court, which, if accepted, would conclude the matter. Speaking for myself, I cannot see any substantial distinction between *Re Denver Hotel Co.* (1), where the reduction was confirmed, and the present case, where it is admitted that, if the view of the Court of Appeal in *Re Denver Hotel Co.* (1) be correct, confirmation must be refused. In both cases, as it seems to me, you have a purchase by a I limited company of its own shares; for I cannot agree that a transaction which involves a surrender of shares as part of the consideration is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor v. Whitworth* (2).

Undoubtedly, as LINDLEY, L.J., observes, "the cases upon reduction of capital are not in a satisfactory state." There are authorities in which it seems to be laid down that a proposed reduction of capital cannot be confirmed if it involves a purchase by the company of its own shares for that reason alone. That of itself, however, cannot be a sufficient objection. The shares are not to be purchased

out of the company's registered capital, but out of moneys withdrawn from the capital and set free by the reduction. A company cannot employ any part of the capital with which it is registered, so long as it forms part of its registered capital, in the purchase of its own shares. But, if it proposes to reduce its capital in accordance with the statutory provisions which empower it to do so, there is no reason why it should not employ the fund set free by the reduction in the purchase of shares which it is intended to extinguish. Nothing can be more contrary to the principle of the Companies Acts than the return of capital by a company limited by shares. But, if capital money is set free by reduction of capital, no one ever suggested that it could not be returned to the shareholders; and, indeed, the Act of 1877 declares that such an operation is included in the power conferred by the Act of 1867. The fact that a thing is prohibited if it is done in the wrong way, and at a time when the circumstances of the case do not justify it, is no reason for holding the thing prohibited if it is to be done in the right way, and when it is justified by the circumstances.

Counsel for the respondent did not press this point as constituting in itself a sufficient answer to the application. The reduction, he said, was not objectionable simply because it involved a purchase by the company of its own shares, but because a purchase by a company limited by shares of some of its own shares must involve dealing with shareholders, members of one and the same class, in different ways. You cannot, he said, reduce or extinguish some of a class of shares without equally reducing or extinguishing all the others of the same class. That was the objection which, in the opinion of the Court of Appeal, would have been fatal to the application of the *Denver Hotel Co.* if the court had regarded the transactions as really a purchase of shares. The words of s. 3 of the Act of 1877 "cannot in our opinion," says LINDLEY, L.J., "be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares." With all deference I venture to think that that mode of stating the proposition is really begging the question. It assumes that the person whose shares are to be purchased is getting a preference, an undue advantage for himself, at the expense of his fellow shareholders. But why should that assumption be made? The person whose shares are bought gets money or money's worth. The persons on whose behalf the company buys have their own shares improved by the value of the shares extinguished. If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the court say that there is a preference on the one side or on the other? If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no inequality in the treatment of a class of shareholders, although they are not all paid in the same coin, or in coin of the same denomination.

It is not easy to ascertain the origin of the objection urged on behalf of the respondent, though it has been put forward not infrequently. It seems to have grown out of the decision in *Hutton v. Scarborough Cliff Hotel Co., Ltd.* (4) on which counsel for the respondent relied, where the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorising the directors to issue a certain number of preference shares. The proposed issue was restrained at the suit of an ordinary shareholder, on the ground mainly that, although the company had passed a special resolution authorising the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by KINDERSLEY, V.-C., on the ground that there was an implied stipulation in the



- A memorandum of association that all the shareholders should stand on an equal footing in respect of dividends, and that what it was proposed to do was "contrary to the very nature of a joint stock company," and was "an alteration in the constitution of the company." It is difficult to understand what the Vice-Chancellor meant by the expression "constitution of the company," and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view that equality among shareholders in respect of dividends was an "implied stipulation in the memorandum." There is nothing in the Act of 1862, or in any other Act requiring the memorandum to contain anything in reference to the rights of shareholders inter se. The division of the capital into shares of a certain fixed amount, which must appear in the memorandum, would not be altered or affected by issuing some of these shares as preference shares.

- C The practical result of the decision has been that, except in cases coming within the rule laid down in *Harrison v. Mexican Rail. Co.* (5), a decision which has not met with universal acceptance, no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors.
- D It seems to me that the decision in *Hutton v. Scarborough Cliff Hotel Co., Ltd. B.* (4) was not founded upon a sound view of the Companies Act, 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view, because I find that CORTON, L.J., has disapproved of the chief ground on which the decision was based. In *Guinness v. Land Corpn. of Ireland* (6) he says (22 Ch.D. at p. 377):

- E "In reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary."

- LINDLEY, L.J., in a later case, took the same view (*Re South Durham Brewery Co.* (7)). I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that, if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount, distinguished by numbers for the purpose of identification, but with no other distinction between them express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal.

- G In the result, therefore, I am of opinion that the objection on the part of the respondent is not well founded. I think that the proposed reduction is within the power conferred by the Act of 1867. As NORTH, J., has observed in *Re Barrow Hæmatite Steel Co.* (8) (39 Ch.D. at p. 594):

- H "There is nothing in the Act which requires that the reduction should be spread either equally or rateably over all the shares of the company."

There is nothing in my opinion either unfair or inequitable in the arrangement involved in the proposed reduction, and I see no reason why it should not be confirmed.

**LORD MORRIS** concurred.

- I Appeal allowed. Special resolution confirmed.

Solicitors: Ashurst, Morris, Crisp & Co.; Linklater & Co.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## JONES v. FOLEY

[QUEEN'S BENCH DIVISION (Day and Lawrance, JJ.), April 15, 1891]

[Reported [1891] 1 Q.B. 730; 60 L.J.Q.B. 464; 64 L.T. 538;  
55 J.P. 521; 39 W.R. 510; 7 T.L.R. 440]

*Landlord and Tenant—Small tenement—Possession—Termination of term by notice—Refusal by tenant to yield up possession—Ejectment order directing possession within twenty-one days—Right of landlord to begin to demolish house within twenty-one days.*

The plaintiff, a quarterly tenant of the defendant, was served with notice to quit expiring on June 24, and on June 25 he received notice to vacate the premises at once as they were going to be pulled down. The plaintiff remained in occupation, and on Sept. 3 the defendant obtained an order for ejectment under the Small Tenements Recovery Act, 1838, requiring the plaintiff to give up possession within twenty-one days. Before the twenty-one days had expired the defendant's builder, under a contract with the defendant, began to take off the roof of the premises and in so doing damaged the plaintiff's furniture. The plaintiff, who left the premises at the end of twenty-one days, claimed damages for trespass from the defendant.

**Held:** since the ejectment order did not extend the plaintiff's right to remain in possession or affect the defendant's right at common law to take possession on the expiration of the notice to quit, the removal of the roof did not amount to forcible entry, the plaintiff had no cause of action against the defendant, and his claim failed.

**Notes.** Referred to: *Hemmings v. Stoke Poges Golf Club, Ltd.*, [1918-19] All E.R.Rep. 798.

As to a landlord's remedies for tenant's failure to deliver possession, see 23 HALSBURY'S LAWS (3rd Edn.) 704 et seq.; and for cases see 31 DIGEST (Repl.) 611 et seq. For the Small Tenement's Recovery Act, 1838, see 13 HALSBURY'S STATUTES (2nd Edn.) 855.

Cases referred to in argument:

*Newton v. Harland* (1840), 1 Man. & G. 644; 1 Scott, N.R. 474; 133 E.R. 490; 31 Digest (Repl.) 44, 2034.

*Ious v. Telford* (1876), 1 App. Cas. 414; 45 L.J.Q.B. 613; 35 L.T. 69; 40 J.P. 741; 13 Cox, C.C. 226; 38 Digest (Repl.) 791, 78.

*Beddall v. Maintland* (1881), 17 Ch.D. 174; 50 L.J.Ch. 401; 44 L.T. 248; 29 W.R. 484; 31 Digest (Repl.) 44, 2035.

**Appeal** by the defendant from a decision of SIR RUPERT KETTLE, sitting at Malvern County Court, in an action by the plaintiff, the tenant, against the defendant, his landlord, for trespass and damage to the plaintiff's furniture.

The plaintiff, Jones, was a quarterly tenant to the defendant, Lady Emily Foley, of a cottage at a rent of £7 a year. On Mar. 24, 1890, the defendant's agents gave the plaintiff notice to quit the premises on June 24. On the expiration of the notice the plaintiff refused to give up the premises though he had been repeatedly asked to do so. The defendant, who wanted possession of the cottage in order to pull it down and build a new one on the site, served the plaintiff with a notice under the Small Tenements Recovery Act, 1838, of her intention to apply to justices for a warrant of possession. On Sept. 3 the application was made to and granted by the justices and an order made requiring possession to be given up within twenty-one days from that date. On the same day the defendant's workmen acting under his instructions commenced to pull down a cottage adjoining the plaintiff's and in so doing took some tiles from the plaintiff's roof over a bedroom thus exposing the room to the sky and some damage was done to the plaintiff's

**A** furniture by falling tiles and mortar. The men, however, desisted on being spoken to by the plaintiff. On Sept. 4 the defendant commenced digging the foundations of new cottages in the plaintiff's garden, and in so doing pulled up some fruit trees and cabbages. On Sept. 21 the plaintiff vacated the cottage but early in the morning of the same day the defendant and his workmen pulled off some tiles from the roof of the plaintiff's cottage. On Oct. 30 the plaintiff brought an action

**B** in the county court against the defendant for £50 "as damages for trespass on and between Sept. 3 and 24, 1890, at a cottage and garden in the occupation of the plaintiff, and damage to the plaintiff's furniture, pictures, garden produce and other effects." The county court judge directed the jury that the issue of the justices' warrant entitled the plaintiff to retain possession during the currency of the twenty-one days, but that even if they, the jury, found that the plaintiff

**C** was not entitled to possession, if they found that possession of the premises was obtained by force, i.e., the act of removing the roof, that act of force was indictable as a forcible entry and that for injury to the plaintiff's furniture resulting therefrom the defendant would be liable in damages. The jury found for the plaintiff damages for £40. From that decision the defendant appealed.

**D** *R. H. Amphlett* for the defendant.  
*A. T. Lawrence* for the plaintiff.

**DAY, J.**—This appeal must succeed. The plaintiff had no right to remain in possession after the defendant's notice to quit had expired. The landlord was quite entitled to take possession. The landlord was quite entitled to take the roof off or to take the house down, and if in consequence the plaintiff's goods were damaged, that was the plaintiff's own fault for allowing his goods to remain on the premises after the tenancy had expired. If a landlord made a forcible entry he might be indicted, but taking off the roof did not amount to a forcible entry. It was unfortunate the plaintiff's goods were damaged, but the goods ought not to have been in the house. The magistrates' order did not extend the tenant's right to remain

**F** in possession, but merely fixed a time when the landlord might have the assistance of an officer to take possession. The tenant had no right to be in the house; he was a trespasser, and the injury to his furniture was the result of his obstinacy in remaining on the premises. The magistrates' order in no way affected the common law rights of the defendant. What was done in this case did not amount to a forcible entry, and the plaintiff has established no cause of action. The defendant's appeal must be allowed, and judgment must be entered for the defendant.

**G**

**LAWRANCE, J.**—I am of the same opinion. I do not think that the removal of the roof was a forcible entry within the meaning of the statute. The defendant had a right at common law to possession, provided no forcible entry was made.

*Judgment for defendant.*

**H** Solicitors: *Wood, Bigg & Nash* for *Young & Cox*, Worcester; *Ford & Ford* for *W. W. A. Tree*, Worcester.

[Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.]



## Re SOUTH AMERICAN AND MEXICAN CO., LTD. Ex Parte BANK OF ENGLAND

[COURT OF APPEAL (Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ.),  
November 7, 1894]

[Reported [1895] 1 Ch. 37; 64 L.J.Ch. 189; 71 L.T. 594;  
43 W.R. 131; 11 T.L.R. 21; 39 Sol. Jo. 27; 12 R. 1]

*Estoppel—Estoppel by record—Judgment by consent—Winding-up—Company—  
Judgment by consent against company for instalment of debt—Liquidator  
estopped from disputing compromise sued on.*

A judgment by consent creates an estoppel between the parties just as much as does a judgment resulting from a decision of the court on a contested action.

The defendant company agreed to pay the plaintiffs a debt by instalments. The company defaulted on the second instalment, and the plaintiffs brought an action against it for the amount of the instalment. By its defence the company denied the existence of the agreement and counterclaimed for the return of the first instalment. A compromise was reached under which judgment by consent for the amount of the second instalment was entered for the plaintiffs, the company's counterclaim was dismissed, and it was agreed that, if the company failed to perform certain conditions, the plaintiffs should be at liberty to issue execution for the full amount of the debt and to enforce payment of the further instalments due under the agreement. The company failed to perform the conditions. Subsequently, they went into liquidation. The plaintiffs claimed to prove in the winding-up for the balance of their debt, but the official receiver and liquidator rejected the proof.

**Held:** the judgment by consent estopped the official receiver from denying the existence of the agreement by the company to pay the debt; and, accordingly, the plaintiffs' proof must be admitted.

**Notes.** Referred to: *Cooke v. Rickman*, [1911-13] All E.R.Rep. 152; *Re Jon Beauforte (London), Ltd., Applications of Grainger Smith & Co. (Builders), Ltd., John Wright & Son (Veneers), Ltd. and Lowell, Baldwin, Ltd.*, [1953] 1 All E.R. 634.

As to estoppel by consent judgment, see 15 HALSBURY'S LAWS (3rd Edn.) 208, para. 389; and for cases see 21 DIGEST (Repl.) 210.

**Appeal** from a decision of VAUGHAN WILLIAMS, J., sitting as an additional judge of the Chancery Division, on a summons taken out by the plaintiffs, the Bank of England, against the official receiver and liquidator of the South American & Mexican Co., Ltd., asking that proof of a debt might be admitted in whole in the winding-up of the company.

Under an agreement the defendants became liable to the plaintiffs for a debt of another company. The debt was repayable by instalments, and the first instalment was duly paid by the defendants. The defendants failed to pay the second instalment of £100,000, and the plaintiffs thereupon brought an action against them for the amount of the instalment. By their defence the defendants denied the agreement to pay the debt and counterclaimed for return of the first instalment. At the trial of the action, before KENNEDY, J., a compromise was reached under which judgment by consent was entered for the plaintiffs on the claim for the instalment of £100,000, with costs; the defendants' counterclaim was dismissed, with costs; and it was further ordered by consent that execution should be stayed but that if the defendants failed, within the time limited by the judgment, to pay a stated sum to the plaintiffs, the plaintiffs should be at liberty to issue execution for the full amount of the judgment debt, and to enforce payment of

A the further instalments claimed by them under the plaintiffs' agreement with the defendants. The defendants failed to pay within the time limited by the judgment. Subsequently, they went into liquidation. In the winding-up the plaintiffs claimed to prove for the balance of their debt. The official receiver and liquidator rejected the proof.

B VAUGHAN WILLIAMS, J., admitting the plaintiffs' proof, held that the judgment by consent estopped the official receiver and liquidator from disputing that there existed an agreement binding on the company to pay the debt. The defendants appealed from that decision.

*Fletcher Moulton, Q.C.*, and *G. P. C. Lawrence* for the defendant company.

C *Finlay, Q.C.*, *H. D. Greene, Q.C.*, *Reginald Bray* and *Howard Wright*, for the plaintiffs, were not called on to argue.

D LORD HERSCHELL, L.C.—I think that the judgment of the learned judge in the court below in this case was right. An action had been brought by the Bank of England against the defendant company claiming a sum of £100,000 as the second instalment of a larger claim—as a sum agreed to be paid by the defendants to the plaintiffs. That was the action—an action for a second instalment due on an agreement between the plaintiffs and the defendants. There was a counter-claim to recover back the sum paid as the first instalment, alleging that the agreement was only inchoate, or that it was conditional, and that the condition had not been performed. The case was partly tried, and thereupon, by consent of the parties, an order was made that judgment should be entered for the plaintiffs on the claim for £100,000 and costs, and the counterclaim was dismissed with costs.

E It seems to me that a judgment for the plaintiffs on the claim is a judgment for them, not for a sum of £100,000 at large—it is a judgment for them on a claim for £100,000, being part of a debt due, namely, the second instalment. Then it was further ordered that execution should be stayed, and that if within three weeks £60,000 should be paid—£20,000 in cash and £40,000 by a promissory note—and if the promissory note was duly paid, that £60,000 should be taken in satisfaction of all claims; that is to say, all claims by the plaintiffs under the agreement. Then it was further ordered that, if the promissory note was not paid—and that was the event that happened—the plaintiffs should be at liberty to issue execution for the full amount of the judgment debt, and to enforce the payment of the further instalments claimed by them under the plaintiffs' agreement with the defendants. F Although it is said that those words "under the agreement with the defendants" do not appear in the minute signed by counsel, at all events the words appear that they should be at liberty to enforce further instalments. What is the meaning of that? It is said that, notwithstanding that agreement to give judgment for the claim, it was open to the defendants to make default in paying the £60,000 and then to say, "As regards all but this one instalment for which you have got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sue, but we are to be at liberty now to say that there never was a debt at all; we cannot affect this £100,000, but we may dispute any liability to anything further." G

H I do not think that that is the meaning fairly to be gathered from the settlement arrived at or the order of the judge. I do not think that the fair meaning was that they were to be at liberty afterwards to dispute the existence of any debt at all. It is to be observed that what the plaintiffs are to be at liberty to enforce is further instalments. What is the meaning of that? Instalments of that debt, the existence of which is recognised and which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due. The defendants say, "If we do not carry out our present arrangement with you, you are to be at liberty to enforce payment of these further instalments." They do not merely say, as it seems to me, "You are to be at liberty then to take proceedings for payment of those further instalments or claims, and we are to be at liberty to

insist that there never was any debt, and there never ought to have been any judgment, and that therefore there are no instalments due." I do not think that that is the fair construction or the fair effect of an arrangement of this sort, where a judgment is given by consent. A

The truth is, a judgment by consent is intended to put a stop to litigation between the parties, just as much as a judgment is which results from the decision of the court after the matter has been fought out to the end. Very often the object of it is to stop litigation; and I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and to allow questions that were really involved in the action—questions which if decided against the party against whom judgment is given would show that there ought to be no judgment at all—to be fought over again after judgment has been agreed to in a subsequent action. I think, therefore, that the judgment of VAUGHAN WILLIAMS, J., should be affirmed, and the appeal dismissed with costs. B C

**LINDLEY, L.J.**—I do not think that this case is arguable in a lawyer's sense of the expression. It is impossible to read that compromise without seeing that the necessary result of it is, and I believe the intention of the parties to it was, that the dispute between them should be brought to an end. I do not say that was all, because there was the money; but to say after that that it is competent to any person to re-open the litigation and dispute the validity of the claim is to say that which I think no lawyer could possibly for a moment assent to. D

**A. L. SMITH, L.J.**—I agree.

*Appeal dismissed.* E

Solicitors: *Hollams, Son, Coward & Hawkesley; Freshfields & Williams.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

## ROGERS v. WHITELEY F

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Macnaghten, Lord Morris, Lord Field and Lord Hannen), March 3, 4, 7, 1892] G

[Reported [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303;  
8 T.L.R. 418]

*Execution—Garnishee order—All debts owing from garnishee—Order granted to answer judgment debt—Balance of bank account greater than debt—Attachment of whole account.* H

The appellant had some £6,800 standing to his credit on deposit and current accounts with the respondent who was his banker. The respondent was served with a garnishee order by a judgment creditor of the appellant whose debt amounted to £6,000, the garnishee order attaching "all debts owing or accruing due" from the garnishee to the judgment debtor in accordance with R.S.C., Ord. 45, r. 1. Subsequently, cheques drawn by the appellant on the balance of £800 over and above the amount of the judgment debt were dishonoured by the respondent. I

**Held:** the respondent was justified in refusing to honour the cheques, for the garnishee order, by its terms, attached all debts which the garnishee could be called on to pay although they were more than the amount sufficient to satisfy the particular judgment debt.



- A** **Notes.** Considered: *Geisse v. Taylor*, [1905] 2 K.B. 658; *Galbraith v. Grimshaw and Baxter*, [1910] 1 K.B. 339. Applied: *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Olschestro Komserverputj and Bank of Russian Trade*, [1932] All E.R.Rep. 534. Referred to: *Yates v. Terry*, [1901] 1 K.B. 102; *Edmunds v. Edmunds*, [1904] P. 362; *Joachimson v. Swiss Bank Corpn.*, [1921] All E.R.Rep. 92; *Richardson v. Richardson, National Bank of India, Ltd., Garnishees*, [1927] All E.R.Rep. 92; *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; *Hirschhorn v. Evans*, [1938] 3 All E.R. 491; *Arab Bank, Ltd. v. Barclays Bank, Ltd.*, [1954] 2 All E.R. 226.
- B** All E.R.Rep. 92; *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; *Hirschhorn v. Evans*, [1938] 3 All E.R. 491; *Arab Bank, Ltd. v. Barclays Bank, Ltd.*, [1954] 2 All E.R. 226.

As to payment of cheques by a banker, see 2 HALSBURY'S LAWS (3rd Edn.) 190 et seq.; and for cases see 3 DIGEST (Repl.) 232 et seq. As to the extent of attachment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq.; and for cases see 21 DIGEST (Repl.) 727. For R.S.C., Ord. 45, r. 1, see the ANNUAL PRACTICE.

- C** 21 DIGEST (Repl.) 727. For R.S.C., Ord. 45, r. 1, see the ANNUAL PRACTICE.
- Cases referred to in argument:
- Johnson v. Diamond* (1855), 11 Exch. 73; 3 C.L.R. 1010; 24 L.J.Ex. 217; 25 L.T.O.S. 85; 1 Jur.N.S. 938; 3 W.R. 407; 156 E.R. 750; 21 Digest (Repl.) 727, 2231.

- D** *Robbins v. Standard* (1667), 1 Sid. 327.
- Re Smith, Ex parte Brown* (1888), 20 Q.B.D. 321; 57 L.J.Q.B. 212; 36 W.R. 403; 4 T.L.R. 259, C.A.; 21 Digest (Repl.) 500, 9.
- Culverhouse v. Wickens* (1868), L.R. 3 C.P. 295; 37 L.J.C.P. 107; 17 L.T. 478; 16 W.R. 402; 21 Digest (Repl.) 751, 2367.

- E** Appeal from a decision of the Court of Appeal (LORD COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.), reported 23 Q.B.D. 236, affirming a decision of the Queen's Bench Division (MATHEW and GRANTHAM, JJ.), refusing a new trial in an action, tried by POLLOCK, B., brought by the appellant against the respondent, who had acted as his banker, to recover damages for the alleged detention of certain bonds, and also for the dishonour of his cheques. The case is reported upon the latter point only.

- F** As regarded the claim in respect of the dishonoured cheques, it appeared that the appellant had been involved in litigation, and that on Feb. 15, 1881, a garnishee order nisi was served on the respondent attaching the moneys standing to the credit of the appellant with the respondent to satisfy a judgment for £6,000. At this time there was standing to the credit of the appellant with the respondent, both on deposit and current account, a sum of £6,870. On Feb. 17 the appellant gave seven days' notice of withdrawal of the amount on the deposit account. The cheques were drawn subsequently to this and were dishonoured, the respondent refusing to honour them on the ground that the whole banking account had been attached. The appellant contended that the account was attached to the amount of the debt only, leaving the balance free to be drawn against. On April 8, 1881, the garnishee order was discharged. POLLOCK, B., held that the whole amount of the moneys of the appellant held by the respondent was bound by the garnishee order, and gave judgment for the respondent.
- G** seven days' notice of withdrawal of the amount on the deposit account. The cheques were drawn subsequently to this and were dishonoured, the respondent refusing to honour them on the ground that the whole banking account had been attached. The appellant contended that the account was attached to the amount of the debt only, leaving the balance free to be drawn against. On April 8, 1881, the garnishee order was discharged. POLLOCK, B., held that the whole amount of the moneys of the appellant held by the respondent was bound by the garnishee order, and gave judgment for the respondent.
- H** the garnishee order was discharged. POLLOCK, B., held that the whole amount of the moneys of the appellant held by the respondent was bound by the garnishee order, and gave judgment for the respondent.

*Pollard and J. R. Paget* for the appellant.

*Waddy, Q.C.*, and *T. W. Chitty* for the respondent were not called upon to address their Lordships.

- I** **LORD HALSBURY, L.C.**—I am not going to offer any opinion (I think it would be very unjustifiable, the question not being necessary to be determined here) upon the question whether it is competent to a judge to make a garnishee order attaching only a part of a debt. That is a very fit question to be discussed in the legislature perhaps, and to be argued before your Lordships if such a question shall arise. It is enough for me to say in reference to this case that the order as it is made, in the terms in which it is made, attaches all debts, that is to say, all money which Mr. Whiteley could be called upon to pay away, although more than

the amount sufficient to satisfy the particular debt in question, and if he paid it away he would do so at his own risk, which of course he would not be bound to do. The order appears to me to have been in such terms that it would have been a disobedience to the order on his part if he had paid anything after it had been served upon him. That being so, it disposes of that part of the case which raised the question whether he was bound to pay while that order was in force. I think he was not. I think it would have been wrong to pay. Of course, therefore, while the debts were under that order of the court it would be impossible to say that he could be responsible for any damage if any damage was claimed as being caused to the plaintiff in this case. I move your Lordships that the appeal be dismissed with costs.

**LORD WATSON.**—The appellant impeaches a direction in law given by the judge, and also the verdict entered for the respondent, and maintains that he ought to have a new trial.

The respondent was owing the appellant, partly on deposit account and partly on account current, sums amounting in all to about £6,800, when he was served with a garnishee order at the instance of a judgment creditor of the appellant whose debt was £6,000. The appellant maintained at the trial that he was entitled, notwithstanding the order attaching the debt, to draw out the balance of £800. The attachment was in the form sanctioned by Ord. 45, r. 1, of "all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor," and POLLOCK, B., ruled that so long as the attachment subsisted the respondent was under no legal obligation to pay the balance, or any part of it, upon the order of the appellant.

Many nice questions may arise in the application of Ord. 45, but I do not think the point which we are called upon to decide in this case is attended with the least difficulty. The effect of an order attaching "all debts" owing or accruing due by him to the judgment debtor is to make the garnishee custodian for the court of the whole funds attached; and he cannot, except at his own peril, part with any of those funds without the sanction of the court. Whether the order can in the first instance issue in other terms than those prescribed by the rules it is not necessary for the purposes of this case to decide; but I entertain no doubt that when the attachment has been made in these terms it is within the power of the court to restrict its operation to such an amount of the debts owing by the garnishee as will satisfy the judgment debt; but so long as such restriction is not made and the attachment is unreleased the garnishee is under no obligation to disregard the attachment and to pay the excess to his creditor.

At the Bar of the House the appellant mainly relied in argument upon the terms of the garnishee order, which he maintained did not lay an attachment upon the whole debts owing to him by the respondent, but only upon such part thereof as was sufficient to meet the judgment debt. The argument is so plainly untenable, that I think it unnecessary to take any further notice of it. I concur in the judgment which has been moved by the Lord Chancellor.

**LORD MACNAGHTEN.**—I entirely agree in everything that has fallen from my noble and learned friends.

**LORD MORRIS.**—I entirely concur in the judgment which has been announced by the Lord Chancellor, and in the opinion of LORD WATSON. I only desire to add a few words as regards the dishonouring of the cheques. Upon the proper construction of the garnishee order, which has been relied upon by the respondent as a protection to him for having refused to pay the drafts of the appellant, it has been contended very forcibly by the learned counsel for the appellant that your Lordships should give what he suggests would be only a reasonable construction to the order in consequence of the irreparable mischief which might arise from giving it what would be apparently a fair construction of it upon the words as

A, they stand. He suggests that your Lordships should attach to the words "to answer" a meaning which would include "to the amount of the judgment recovered by the judgment creditor." I cannot concur in that contention, because in this order which is before your Lordships it is very plain upon the face of it that all debts due and owing by the above-named garnishee are attached to answer the judgment creditor's demand—that is, they are all captured for the purpose of afterwards answering the plaintiff's demand.

B I cannot, however, rest here without saying that, in my judgment, a great deal of the argument addressed by the learned counsel for the plaintiff can be answered if your Lordships are of opinion, as I am undoubtedly of opinion, that it would be quite competent for the judge in making the garnishee order (indeed in the particular state of facts which is alleged, he ought so to make the order) to make it so that the amount of the debts attached should only extend to an amount sufficient to answer the judgment. I can find nothing in the rule or Ord. 45 which limits the power and discretion of the learned judge to give an authority to attach all debts, and does not enable him to limit its operation to the amount of the judgment creditor's debt. I can see no objection to that course. It would appear to me to be quite open, upon the order, to the learned judge to take that course, and it would defeat all the arguments which, in my humble opinion, your Lordships cannot shut your eyes to, such as that a judgment creditor for a small amount of debt, say £5 or £10, might get a garnishee order to attach £50,000 in the bank in order to answer that small debt of £5 or £10.

D In this particular case which is now before your Lordships, it does not carry the appellant's case any further to call upon your Lordships to attach to the words "to answer" a meaning extending merely to the amount of the judgment debt. E If these words, or words to that effect, had been put in the order, they would have controlled it. However, no such words having been put into the order, I come to the conclusion that the order is an order extending to the entire amount of debts, and that the entire amount of debts is attached to answer the demand of the judgment creditor, and that it is not limited merely to the extent of his judgment debt. F With these observations I entirely concur in the proposed judgment.

LORD FIELD.—I am of opinion that this appeal has failed and upon the grounds which have been so clearly and fully stated by my noble and learned friends. I am quite satisfied, in this case, that the construction which has been put upon the order is the correct one. I do not think that the form of the order itself has in the present case been productive of any injustice whatever to the appellant. I am not quite prepared at this moment to say whether I would concur with what I understand to be the view of LORD MORRIS, namely, that it would be competent to a judge at chambers, upon the construction of this order, to make the limited garnishee order which he suggests; but I think it may well be a fit matter for the distinguished persons who have the making of these rules to consider whether or not some form of words might be adopted which would at the same time meet the possible injustice that might arise from this order and the fair interests of judgment creditors. As to the appeal now before your Lordships, I have no hesitation in saying that it ought to be dismissed.

LORD HANNEN.—I entirely concur in the opinions which have been expressed I by the Lord Chancellor and LORD WATSON. For the reasons which they have given, I think this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: Morley, Shirreff & Co.; Roche & Son.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]



## CROZAT v. BROGDEN AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.J.J.), May 14, 1894]

[Reported [1894] 2 Q.B. 30; 63 L.J.Q.B. 325; 70 L.T. 522;  
42 W.R. 353; 10 T.L.R. 61; 9 R. 296]

*Costs—Security for costs—Plaintiff resident out of jurisdiction—No distinction between action on foreign judgment and other claim—Merits of action irrelevant on application for security for costs.*

The rule by which a plaintiff resident outside the jurisdiction is usually required to give security for costs is applicable whether the action is on a foreign judgment or on some other claim.

On an application for security for costs against a plaintiff resident outside the jurisdiction the court cannot go into the merits of the action.

**Notes.** Referred to: *Kevorkian v. Burnley* (No. 2), [1937] 4 All E.R. 468; *Jackson v. John Dickinson & Co. (Bolton), Ltd.*, [1952] 1 All E.R. 104.

As to security for costs, see 30 HALSBURY'S LAWS (3rd Edn.) 378-380; and for cases see DIGEST (Practice) 903.

Cases referred to:

- (1) *Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co.* (1876), 2 Ch.D. 531; 45 L.J.Ch. 526; 24 W.R. 1057; 3 Char. Pr. Cas. 408; Digest (Practice) 909, 4499.
- (2) *Pray v. Edie* (1786), 1 Term Rep. 267.

Also referred to in argument:

*Ferguson v. Kootenay Smelting and Trading Syndicate*, 36 Sol. Jo. 461.

*Re Contract and Agency Corp'n., Ltd.* (1887), 57 L.J.Ch. 5; 4 T.L.R. 141; Digest (Practice) 913, 4558.

*Edinburgh and Leith Rail. Co. v. Dawson* (1839), 7 Dowl. 573.

*Aboulloff v. Oppenheimer* (1882), 10 Q.B.D. 295; 52 L.J.Q.B. 1; 47 L.T. 325; 31 W.R. 57, C.A.; 11 Digest (Repl.) 516, 1308.

*Williams v. Jones* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, 1401.

*The City of Mecca* (1879), 5 P.D. 28; 49 L.J.P. 17; 41 L.T. 444; 4 Asp.M.L.C. 187; reversed (1881), 6 P.D. 106; 50 L.J.P. 53; 44 L.T. 750; 4 Asp.M.L.C. 412, C.A.; 11 Digest (Repl.) 524, 1370.

**Appeal** from an order of the Divisional Court (MATHEW and HENN COLLINS, JJ.), setting aside an order of GRANTHAM, J., in chambers, affirming an order of the master increasing the amount of the security for costs to be given by the plaintiff, a foreigner resident out of the jurisdiction, in an action by him against the defendants for a sum due under a judgment of a French court of first instance which had been affirmed by a French court of appeal.

At the commencement of the action the master ordered the plaintiff to give security for costs. The plaintiff's application for judgment under R.S.C., Ord. 14, was refused and the defendants were given unconditional leave to defend on their allegation that the French judgment was obtained by fraud. The defendants then obtained from the master a further order increasing the amount of the plaintiff's security for costs, and that order was affirmed on appeal by GRANTHAM, J. The plaintiff then appealed to the Divisional Court against GRANTHAM, J.'s order and the Divisional Court set aside the order for increased security for costs. From that decision the defendants appealed to the Court of Appeal.

*Lawson Walton, Q.C.*, and *E. F. Spence* for the defendants.

*Crump, Q.C.*, and *Geary* for the plaintiff.

**A LORD ESHER, M.R.**—In my opinion we cannot interfere with the decision of the learned judge at chambers ordering the plaintiff to give security for costs. The Divisional Court have set aside that order, and have held that the discretion exercised by the judge at chambers should be overruled. For my own part I am inclined to think that it is a matter of discretion, and that the court is not always bound as a matter of course to order security for costs to be given by a foreign plaintiff. That discretion, however, is always exercised in one way unless there are exceptional circumstances in the case. In the Divisional Court that discretion was exercised by refusing to order security for costs upon the ground that the plea disclosed no real defence to the action. That was a mistaken ground, for the plea if it is proved will be a complete defence. The Divisional Court, therefore, exercised their discretion upon a wrong ground, and this appeal must be allowed.

**C LOPES, L.J.**—In *Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co.* (1) (2 Ch.D. at p. 531), SIR GEORGE JESSEL, M.R., and in *Pray v. Edie* (2), BULLER, J., held that,

**D** "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs."

I have always understood that to be the rule, and that there is no difference between an action upon a foreign judgment and an action for any other debt. The Divisional Court have set aside the order of GRANTHAM, J., at chambers, and

**E** the learned judges in the Divisional Court seem to have done so upon different grounds. MATHEW, J., seems to have proceeded upon the ground that there was no real substantial defence to the action; but the plea is a good answer to the action if it is proved. I think that we must have come to that conclusion when the appeal under Ord. 14 came before us. The ground, therefore, upon which MATHEW, J., proceeded was erroneous. The ground upon which HENN COLLINS, J., proceeded was that there was a distinction between an action upon a foreign judgment and an action for an ordinary debt, and that in the former case there was a strong prima facie case in favour of the plaintiff. I think that there is no such distinction. The order of the Divisional Court was wrong, and must be reversed.

**G DAVEY, L.J.**—I am of the same opinion. Counsel for the plaintiff has admitted that no authority can be found in the reports, or in textbooks, showing that the court has ever refused to order security for costs to be given by a foreign plaintiff suing in the courts of this country except in the well-known exceptional cases of a cross action, or where the money belonging to the plaintiff is already in the defendant's hands. I adopt the language of SIR GEORGE JESSEL, M.R., as quoted by LOPES, L.J. As to the ground upon which MATHEW, J., acted in the court

**H** below, I think that, upon an application against a foreign plaintiff for security for costs, the court cannot go into the merits at all. It would be very inconvenient to do so, and the rule upon which security for costs is ordered has nothing to do with the merits of the case. If, as was suggested, the defence discloses no defence at all, the plaintiff can apply to have it struck out as being frivolous, and disclosing no real defence to the action. As to the grounds upon which HENN COLLINS, J.,

**I** based his decision, I must confess that his judgment surprised me. There is no authority that I am aware of for saying that, where an order for security for costs is sought against a foreign plaintiff, there is any difference between an action on a foreign judgment and an action upon any other cause of action.

*Appeal allowed.*

Solicitors: *Tatham & Lousada; Nokes & Stammers.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

A

## PRESTON BANKING CO. v. WILLIAM ALLSUP &amp; SONS, LTD.

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), December 7, 1894]

[Reported [1895] 1 Ch. 141; 64 L.J.Ch. 196; 71 L.T. 708;  
43 W.R. 231; 39 Sol. Jo. 113; 12 R. 51]

B

*Judgment—Setting aside—Order—Jurisdiction to set aside order obtained by fraud.*

A judge has no jurisdiction to alter an order which has been passed and entered and which expressed his real decision even though the order was obtained by fraud.

C

In a debenture-holders' action an order, dated Feb. 17, 1894, was made that the property comprised in the debentures should be sold by public auction. There were no bids for the property, and subsequently L., one of the debenture-holders, applied for an order that all further proceedings under the order of Feb. 17 should be carried out under the court's direction. By an order dated July 11, L.'s application was granted on condition that he paid into court £250 as security for costs in default of which it was ordered that the application should be dismissed with costs. L. did not pay in the money. On the sale of the property a sum became available for distribution among the debenture-holders, and on Aug. 7 L. applied to the judge who had made the order of July 11 asking that, notwithstanding that order, the costs directed to be paid by L. thereunder should be costs in the action, and that all further proceedings under the order of July 11 should be stayed. The ground of the application was that there had been misrepresentation as to the value of the property when the order of July 11 was made. At the date of the application of Aug. 7 the order of July 11 had been passed and entered and accurately expressed the intention of the court.

D

E

**Held:** the judge had no jurisdiction to re-hear the earlier application or to alter the order of July 11 made thereon.

F

*Staniar v. Evans* (1) (1886), 34 Ch.D. 470, considered.

**Notes.** Explained: *Re Scowby, Scowby v. Scowby*, [1897] 1 Ch. 741. Considered: *Chessum & Sons v. Gordon*, [1900-3] All E.R.Rep. 260. Followed: *MacCarthy v. Agard*, [1933] All E.R.Rep. 991. Referred to: *Re Calgary and Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652; *Re Pilling*, [1909] 2 K.B. 788; *Powell Dyffryn Steam Coal Co. v. Griffiths* (1934), 27 B.W.C.C. 408; *Re City Housing Trust, Ltd., Kolb v. City Housing Trust, Ltd.*, [1942] 1 All E.R. 369; *Re Inchcape, Craigmyle v. Inchcape*, [1942] 2 All E.R. 157; *Craig v. Kanseen*, [1943] 1 All E.R. 108; *Re Harrison's Share under a Settlement, Harrison v. Harrison, Re Ropner's Settlement Trusts, Ropner v. Ropner*, [1955] 1 All E.R. 185; *Thynne (Marchioness of Bath) v. Thynne (Marquess of Bath)*, [1955] 3 All E.R. 129.

G

H

As to amendment and setting aside judgments or orders, see 22 HALSBURY'S LAWS (3rd Edn.) 784. For cases on re-hearing, see DIGEST (Practice) 815.

Cases referred to:

- (1) *Staniar v. Evans, Evans v. Staniar* (1886), 34 Ch.D. 470; 56 L.T. 87; Digest (Practice) 816, 3771.
- (2) *Re Suffield and Watts, Ex parte Brown* (1888), 20 Q.B.D. 693; 58 L.T. 911; 36 W.R. 584; 5 Morr. 83, C.A.; Digest (Practice) 815, 3762.
- (3) *Re St. Nazaire Co.* (1879), 12 Ch.D. 88; 41 L.T. 110; 27 W.R. 854, C.A.; Digest (Practice) 815, 3759.

I

Also referred to in argument:

*Re Roper, Taylor v. Bland* (1890), 45 Ch.D. 126; 63 L.T. 484; 39 W.R. 101, C.A.; 24 Digest (Repl.) 907, 9097.



- A *Nicholson v. Norton* (1844), 7 Beav. 67; 13 L.J.Ch. 140; 2 L.T.O.S. 345; 49 E.R. 988; 24 Digest (Repl.) 903, 9050.  
*Blakey v. Hall* (1887), 56 L.J.Ch. 568; 56 L.T. 400; 35 W.R. 592; Digest (Practice) 881, 4207.  
*Flower v. Lloyd* (1877), 6 Ch.D. 297; 46 L.J.Ch. 828; 37 L.T. 419; 25 W.R. 793, C.A.; Digest (Practice) 818, 3786.

B **Appeal** from a decision of the Vice-Chancellor of the County Palatine of Lancaster in an action by debenture-holders.

By an order dated Feb. 17, 1894, D. W. Allsup and F. L. Lindsay were appointed receivers and managers of the real and personal property of the defendant company, which was charged with three series of debentures. Lindsay was the holder of a debenture of the third series for £1,000, and was also a shareholder. By an order, dated June 4, a sale was directed, with the consent of the plaintiff company, out of court by public auction or private treaty, of the property of the defendant company comprised in the debentures. The property was afterwards offered for sale by auction, but no biddings were obtained. Lindsay subsequently applied for an order directing that all further proceedings under the order of June 4 might be carried out under the direction of the court. The summons was heard on July 11, when the Vice-Chancellor made an order directing that, if Lindsay, within one week from that date, paid into court to the credit of the action the sum of £250 as security for the costs of that application, it should be referred to the registrar to appoint some fit and proper person to conduct the sale of the property out of court, but in case Lindsay did not pay in the £250 within the time mentioned, then the application should be dismissed with costs. Lindsay did not pay the £250 into court. On Aug. 7 he took out a summons asking that, notwithstanding the order of July 11, the costs thereby directed to be paid by him should be costs in the action, and that all further proceedings under that order might be stayed.

At the date of this summons the order of July 11 had been passed and entered, but the assets of the defendant company had been sold, and some of the proceeds were available for distribution among the holders of the debentures of the third series, and the ground of the application was that when the order of July 11 was obtained, there had been a misrepresentation to the court as to the value of the assets. The Vice-Chancellor held that he had no jurisdiction to make the order asked by the summons of Aug. 7, and from this decision Lindsay appealed.

*Hopkinson, Q.C.*, and *Mansfield* for Lindsay.

G *Humber* for the plaintiffs.

*Astbury* for the defendants and Allsup.

**LORD HALSBURY.**—I am of opinion that this appeal must be dismissed. If by mistake an order has been drawn up which does not express the intention of the court, the court must have jurisdiction to correct the mistake. But this was an application to the Vice-Chancellor to re-hear an application and alter an order which he intended to make, but which it is said he ought not to have made. Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to re-hear it. If such a jurisdiction existed, it would be most mischievous. The fact that in the present case the application to re-hear was made to the particular judge who made the order is immaterial. For, if one judge can re-hear and alter the order, another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction, but he has no jurisdiction to re-hear or alter this order.

**LINDLEY, L.J.**—I am of the same opinion. This is a matter of some importance with reference to the practice and procedure of the court. This is not an application to alter an order on the ground of some slip or oversight, nor is it a case in which the order has not been drawn up. Here the order has been passed and

entered, and, it expresses the real decision of the judge, and that being so, the judge has no jurisdiction to alter it. If this summons had proceeded on the theory that the order of July 11 was right, or that circumstances had since occurred which had rendered a supplemental order necessary, the court might have entertained the application; but this summons proceeds on the theory that the order made on July 11 was wrong. In my opinion it is of the utmost importance that there should be a finality to litigation when once the order has been completed. The appeal must be dismissed with costs, but without prejudice to any application which Lindsay may make to the Vice-Chancellor, that the costs which he has been ordered to pay may be taken out of the proceeds of the sale of the company's assets.

**A. L. SMITH, L.J.**—I am of opinion that the Vice-Chancellor was right in arriving at the conclusion that he had no jurisdiction in this matter. This is not an application to re-hear a matter before the order has been drawn up; nor is it an application to vary an order which has been drawn up not in accordance with the order pronounced by the judge; nor is it an application that the judge should make an order supplemental to the order drawn up. This is an application that he should re-hear the matter and make a different order. In my opinion the judge had no jurisdiction to do that. It was said that NORTH, J., had decided the contrary in *Staniar v. Evans* (1). But at the date of that decision *Re Suffield and Watts, Ex parte Brown* (2) had not been decided by the Court of Appeal, and *Re St. Nazaire Co.* (3), upon which FRY, L.J., relied in the former case, was not brought to the notice of the learned judge. *Staniar v. Evans* (1) is not now before the court. If it were, in my judgment, it would require re-consideration. FRY, L.J., put the law on the right foundation when he held that a judge ceased to have jurisdiction over a judgment or order when once it was perfected. In my opinion the Vice-Chancellor had no jurisdiction to do what he was asked to do in this case, and the appeal must be dismissed.

*Appeal dismissed.*

Solicitors : *T. H. & T. Dodds*, Preston; *Finch & Johnson*, Preston; *William Bramwell*, Preston; *Whitehead*, Preston.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

A

## DAVEY v. BENTINCK

[COURT OF APPEAL (Lord Esher, M.R., and Lopes, L.J.), December 1, 1892]

[Reported [1893] 1 Q.B. 185; 62 L.J.Q.B. 114; 67 L.T. 742;  
41 W.R. 181; 4 R. 144]

B

*Pleading—Particulars—Failure to deliver within time ordered—Jurisdiction to impose terms limiting time for delivery of particulars—Jurisdiction to dismiss action on ground that frivolous and vexatious—"Pleadings"—Inclusion of particulars—R.S.C., Ord. 19, r. 7—R.S.C., Ord. 25, r. 4.*

C

On May 30, 1892, in an action brought for money alleged to be due in respect of services alleged to have been performed by the plaintiff for the defendant at his request, the plaintiff was ordered to deliver particulars of his claim. On June 15 an order was made for the delivery of the particulars within ten days. On July 4 an order was made that the action should be dismissed unless the particulars were delivered within seven days. On July 20 an order was made that, unless proper particulars were delivered within ten days, the claim should be struck out. On Aug. 4 the defendant took out a summons asking that the claim might be struck out under R.S.C., Ord. 25, r. 4, as frivolous and vexatious, and that the action might be dismissed unless proper particulars pursuant to the previous orders were delivered within seven days. On Aug. 10 the master dismissed the action with costs. The judge at chambers affirmed this order. The Divisional Court ordered the action to be dismissed unless the plaintiff delivered particulars within fifteen days. The plaintiff delivered no particulars under this last order, but appealed.

D

E

**Held:** (i) in the exercise of the inherent power of the court, the action was rightly dismissed as frivolous and vexatious; (ii) R.S.C., Ord. 19, r. 7, empowered the court to impose terms as to the time in which particulars were to be delivered and as to dismissal of the action if they were not delivered within the limited time, and, therefore, the master had jurisdiction to make the order dismissing the action.

F

**Semble,** that, in Ord. 25, r. 4, the word "pleadings" included particulars.

**Notes.** Referred to: *Reiss v. Woolf*, [1952] 2 All E.R. 3, 112.

G

As to further particulars, and as to dismissal of action for want of prosecution or default under the Rules of the Supreme Court, see 30 HALSBURY'S LAWS (3rd Edn.) 30 et seq., and 410, para. 771. For cases on frivolous or vexatious pleadings, and on particulars, see DIGEST (Pleading) 82 and 184. For R.S.C., Ord. 19, r. 7, and Ord. 25, r. 4, see the ANNUAL PRACTICE.

H

**Appeal** from an order of the Queen's Bench Division (MATHEW and BRUCE, JJ.), dismissing the action unless proper particulars of the plaintiff's claim were delivered within fifteen days.

I

The action was brought for money alleged to be due in respect of services alleged to have been performed by the plaintiff for the defendant at his request, and on an account stated between them in respect of the alleged services. On May 30, 1892, an order was made by the master for delivery by the plaintiff of particulars of his claim. On June 15 a further order was made for their delivery within ten days. On July 4 an order was made that the action should be dismissed unless the plaintiff delivered particulars within a week. On July 20, the particulars delivered being deemed insufficient, an order was made that, unless proper particulars were delivered within ten days, certain paragraphs of the statement of claim should be struck out. The particulars afterwards delivered being deemed insufficient, a summons was taken out on Aug. 4 (i) to strike out the statement of claim under R.S.C., Ord. 25, r. 4, on the ground that it was frivolous and vexatious and an abuse of the process of the court; (ii) to dismiss the action with costs



unless the plaintiff within seven days should deliver proper particulars pursuant to the previous orders. A

On Aug. 10 an order was made by the master dismissing the action with costs. This order was affirmed on appeal by the judge at chambers. The Divisional Court (MATHEW and BRUCE, JJ.), on the plaintiff's appeal, made an order dismissing the action with costs unless the plaintiff should deliver his particulars within fifteen days. The plaintiff delivered no particulars, but appealed to this court, and asked that the order of the master of Aug. 10, the order of the judge affirming it, and the order of the Divisional Court be set aside. B

*Fox* for the plaintiff.

*J. E. Bankes* for the defendant.

**LORD ESHER, M.R.**—In this case the Divisional Court has ordered the action to be struck out. An order was made by a master and affirmed by the judge in chambers and by the Divisional Court. The summons taken out before the master was applied for upon two grounds; first, that the action was frivolous and vexatious; and secondly, that the particulars which were ordered to be given within a certain time were not delivered. In consequence of this an order was made that the action should be dismissed. It seems to me that, if either of those two preliminaries be made out, the master's order dismissing the action is right; that is to say, either if the action is frivolous or vexatious, or if particulars were not delivered within the limited time. D

As to the first point I think the order was right. An action may be dismissed as frivolous and vexatious in either one of two ways, namely, either under R.S.C., Ord. 25, r. 4, or under the inherent jurisdiction of the court to prevent oppression. Whether this case comes within Ord. 25, r. 4, depends on the question whether particulars when ordered can be considered for the purpose of the rule to be part of the pleadings. I am inclined strongly to think that it is so, that Ord. 25, r. 4, is to be construed in the largest sense of the words, and when particulars have been delivered which show grounds on which a party to the action may make an application under the rule, then the action may be dismissed, or the defence struck out, as the case may be. But on the present occasion it is unnecessary to determine that point finally, because, in the exercise of its inherent jurisdiction, the court may stop the proceedings at any stage if it thinks an action, or a defence as the case may be, is frivolous and vexatious. The court has an inherent authority and duty to protect a party to an action against frivolous and vexatious proceedings. In this case the plaintiff has brought an action for services performed by him for the defendant at his request, and upon an account stated between them in respect thereof. The plaintiff is then asked for particulars of the alleged services. If he has performed no services at all, he has no cause of action either in respect of the alleged services or of the account stated. He is pressed to give particulars of the services, and it is obvious that he must know when, where, and for whom he has performed them. He then delivers particulars which give no information whatever, and he has never given any particulars on which anyone could act. It appears to me that the reason he has not given any particulars is that he has none to give. Therefore, it seems to me that the action is frivolous and vexatious, and is rightly dismissed under the inherent power of the court. F G H

Then there is another point arising under Ord. 19, rr. 6 and 7. Rule 7 gives power to the court, in making an order for the delivery of particulars, to impose terms, at least as to the time in which they are to be given, and also as to dismissal in case the particulars are not given within the limited time. Therefore, it seems to me that the effect of the order of the master is to say that the action shall be dismissed if particulars are not given within the limited days. That order was within his jurisdiction, and on that ground also I think the action was rightly dismissed. I

**LOPES, L.J.**—I am of the same opinion. The action has been dismissed by an

A order of the master, by the judge at chambers, and by the Divisional Court; and I think it has been rightly dismissed. It has been contended before us that there are three grounds upon which the order may be justified. The first ground is Ord. 25, r. 4; the second is the inherent power of the court to dismiss an action when the procedure of the court is being abused; and the third is Ord. 19, rr. 6 and 7. It is not necessary now to determine whether particulars when ordered  
B are part of a "pleading" within the meaning of that word as used in Ord. 25, r. 4, but I am inclined to think so. On the other two points I entirely agree with what the Master of the Rolls has said, and I think this appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors: *Fox & Joy; Lewis & Lewis.*

C [Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

D

## GLYNN & CO. AND OTHERS v. MARGETSON AND OTHERS

E [HOUSE OF LORDS (Lord Herschell, L.C., Lord Halsbury, Lord Macnaghten and Lord Shand), April 28, May 1, 1898]

[Reported [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1;  
9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193]

*Shipping—Deviation—Printed clause in bill of lading permitting call at number of ports—Limitation—Avoidance of interference with main intent and object of contract.*

F Perishable goods were shipped from a port in the south of Spain to Liverpool under a bill of lading which contained a printed clause giving the ship "liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering  
G coals, cargo, or passengers, or for any other purpose whatsoever." After the cargo was loaded the ship proceeded, not westwards in the direction of Liverpool, but to a port in the north-east of Spain, and, owing to the delay so caused, the cargo was found to be damaged when it eventually arrived at Liverpool. In an action by the consignees against the shipowners for damages,

H **Held:** in construing the clause in the bill of lading it was legitimate to bear in mind (i) that it was a printed clause applicable to many voyages and not specially agreed on in relation to the particular voyage contemplated by the parties, and (ii) that the cargo was perishable; the main intent and object of the bill of lading must be considered, and the general, printed, words must be limited so as not to conflict with that intent and object; the printed words must, accordingly, be limited so as only to confer a liberty to proceed to and stay at ports which were in the course of the voyage between the south of Spain and Liverpool; and, therefore, the shipowners were in breach of the bill  
I of lading, and the consignees' action succeeded.

**Notes.** Explained: *Evans v. Cunard Steamship Co.* (1902), 18 T.L.R. 374. Considered: *James Morrison & Co., Ltd. v. Shaw, Savill and Albion Co., Ltd.*, [1916-17] All E.R.Rep. 1068. Applied: *A.-G. v. Smith* (1918), 87 L.J.K.B. 1045. Considered: *United States Shipping Board v. Bunge y Born Limitada Sociedad*, [1925] All E.R.Rep. 173. Distinguished: *Frenkel v. MacAndrews & Co.*, [1929] All E.R.Rep. 260. Considered: *Stag Line, Ltd. v. Foscolo Mango & Co.*, [1931]

All E.R.Rep. 660; *Felston Tile Co. v. Winget, Ltd.*, [1936] 3 All E.R. 473; *Compagnie Primera de Navigazona Panama and Compania Arrendataria, Re Monopolio de Petroleos, S.A.*, [1939] 2 All E.R.Rep. 240; *Reardon Smith Lines, Ltd. v. Black Sea and Baltic General Insurance Co., The Indian City*, [1939] 3 All E.R. 444; *G. H. Renton & Co. v. Palmyra Trading Corp'n. of Panama*, [1956] 1 All E.R. 209; *Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co.*, [1959] 3 All E.R. 182. Referred to: *Caffin v. Aldridge* (1895), 1 Com. Cas. 181; *Burstall v. Grimsdale* (1906), 11 Com. Cas. 280; *Sanday v. British and Foreign Marine Insurance*, [1915] 2 K.B. 781; *Re Sutro & Co. and Heilbut, Symons & Co.*, [1917] 2 K.B. 348; *Naylor, Benzoni & Co. v. Krainische Industrie Gesellschaft* (1918), 87 L.J.K.B. 1066; *Ruffy-Arnell, etc., Co. v. R.*, [1922] 1 K.B. 599; *Cunard Steamship Co. v. Buerger*, [1926] All E.R.Rep. 103; *Kaufmann v. British Surety Insurance Co.* (1929), 45 T.L.R. 399; *Connolly Shaw, Ltd. v. Nordenfjeldske Steamship Co.* (1934), 50 T.L.R. 418; *Tate and Lyle, Ltd. v. Hain Steamship Co.* (1934), 151 T.L.R. 249; *Sociedad Anonima Commercial De Esportacion e Importacion (Louis Dreyfus & Co.) v. National Steamship Co.*, [1935] All E.R.Rep. 181; *Mann, Taylor & Co. v. Royal Bank of Canada* (1935), 40 Com. Cas. 267; *North and South Insurance Corp'n., Ltd. v. National Provincial Bank, Ltd.*, [1935] All E.R.Rep. 640; *Vsesojuznoje Obediheni Sovfracht of Moscow v. Temple Steamship Co.* (1945), 173 L.T. 373; *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768; *G. H. Renton & Co. v. Palmyra Trading Corp'n. of Panama*, [1956] 3 All E.R. 957; *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.*, [1958] 1 All E.R. 725.

As to deviation, see 35 HALSBURY'S LAWS (3rd Edn.) 269-273, 415, 419, 533, 534; and for cases see 41 DIGEST 483 et seq.

Case referred to:

- (1) *Robertson v. French* (1803), 4 East, 130; 102 E.R. 779; 17 Digest (Repl.) 259, 637.

Also referred to in argument:

- Gairdner v. Senhouse* (1810), 3 Taunt. 16; 128 E.R. 7; 29 Digest (Repl.) 175, 1120.

- Leathly v. Hunter* (1831), 7 Bing. 517; 1 Cr. & J. 423; 5 Moo. & P. 457; 1 Tyr. 355; 9 L.J.O.S.Ex. 118; 131 E.R. 200, Ex. Ch.; 29 Digest (Repl.) 156, 928.

- Leduc v. Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313, C.A.; 41 Digest 485, 3172.

**Appeal** from a decision of the Court of Appeal (LORD ESHER, M.R., BOWEN and FRY, L.JJ.), reported [1892] 1 Q.B. 337, affirming a decision of HAWKINS, J.

*Bigham, Q.C.*, *Boyd and Glynn* for the appellants.

*J. Walton, Q.C.*, *C. C. Scott and Cecil Carver* for the respondents, were not called upon to address the House.

**LORD HERSCHELL, L.C.**—The question raised by this appeal is the construction to be put upon a bill of lading by which the appellant shipowners agreed to carry certain goods of the respondents. The shipowners allege that the court below erred in so construing their liability under the bill of lading as to hold that they had broken their contract by proceeding to a port called Burriana after they had taken on board the cargo shipped by the respondents.

A cargo of oranges was shipped at Malaga, and the bill of lading was in these terms:

"Shipped in good order and condition...in and upon the good steamship called the *Zena*...now lying in the port of Malaga, and bound for Liverpool...eight third cases of oranges."

The port to which the vessel proceeded after she left Malaga was not in the direction of Liverpool, but in the contrary direction taking the vessel farther away from Liverpool than she was at Malaga. Of course it could not be disputed that, if the words which I have read to your Lordships were the only words to be found in the



**A** bill of lading relating to the voyage, the shipowners could not justify their act in thus deviating from the stipulated voyage, and would be liable to the shippers in respect of any damage to their goods sustained in consequence of such deviation. In the present case, owing to the delay which took place before the vessel arrived at Liverpool, the oranges were very much damaged, and loss was consequently sustained.

**B** But the shipowners seek to justify the act of proceeding to Burriana by reason of these words which follow those which I have read :

"with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

**C** The contention of the appellants is, that under those words the voyage to Burriana was justified by the terms of the contract between the parties. It is admitted that the contention of the appellants goes to this length, that after the oranges were taken on board at Malaga upon a vessel said to be bound for Liverpool, the ship might have been sent to any port within the limits named or any number of those ports in any order, staying there any time she pleased, for the purpose of taking in cargo, or delivering it at any of those ports, and it is true that, if their full and complete meaning be given to the words used, that will be the consequence of giving them that meaning. The question is whether they ought to be so construed, or whether there is any reason for putting a restriction upon their construction.

These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment. The name of the particular port of shipment as well as the goods to be shipped is left in blank, and these words are treated as a liberty which is to attach to the particular voyage which is agreed upon between the parties. But the main object and intent of the bill of lading is the voyage so agreed upon; and although it would not be legitimate to discard the printed words (indeed here the shipowners require the shippers to undertake to be bound by them as well as by the written words), yet it is well recognised that, in construing an instrument of this sort, and in considering what is its main intent and object, and what the interpretation ought to be from words connected with that main intent and object so expressed, it is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to the particular voyage. The main object and intent, as I have said, of this bill of lading is the carriage of oranges from Malaga to Liverpool. That is the matter in which the shippers are concerned; and it seems to me that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowners to proceed anywhere that they pleased, to trade in any manner that they pleased, and to arrive at the port at which the oranges were to be delivered when they pleased.

**H** Is there any rule of law which compels the construction contended for? I think there is not. Where general words are used which are obviously intended to be applicable, so far as they are applicable, to the circumstances of the particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent. Therefore, it seems to me that the construction contended for would be an unreasonable one, and there is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage is, inasmuch as at the time when this document is framed the parties who frame it do not know what the particular voyage will be, and intend it to be equally used whatever that voyage is. The ports, a visit to which would be justified under this contract will no doubt differ

according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that, I am speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports in the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given.

Then it is said that this may be done "in any rotation." I do not think that that carries the matter any further. When once the conclusion which I have indicated is arrived at, if the meaning to be given to those words is such that the vessel may take those ports in any order she pleases in a reasonable sense, nevertheless the ports referred to must still, in my opinion, be ports lying between Malaga and the port of destination, Liverpool, even although there might be justification for her not touching at any particular one of those ports, or more than one of them, in the exact order in which they would come in the voyage between those two places. It is not necessary to decide what effect should be given to those words "in any rotation"; but, even giving to them the fullest possible effect, they do not seem to me to enlarge the number of ports at which it would be justifiable for this vessel to touch during the course of her voyage. It is to be observed that the liberty which is given is not a liberty simpliciter to proceed to those ports. Purposes are mentioned; and the first which is mentioned is "for the purpose of delivering coals, cargo, or passengers." It is exclusively for the "delivering of coals, cargo, or passengers." It is true those words are followed by the words "or for any other purpose whatsoever," but I am by no means satisfied that, when you find liberty given to proceed to certain ports "for the purpose of delivering" and "for any other purpose whatsoever," you must not put a limitation upon those words "any other purpose whatsoever," and that it would be legitimate to deduce from them the conclusion that there was authority to the shipowner to proceed to any of those ports for the purpose of taking in cargo as well as delivering it. It is impossible to conceive why there should be this mention of the delivery of cargo, as the thing first mentioned in dealing with the purpose for which the vessel might proceed to these ports, if she was to be at liberty either to take in or to discharge cargo; and it seems to me to throw light at all events upon the construction which ought to be put upon the language used, because the delivering of coals, cargo, or passengers points to the carrying out of a voyage already determined upon in relation to a cargo already on board.

I do not put that before your Lordships as by any means the governing consideration, because I am led to the conclusion at which I have arrived upon the same grounds as those which have been so very clearly and fully expressed by the learned judges in the court below. I find myself so completely in agreement with the reasons which they have given that I do not think it necessary to trouble your Lordships with any further observation. I move your Lordships that this appeal be dismissed with costs.

**LORD HALSBURY.**—I am entirely of the same opinion. It seems to me that, in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only.

Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port, and to deliver at another port a perishable cargo. I do

A not think the learned counsel who argued this case on the part of the appellants gave sufficient effect in the argument which he addressed to your Lordships to the difference between the ordinary and formal parts of the document which are to be found in print and the written parts; indeed, I gathered from him at one time that he rather contested the legitimacy of considering the difference whether the words were in print or in writing. I suppose that that doubt which he appeared to intimate was justified by the terms of this particular document; because the fact that in the ordinary construction of a commercial document such a principle as I have mentioned has been adopted for something like a century cannot be a matter of doubt; and the reason for it appears to me to be very cogent and relevant to the case before your Lordships.

C I have in my hand the report of a case in the Court of King's Bench in the year 1803 (*Robertson v. French* (1)), in which LORD ELLENBOROUGH, C.J., as it appears to me, gives with great precision the ground upon which one part of a document may be relied upon as controlling and cutting down the generality of the words in the other. His Lordship says (4 East, at pp. 135, 136):

D "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases. It is therefore proper to state upon this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect of the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them being invariable and uniform has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

H If one applies the principle of what LORD ELLENBOROUGH there says to the present case, it seems to me that the particular document which your Lordships are now construing was obviously intended to fulfil the function which the learned counsel himself very truly described, and there is no doubt, within the ambit of what the parties would contemplate, of the sort of voyage by which probably every one of the terms of the instrument would be satisfied. For my own part I should imagine I that where it was intended, at some of the distant ports referred to, to have a full and complete cargo taken on board, or that where they had intended from time to time to call at an intermediate port before going to the ultimate port to which the parties agreed, probably there is no one of the stipulations in this contract which would not receive its ample fulfilment. But when one applies it to the particular circumstances of this case in which the parties have in writing expressed the intention that there should be a delivery of goods (and the particular class of goods is not to be omitted from consideration—they were perishable goods taken from one port to another) it seems to me that to apply these general printed words



(which might in another case, as I say, receive complete fulfilment), as regards each of these stipulations, to the particular contract which the parties had immediately before them when they agreed to this contract as between carrier and customer, would manifestly defeat the very object which both the parties had in view. I also concur with the Lord Chancellor that the particular words which give the liberty are not to be rejected, not as in themselves forming a complete answer to the argument, but as forming part of that general consideration of the entire document which it is the duty of every court, so far as they can, to apply to a document under construction; and that appears to me again to refer to a liberty to deliver in the course of a voyage where the principal voyage has been agreed upon between the parties. A

Under these circumstances I do not desire to add anything, except to point out that the argument of counsel for the appellants, very lucid and able as it was, did somewhat of injustice when he said that BOWEN, L.J., had assumed something when he stated that it would make it impossible to insure the cargo if such a construction was adopted as was then insisted upon. BOWEN, L.J., said: B

"It would make it impossible to insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery and to know what they were to do with the bills of lading." C

It seems to me that that which the learned counsel attributed to BOWEN, L.J., he has been guilty of himself. If he assumes that the construction is that which he contends for, his answer that nevertheless business does go on would be good enough; but he seems to forget that the question which we are considering is whether that is the construction. He must not first assume that that is the true construction and that business does go on nevertheless, which was his answer, but he must consider whether mercantile men when they do go on with business in this form do not recollect that a business sense will be given to business documents, and that, therefore, they are not under the peril of leaving it absolutely to the shipowner himself to do what he will with the cargo. Indeed the argument seems to me to assume that you might get rid of written documents altogether, inasmuch as both carrier and customer have such complete confidence in each other that, however wide and unreasonable may be the construction attributed to a written instrument between carrier and customer, they are not likely to disagree. D

If that is the argument, I am afraid that the records both of your Lordships' House and of all other courts do not favour that view. Undoubtedly both carrier and customer differ very widely sometimes as regards what is reasonable and what is not, and for that reason they call upon courts of law to construe sometimes somewhat loose and irregular instruments. For these reasons I agree in the motion which my noble and learned friend on the woolsack has made. E

**LORD MACNAGHTEN.**—I agree. F

**LORD SHAND.**—I am also of opinion that this decision must be adhered to. It appears to me that, as it is clear that in this trade a number of perishable cargoes are constantly carried, that is a circumstance not to be lost sight of. In the Mediterranean undoubtedly in certain seasons of the year the main cargoes brought by these vessels are oranges, which are extremely liable to deterioration; and I agree with your Lordships in thinking that the reading which we have been asked to put upon this bill of lading is not only inconsistent with the object of the contract of carriage known to both parties, but would be entirely destructive of that object. I should like to add, with reference to a point which does not seem to have been discussed in the court below in regard to that clause of the bill of lading which speaks of the purpose for which calls may be made at the different ports, namely, that they may be "for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever," that while undoubtedly these words, as one looks at them in the first instance, would seem to suggest that it is the case of a vessel G

**A** which has taken on board all her cargo and is proceeding to deliver her cargo as she goes onwards, yet I should feel great difficulty in restraining those words, in the sense which has been contended for, to the case of delivering cargo only in such a case as the present. I suppose it is notorious that in these voyages on the Mediterranean vessels call at one port after another for the purpose of taking in cargo, and if a case occurred in which a shipper has sent it, it may be a small portion

**B** of oranges or other goods, on board a vessel which has got to fill up, I should have considerable difficulty in holding at the moment that the words used in the bill of lading as to delivering a cargo might not fairly include receiving a cargo in the course of the voyage. But, my Lords, that question is not before the House now, and I do not think that anything which has been said upon that subject forms a ground of decision in this case. I entirely concur in the other ground stated by

**C** your Lordships, and I agree that this appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors: *W. A. Crump & Son; Snow, Snow & Fox.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

**D**

**E**

## RATCLIFFE v. EVANS

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), January 20, May 26, 1892]

[*Reported* [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539]

**F**

*Malicious Falsehood—False statement about business of trader—General loss of business—Admissibility of evidence.*

**G**

In an action on the case for falsehood producing damage to a man's trade, which, in its very nature, is intended or is reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular customers, evidence of such general loss of business is admissible and is sufficient to sustain the action.

**H**

Per BOWEN, L.J. That an action will lie for written or oral falsehoods not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.

**I**

**Notes.** By the Defamation Act, 1952, s. 3 (1) (32 HALSBURY'S STATUTES (2nd Edn.) 400): "In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage—(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication."

Considered: *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R.P.C. 95; *Leatham v. Rank* (1912), 57 Sol. Jo. 111; *Shapiro v. La Motta*, [1923] All E.R.Rep. 378; *Interoven Stove Co. v. British Broadcasting Corpn.* (1935), 79

Sol. Jo. 921; *Worsley & Co. v. Cooper*, [1939] 1 All E.R. 290. Applied: *Joyce v. Motor Surveys, Ltd.*, [1948] Ch. 252. Referred to: *Mellin v. White*, [1894] 3 Ch. 276; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood and Clark, Ltd.*, [1895-99] All E.R.Rep. 244; *Lyne v. Nicholls* (1906), 23 T.L.R. 86; *Barrett v. Associated Newspapers* (1907), 23 T.L.R. 666; *Concaris v. Duncan*, [1909] W.N. 51; *Weld-Blundell v. Stephens*, [1920] All E.R.Rep. 32; *British Railway Traffic and Electric Co. v. C.R.C. Co. and L.C.C.*, [1922] 2 K.B. 260; *Ormond Engineering Co. v. Knopf* (1932), 49 R.P.C. 634; *Bruce v. Odhams Press, Ltd.*, [1936] 1 All E.R. 287; *Danish Mercantile Co. v. Beaumont* (1950), 67 R.P.C. 111; *London Ferro-Concrete Co. v. Justicz* (1951), 68 R.P.C. 65; *Mentmore Manufacturing Co. v. Fomento (Sterling Area), Ltd.* (1954), 72 R.P.C. 12.

As to slander of title or goods and malicious falsehood, see 24 HALSBURY'S LAWS (3rd Edn.) 125 et seq.; and for cases see 32 DIGEST 203 et seq.

#### Cases referred to:

- (1) *Ashby v. White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; on appeal (1704), 1 Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 E.R. 417, H.L.; 17 Digest (Repl.) 79, 22.
- (2) *Cane v. Golding* (1649), Sty. 169, 176; 82 E.R. 619, 625; 32 Digest 204, 2546.
- (3) *Harwood v. Lowe* (1628), Palm. 529; 81 E.R. 1205; sub nom. *Law v. Harwood*, Cro. Car. 140; sub nom. *Lowe v. Harwood*, W.Jo. 196; 32 Digest 204, 2545.
- (4) *Tasburgh v. Day* (1618), Cro. Jac. 484; 79 E.R. 413; 32 Digest 205, 2554.
- (5) *Iveson v. Moore* (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K.B. 10; 1 Salk. 15; Willes, 74 n.; 91 E.R. 1224; sub nom. *Jeveson v. Moor*, 12 Mod. Rep. 262; 36 Digest (Repl.) 312, 590.
- (6) *Rose v. Groves* (1843), 5 Man. & G. 613; 1 Dow. & L. 61; 6 Scott, N.R. 645; 12 L.J.C.P. 251; 1 L.T.O.S. 146; 7 Jur. 951; 134 E.R. 705; 36 Digest (Repl.) 312, 594.
- (7) *Harrison v. Pearce* (1859), 32 L.T.O.S. 298; 32 Digest 169, 2078.
- (8) *Bluck v. Lovering* (1885), 1 T.L.R. 497, D.C.; 32 Digest 170, 2084.
- (9) *Ingram v. Lawson* (1840), 6 Bing.N.C. 212; 8 Scott 471; 9 L.J.C.P. 145; 7 L.T. 134; 4 Jur. 151; 133 E.R. 84; 32 Digest 26, 161.
- (10) *Ward v. Weeks* (1830), 7 Bing. 211; 4 Moo. & P. 796; 9 L.J.O.S.C.P. 6; 131 E.R. 81; 32 Digest 174, 2136.
- (11) *Holwood v. Hopkins* (1600), Cro. Eliz. 787; 78 E.R. 1017; 32 Digest 173, 2123.
- (12) *Dixon v. Smith* (1860), 5 H. & N. 450; 29 L.J.Ex. 125; 157 E.R. 1257; 32 Digest 165, 2015.
- (13) *Evans v. Harries* (1856), 1 H. & N. 251; 26 L.J.Ex. 31; 156 E.R. 1197; 32 Digest 175, 2158.
- (14) *M'Loughlin v. Welsh* (1846), 10 I.L.R. 19; 32 Digest 165, 2012.
- (15) *Ashley v. Harrison* (1793), 1 Esp. 48; Peake, 194, N.P.; 32 Digest 175, 2143.
- (16) *Hartley v. Herring* (1799), 8 Term. Rep. 130; 101 E.R. 1305; 32 Digest 174, 2129.
- (17) *Hopwood v. Thorn* (1849), 8 C.B. 293; 19 L.J.C.P. 94; 15 L.T.O.S. 45; 14 Jur. 87; 137 E.R. 522; 32 Digest 37, 344.
- (18) *Malachy v. Soper* (1836), 3 Bing.N.C. 371; 2 Hodg. 217; 3 Scott, 723; 6 L.J.C.P. 32; 132 E.R. 453; 32 Digest 203, 2525.
- (19) *Evans v. Harlow* (1844), 5 Q.B. 624; 1 Dav. & Mer. 507; 13 L.J.Q.B. 120; 2 L.T.O.S. 400; 8 Jur. 571; 114 E.R. 1384; 32 Digest 209, 2601.
- (20) *J'Anson v. Stuart* (1787), 1 Term Rep. 748; 99 E.R. 1357; 32 Digest 18, 88.
- (21) *Lord Arlington v. Merricke* (1672), 2 Saund. 403; 3 Keb. 45, 59; 85 E.R. 1215; 26 Digest (Repl.) 55, 393.
- (22) *Grey v. Friar* (1850), 15 Q.B. 901; 19 L.J.Q.B. 393.
- (23) *Westwood v. Cowne* (1816), 1 Stark. 172, N.P.; 28 Digest (Repl.) 331, 777.



- A** (24) *Hargrave v. Le Breton* (1769), 4 Burr. 2422; 98 E.R. 269; 32 Digest 206, 2565.
- (25) *Riding v. Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest 171, 2094.

**B** **Application** to enter judgment for the defendant, or for a new trial, by way of appeal from the verdict and judgment in an action tried before Mr. Commissioner BOMPAS, Q.C., and a jury at Chester.

The plaintiff, in his statement of claim, alleged that he had for a long time carried on the business, at Hawarden, in the county of Flint, of an engineer and boiler-maker, under the name of "Ratcliffe & Sons," having become entitled to the goodwill of the business upon the death of his father, who, with others, had

**C** previously carried on the same business under the same name. The defendant was the registered proprietor, publisher, and printer of a weekly newspaper, called the "County Herald," which circulated in Flintshire and some of the adjoining counties. The plaintiff alleged that he had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff, in relation to his business, in the "County Herald," certain words, which were as follows:

**D** "An event of a very pleasant and interesting nature occurred at the new station of the Manchester, Sheffield, and Lincolnshire Railway at Hawarden on Saturday last, the 26 ult. It had been whispered abroad for a few days previous that Mr. Edward Ratcliffe of that village intended having a storeyard at this station, and the fact was fully demonstrated when, on the afore-mentioned date, a large crowd of persons assembled to witness the arrival and unloading operation of a large steel boiler at Hawarden. This boiler is a specially constructed one, capable of working at 100 lb. pressure, and was purchased by

**E** Mr. Ratcliffe in Sheffield, and consigned direct to its destination. We may mention that, although Mr. Edward Ratcliffe has superintended the building of hundreds of boilers when connected with the firm of Ratcliffe & Sons (which firm is now unfortunately extinct), yet this is the first time he has had the

**F** honour of personally importing into Hawarden."

At the trial, the learned commissioner allowed the statement of claim to be amended by adding the words

**G** "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business."

The plaintiff proved a general falling off and loss of business since the publication of the statement complained of, but gave no specific evidence of the loss of any particular customers or orders by reason of the publication. In answer to questions put to them by the learned commissioner, the jury found that the words did not

**H** reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of "Radcliffe & Sons" was extinct was not published bona fide; and that the plaintiff's business suffered damage to the extent of £120 by reason of the publication of that statement. The learned commissioner, upon these findings, gave judgment for the plaintiff for £120. The defendant applied for judgment or for a new trial, on the ground that the evidence of general loss of business was

**I** improperly admitted, and that there was no evidence of any such special damage as was necessary to support the action.

*Bowen Rowlands, Q.C., and E. H. Lloyd* for the defendant.  
*F. Marshall* for the plaintiff.

*Cur. adv. vult.*

May 26, 1892. **BOWEN, L.J.,** read the following judgment of the court. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester Assizes, with

the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial [but see now s. 3 of the Defamation Act, 1952]. The injurious statement complained of was a publication in the "County Herald," a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel, but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business, without specific proof of the loss of any particular customer or orders, and the question we have to determine is whether in such an action such general evidence of damage was admissible and sufficient.

That an action will lie for written or oral falsehoods not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general, and not special, damage; and special damage—as has often been said—is the gist of such an action on the case.

Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White* (1). In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage) which results from the particular circumstances of the case and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings, in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has in fact occurred. Such damage is called variously in old authorities "express loss," "particular damage" (*Cane v. Golding* (2)), "damage in fact," "special or particular cause of loss" (*Harwood v. Lowe* (3); *Tasburgh v. Day* (4)).

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained (beyond what is sustained by the general public) if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson v. Moore* (5); *Rose v. Groves* (6). In this judgment we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends when successively employed in more than one context, and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance.

In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to

- A show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong, in regard to which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong the defendant is prepared for the proof that some general damage may have been done. As is said by GOULD, J., in *Iveson v. Moore* (5), in actions against a wrongdoer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is, under the circumstances, to be relied on by the plaintiff, such particular damage must, of course, be alleged and shown. But a loss of general custom flowing directly and in the ordinary course of things from a libel may be alleged and proved generally.
- C POLLOCK, C.B., said in *Harrison v. Pearce* (7) (32 L.T.O.S. at p. 298):

“That is not special damage—it is general damage arising from the kind of injury the plaintiff has sustained.”

- D So in *Bluck v. Lovering* (8), under a general allegation of loss of credit in business, general evidence was received of a decline of business, presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram v. Lawson* (9).

- E Akin to—though distinguishable, in a respect which will be mentioned, from—actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves, and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong, and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes and in theory allows proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements
- F may indeed be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorised repetition: see *Ward v. Weeks* (10); *Holwood v. Hopkins* (11); *Dixon v. Smith* (12). General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable per se general damage may be alleged and proved with generality must be taken therefore with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly
- H produced the general damage that has in fact occurred.

- I *Evans v. Harries* (13) was a slander uttered in such a manner. It consisted of words reflecting on an innkeeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn, a floating and transitory class. The court held that general evidence of the decline of business was rightly receivable. MARTIN, B., said (1 H. & N. at p. 254):

“How is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander, unless he is allowed to give general evidence of loss of custom?”

*M'Loughlin v. Welsh* (14) was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should



be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley v. Harrison* (15). A

From libels and slanders actionable per se, we pass to the case of slanders not actionable per se, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Harwood v. Lowe* (3). Many such instances are collected in the judgments in *Iveson v. Moore* (5), where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said—in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim— B

“damages in the per quod, where the per quod is the gist of the action, should be shown certainly and specially.” C

But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here (as before) occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. D

*Hartley v. Herring* (16) is probably a case of the kind; although it does not appear from the report under what circumstances or in the presence of whom the slanderous words were uttered. But if the words are uttered to an individual and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: see *Dixon v. Smith* (12); *Hopwood v. Thorn* (17). The broad doctrine is stated in BULLER'S NISI PRIUS at p. 7, that where words are not actionable and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present brought for damage done by falsehoods, written or oral, about a man's goods or business are similar in many respects to the last-mentioned class of slanders, not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: see *Malachy v. Soper* (18). The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Harwood v. Lowe* (3); *Cane v. Golding* (2); *Tasburgh v. Day* (4); *Evans v. Harlow* (19). But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: see *J'Anson v. Stuart* (20); *Lord Arlington v. Merricke* (21); *Grey v. Friar* (22); *Westwood v. Cowne* (23); *Iveson v. Moore* (5). E

In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss F

A of business, as the natural and direct result produced, and perhaps intended to be produced.

An instructive illustration, and one by which the present appeal is really covered, is furnished by *Hargrave v. Le Breton* (24), decided a century and a half ago. It was an action of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped; and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave v. Le Breton* (24) it was a falsehood openly promulgated at an auction. In the case before us to-day it is a falsehood openly disseminated through the press, probably read and possibly acted on by persons of whom the plaintiff never heard. To refuse with reference to such subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from and not to follow old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed.

It may be added that, so far as the decision in *Riding v. Smith* (25) can be justified, it must be justified on the ground that the court, rightly or wrongly, believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Hamlin & Co.*, for *Cartwright & Sons*, Chester; *Chester & Co.*, for *Henry Joliffe*, Chester.

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]

## BERNSTEIN v. BERNSTEIN

[COURT OF APPEAL (Lindley, Lopes and A. L. Smith, L.JJ.), July 19, 21, August 7, 1893]

[Reported [1893] P. 292; 63 L.J.P. 3; 69 L.T. 513; 9 T.L.R. 639;  
37 Sol. Jo. 730; 6 R. 609]

*Divorce—Condonation—Defined—Conclusion of fact, not law—Effect of knowledge of forgiving spouse, acquired subsequent to condonation, of other conjugal offences.*

Condonation is a conclusion of fact, not of law, and it means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of the particular offence forgiven. Condonation of that offence stands good, with all its consequences, although the forgiving spouse has since been made aware of other offences committed by the other spouse which were unknown to the forgiving spouse at the time of the condonation, as to which every remedy remains.

*Divorce—Damages—Bar to claim—Condonation by husband of wife's adultery.*

Where a husband has condoned the adultery of his wife with a co-respondent the condonation operates as a bar to a claim by him for damages against the co-respondent.

*Pomero v. Pomero and Hadley* (1) (1884), 10 P.D. 174, overruled.

**Notes.** Sections 29, 30, 31, and 33 of the Matrimonial Causes Act, 1857, referred to in the judgments *infra*, have been replaced by s. 4 (1) (2) and s. 30 of the Matrimonial Causes Act, 1950.

Followed: *Hyman v. Hyman and Goldman*, [1904] P. 403; *Cox v. Cox*, [1906] P. 267. Distinguished: *Stocker v. Stocker*, *Brice and Patterson*, [1917] P. 264. Considered: *Cramp v. Cramp and Freeman*, [1920] All E.R.Rep. 164; *Lloyd v. Lloyd and Hill*, [1947] 1 All E.R. 383; *Barnes v. Barnes*, [1947] 2 All E.R. 326. Referred to: *Brydges v. Brydges and Wood*, [1909] P. 187; *Butterworth v. Butterworth and Englefield*, *Collins v. Collins and Harrison*, *Barratt v. Barratt and Fox*, *Howell v. Howell and Walker*, *Adams v. Adams and Ward*, *Ellworthy v. Ellworthy and Ledgard*, [1920] P. 126; *Crocker v. Crocker*, [1921] P. 25; *Kent v. Atkinson*, [1923] All E.R.Rep. 28; *Sneyd v. Sneyd and Burgess*, [1926] P. 27; *Jacobs v. Jacobs and Ceen*, [1950] 1 All E.R. 96; *Burch v. Burch*, [1958] 1 All E.R. 848.

As to condonation, see 12 HALSBURY'S LAWS (3rd Edn.) 302-307; and for cases see 27 DIGEST (Repl.) 395 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- (1) *Pomero v. Pomero and Hadley* (1884), 10 P.D. 174; 54 L.J.P. 93; 34 W.R. 124; 27 Digest (Repl.) 404, 3333.
- (2) *Dempster v. Dempster* (1861), 2 Sw. & Tr. 438; 31 L.J.P.M. & A. 20; 5 L.T. 433; 8 Jur.N.S. 44; 164 E.R. 1066; 27 Digest (Repl.) 406, 3351.
- (3) *Durant v. Durant* (1825), 1 Hag. Ecc. 733; 162 E.R. 734; 27 Digest (Repl.) 396, 3265.
- (4) *Turton v. Turton* (1830), 3 Hag. Ecc. 338; 162 E.R. 1178; 27 Digest (Repl.) 312, 2609.
- (5) *Bramwell v. Bramwell* (1831), 3 Hag. Ecc. 618; 162 E.R. 1285; 27 Digest (Repl.) 402, 3312.
- (6) *Alexandre v. Alexandre*, *Queen's Proctor Intervening* (1870), L.R. 2 P. & D. 164; 39 L.J.P. & M. 84; 23 L.T. 268; 18 W.R. 1087; 27 Digest (Repl.) 372, 3074.
- (7) *Peacock v. Peacock* (1858), 1 Sw. & Tr. 183; 27 L.J.P. & M. 71; 31 L.T.O.S. 302; 6 W.R. 866; 164 E.R. 684; 27 Digest (Repl.) 402, 3314.



- A (8) *Keats v. Keats and Montezuma* (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur.N.S. 176; 7 W.R. 377; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.
- (9) *Howard v. Burtonwood* (1742), Selwyn's N.P. (13th Edn.), p. 9, n.; 27 Digest (Repl.) 404, 3332.
- B (10) *Duberley v. Gunning* (1792), 4 Term. Rep. 651; 100 E.R. 1226; 27 Digest (Repl.) 387, 3191.
- (11) *Story v. Story and O'Connor* (1887), 12 P.D. 196; 57 L.J.P. 15; 57 L.T. 536; 51 J.P. 680; 36 W.R. 190; 27 Digest (Repl.) 433, 3617.
- (12) *Norris v. Norris, Lawson and Mason* (1861), 4 Sw. & Tr. 237; 30 L.J.P.M. & A. 111; 164 E.R. 1506; 27 Digest (Repl.) 410, 3386.
- (13) *Seddon v. Seddon and Doyle* (1860), 30 L.J.P.M. & A. 12; 7 Jur.N.S. 147; 27 Digest (Repl.) 481, 4189.
- C (14) *Ramsden v. Ramsden and Luck, Ramsden v. Ramsden* (1886), 2 T.L.R. 867; 27 Digest (Repl.) 409, 3383.
- (15) *Seddon v. Seddon and Doyle* (1862), 2 Sw. & Tr. 640; 31 L.J.P.M. & A. 101; 7 L.T. 253; 164 E.R. 1146; 27 Digest (Repl.) 574, 5297.
- (16) *Adams v. Adams and Colter* (1867), L.R. 1 P. & D. 333; 36 L.J.P. & M. 62; 16 L.T. 69; 27 Digest (Repl.) 574, 5307.
- D (17) *Ravenscroft v. Ravenscroft and Smith* (1872), L.R. 2 P. & D. 376; 41 L.J.P. & M. 28; 26 L.T. 265; 20 W.R. 448; 27 Digest (Repl.) 559, 5113.
- (18) *Lyne v. Lyne and Blackney* (1867), L.R. 1 P. & D. 508; 37 L.J.P. & M. 9; 17 L.T. 297; 16 W.R. 159; 27 Digest (Repl.) 475, 4112.
- E Also referred to in argument:  
*Winter v. Henn* (1831), 4 C. & P. 494, N.P.; 27 Digest (Repl.) 331, 2752.  
*Feize v. Thompson* (1808), 1 Taunt. 121; 127 E.R. 778; 17 Digest (Repl.) 89, 90.  
*Collins v. Collins* (1884), 9 App. Cas. 205; 32 W.R. 501, H.L.; 27 Digest (Repl.) 410, 3388.
- F *D'Aguilar v. D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, 4256.  
*Rose v. Rose* (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 31 W.R. 573, C.A.; 27 Digest (Repl.) 433, 3616.  
*Blandford v. Blandford* (1838), 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238; 31 W.R. 508; 27 Digest (Repl.) 397, 3269.
- G *Calcraft v. Earl of Harborough* (1831), 4 C. & P. 499, N.P.; 27 Digest (Repl.) 481, 4183.  
*Howe v. Howe* (1867), 15 W.R. 498; 27 Digest (Repl.) 575, 5318.

**Application** by the husband for the new trial of a suit for divorce brought by him against his wife and two co-respondents. Sampson and Turner, or that the judgment of SIR FRANCIS JEUNE, P., might be varied.

- H At the trial the jury found that the wife had committed adultery with both the co-respondents, but that the husband had condoned the adultery with Turner. The evidence showed that at the time of the condonation the husband did not know of the adultery with Sampson. Damages were claimed against Turner alone, but the learned President did not direct the jury to assess any, and they did not do so. He granted a decree nisi with costs as regarded the adultery with Sampson,
- I but took time to consider his decision with regard to Turner. He delivered his judgment on June 19, 1893, when he said that it had been argued on behalf of the husband that, as at the time of the condonation of the adultery with Turner, the husband did not know of the adultery with Sampson, there had been no condonation, and that, on that ground, even as against Turner, the petition should not be dismissed. The question turned on the true construction of ss. 29, 30, and 31 of the Matrimonial Causes Act, 1857. The language of those sections appeared, as regards allegations of adultery and condonation, to treat the charge against each co-respondent, where there were more than one, as a separate complaint, and,

if the adultery so complained of be proved, to direct that the decree should be pronounced, but, if such adultery be further shown to have been condoned, to direct that the petition, as regards such complaint, should be dismissed. It was consonant with good sense to say that an offence known and forgiven was not the less condoned because there might have been other offences which were not known or forgiven, and as to which every remedy remained. The husband's claim for damages against Turner fell with the petition for divorce, and, as against Turner, the petition was dismissed with costs. The husband appealed.

*Henry Kisch and H. J. Turrell* for the husband.

*Sir Edward Clarke, Q.C.*, and *Bargrave Deane* for the co-respondent, Turner.

*Cur. adv. vult.*

Aug. 7, 1893. The following judgments were read by *LOPES, L.J.*, and *A. L. SMITH, L.J.*

**LOPES, L.J.**—The petitioner prayed for a divorce from his wife on the ground of her adultery with the two co-respondents (Turner and Sampson), claiming damages from Turner and costs against both co-respondents. Divers acts of adultery were alleged at divers times and divers places against both co-respondents. The respondent and the co-respondent Turner denied the charges of adultery, and Turner set up condonation by the petitioner of the adultery complained of with him. Adultery with both Turner and Sampson was proved. At the trial it was proved that the petitioner had condoned the adultery with Turner, but it was also proved that at the time of that condonation he did not know of the adultery with Sampson. The President, after hearing the evidence, dismissed the petition against Turner, on the ground that the petitioner had condoned the adultery of his wife with him, and refused to entertain the claim for damages made by the petitioner against Turner, and ordered that the petitioner should pay Turner's costs. The President granted a decree nisi against Sampson. No question arises in the case so far as it relates to Sampson. The petitioner now appeals against the decision of the President, so far as it relates to Turner, on the following grounds. His counsel contends that he is entitled to a new trial, because the President misdirected the jury in not telling them (i) that there was no evidence of legal condonation of the adultery with Turner, and because he should thereupon have granted a decree nisi; (ii) in not telling the jury that Turner was not entitled to rely upon condonation as an answer to the claim for damages; (iii) in not telling the jury that they must assess damages against Turner, whose costs the petitioner could not be legally ordered to pay.

With regard to the first point, it was contended that there could be no legal condonation of the wife's adultery with Turner, however complete and absolute the forgiveness, and however full and complete the knowledge of all the circumstances of that particular offence, if at the time of that condonation there was any other matrimonial offence of the wife unknown to the husband—in fact, that condonation, to be legal and effective, involved the knowledge by the husband of all the adulteries of the wife, with whomsoever committed, up to the time of the condonation; that he could not forgive one act of adultery, or the adultery with one person, all the facts and circumstances of which he well knew and, knowing, elected to forgive and resume cohabitation with his wife, unless he also knew all her matrimonial delinquencies then existing. This view of condonation is not supported by the Matrimonial Causes Act, 1857, which now regulates all proceedings for divorce, whether it be a *mensa et thoro* or a *vinculo*, nor, I think, by the authorities.

I will deal first with the Act. Sections 27 and 28 provide the new remedy for dissolution of marriage. They create a power which the ecclesiastical courts did not possess, a power totally new in England, s. 28 enacting that the adulterer is to be made a co-respondent, and, of course, the adulterers, if more than one. Section 29 declares it to be the duty of the court, upon a petition for dissolution of mar-

**A**riage, to satisfy itself, not only of the facts charged in the petition, but also, among other things, whether or no the petitioner has "condoned" the adultery. I take that to mean the particular adultery relied upon—alleged to have been committed with the particular co-respondent charged with it. This is made more clear by s. 30, which deals with the dismissal of the petition, for it says the court shall dismiss the petition if it finds that the petitioner has during the marriage "condoned the adultery complained of." Complained of where? Surely in the petition and with the particular co-respondent charged with it; not adulteries of which the petitioner then had no knowledge and could not complain. Again, s. 31, dealing with the power of the court to pronounce a decree for dissolving the marriage, uses the words "has condoned the adultery complained of." I infer from the language of the Act that the legislature contemplated the case of adulteries known to the husband and complained of, and not other adulteries not known, and, therefore, not complained of; the former known and capable of being condoned; the latter not known and not capable of being condoned; and, with this state of things in their minds, advisedly provided for condonation in the one case and non-condonation in the other, never intending that no effective condonation should be possible unless all the matrimonial offences existing at the time were known to the forgiving party. As an abstract proposition it seems to me most unreasonable to say that you cannot forgive an offence, all the circumstances of which you know, unless at that time you are also acquainted with other delinquencies of the person forgiven. It would introduce into forgiveness such uncertainty—such a power of retraction and revocation—as would to a great extent make forgiveness no forgiveness at all.

**E** I now proceed to deal with the authorities. *Dempster v. Dempster* (2) was decided in 1861, and is an important case. It seems to me to make it clear that, up to that time, the question as to what amount of knowledge of conjugal offences is necessary to constitute legal condonation was an open question, upon which the learned judge (SIR CRESSWELL CRESSWELL), who decided that case, had not himself formed a concluded opinion. He deals with *Durant v. Durant* (3), *Turton v. Turton* (4), and *Bramwell v. Bramwell* (5), and says (2 Sw. & Tr. at p. 440):

**G** "If the dicta cited from *Turton v. Turton* (4) and *Bramwell v. Bramwell* (5) are to be taken literally, they dispose of the question; but, if they are to be construed with reference to the facts of those cases, and with reference to *Durant v. Durant* (3), they seem to me to leave it an open question whether adultery by a husband with A. may not be condoned, although he had previously been guilty of adultery with B., which at the time of the alleged condonation was unknown to the wife."

**H** In 1870 *Alexandre v. Alexandre, Queen's Proctor Intervening* (6), came before LORD PENZANCE. The petition alleged two charges of adultery, and alleged that neither of them had been condoned. The Queen's Proctor intervened, and proved condonation of one adultery, but not of the other, and the court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery. That case proceeds on the assumption that one matrimonial offence may be condoned, notwithstanding the fact that at the time of such condonation there may be another matrimonial offence unknown to the other party to the marriage. LORD PENZANCE says (L.R. **I** 2 P. & D. at p. 167):

"As regards the adultery which resulted in the birth of a child, I think the facts now disclosed are a complete answer to the petitioner's claim to a decree, because he condoned it. But there is another charge of adultery, which was established on the first hearing, and which is not only not refuted now, but is really supported by what the respondent has told us."

The learned judge proceeds (*ibid.* at p. 168):

"Then substantially the charge of adultery at 7, Buckingham Place, is proved,



and what answer is there to that adultery? It has never been condoned, because the husband never knew of it." A

The adultery in Buckingham Place was anterior to the condoned adultery, but was carefully concealed from the petitioner when he condoned the subsequent adultery. It is clear to my mind that LORD PENZANCE did not consider that to constitute legal condonation there must be knowledge of all the conjugal delinquencies. It is clear he took the contrary view. B

In 1858 *Peacock v. Peacock* (7) was decided. It was a petition for judicial separation. The respondent, among other defences, set up condonation. The Judge Ordinary (SIR CRESSWELL CRESSWELL) explained to the jury that condonation signified forgiveness of a conjugal offence with full knowledge of all particulars. It was not suggesting that the forgiving party need know more than all the particulars of the particular offence forgiven. C

In 1859 *Keats v. Keats and Montezuma* (8) came before the court. The respondent denied the adultery and pleaded condonation, and the Judge Ordinary, addressing the jury on condonation, said (1 Sw. & Tr. at p. 346):

"Condonation means a 'blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed.'" D

A person may forgive in the sense of not meaning to bear ill-will, or not seeking to punish, still being far from meaning to restore the guilty party to his or her original position. A master may forgive a clerk or a servant who has robbed him. He may say: "I forgive you," without having the slightest intention to restore him to the position he has forfeited. I take it that condonation would mean something more than that. To use the language of LORD STOWELL, it is like the releasing a debt; it makes it as if the debt had never existed. Again, with reference to condonation, it has been held that the person condoning must know of the offence, otherwise he cannot be supposed to condone it. The definition of condonation given by the Judge Ordinary was afterwards sought to be impeached before the full court, but the attempt failed. It will be observed that the learned judge uses the words "blotting out of the offence imputed." Nothing is said of other offences not known at the time of the condonation, the existence of which might make the condonation inoperative. E

It appears to me that to hold condonation effectual only where the forgiving party knew of all the delinquencies of the party forgiven would lead to results which show that such cannot be the true meaning of legal condonation. An injured husband prays dissolution of his marriage on account of his wife's adultery with A.; the wife admits the adultery and pleads condonation; the condonation is proved and petition dismissed. A year afterwards the same injured husband prays dissolution of his marriage on account of his wife's adultery with B. Adultery with B. is proved, such adultery being before the condoned adultery with A. What is to happen? The husband condoned the adultery with A., not knowing of the adultery with B.; the condonation cannot be recalled, for the petition has been dismissed, and no fresh proceeding can be taken against A. If the contention of the husband here was maintained, the condonation of the adultery with A. would be inoperative, because there was existing at the time of the condonation adultery with B., of which the condoning husband knew nothing. But if the condonation of the adultery with A. is to be operative in the case I have put, it is simply operative, if the plaintiff's contention is supported, because there have been two petitions instead of one making A. and B. both co-respondents. Condonation is a conclusion of fact, not of law, and, in my judgment, means the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The husband, in my opinion, need not be aware of all the acts of adultery committed by the wife when he forgives her any particular act of adultery. Condonation means F G H I

A a full and absolute forgiveness, with knowledge of all that is forgiven—it does not operate as a forgiveness of other unknown adulteries; but, on the other hand, there is no reason why it should not stand good although the husband has since been made aware of other adulteries committed by the wife, which were unknown to him at the time of the condonation, and as to which every remedy remains.

B On this point I think the learned President rightly directed the jury, and properly dismissed the petition against Turner, so far as it related to the prayer for dissolution of the marriage. But it is said, and strongly urged as a second point on behalf of the husband, that, assuming that the learned President was right in holding that there was evidence of condonation, and that the jury rightly found condonation, still, the adultery of the wife with Turner being proved, the husband was entitled to damages, notwithstanding the condonation, and that the C President ought so to have directed the jury. It was contended that condonation is no bar to the recovery of damages where the adultery is proved and damages are claimed, but that the same principle is to be applied as in the old action of criminal conversation. It is necessary to consider the law applicable to the old action of criminal conversation, and also the Matrimonial Causes Act, 1857, especially s. 33 of that Act. It is true that s. 59 of the Act abolishes the old D action of criminal conversation, but, inasmuch as the principles of law and rules of practice which governed it are to apply to a claim for damages substituted for it by s. 33 [see now s. 30 of the Matrimonial Causes Act, 1950] it is necessary to consider what the law and practice were upon the subject. The injured husband was entitled to recover compensation in damages for the loss of the society, comfort, and assistance of his wife in consequence of the adultery. E The injured husband must have come into court with clean hands. How far his misconduct was an answer to the action, or only went in mitigation of damages, was a question about which different opinions were entertained. The wife was no party to the action. If illicit intercourse was had with the wife and the husband was not privy to it at the time, but knew of it afterwards and then received her back, the subsequent reconciliation went only in mitigation of damages: per F DE GREY, C.J., in *Howard v. Burtonwood* (9). This was agreed to by the court in *Duberley v. Gunning* (10), and said by BULLER, J., in that case to be settled law. Therefore, before the Act of Parliament most clearly condonation was only available by the adulterer in mitigation of damages, and was no answer to the action; and the injured husband, however much he had forgiven his wife, could bring his action against the adulterer, and recover damages, the condonation only going in G mitigation.

How far has this state of the law been altered by the Act of 1857? Section 59 abolishes the old action of criminal conversation; it enacts by s. 33, as regards the claim for damages, that it shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation at the time of the Act coming into operation were H tried and decided in courts of law. It was an inseparable incident of the old action that condonation was no answer to the action, and only went in mitigation of the damages. Is there anything in the Act to show that this state of the law was no longer to exist? Sections 27 to 31 deal with petitions for dissolution of marriage in cases where no damages are claimed, s. 30 enacting that, in case the petitioner has condoned the adultery complained of, then the court shall dismiss I the petition. That the court is compelled so to proceed where no damages are claimed is clear. But what is to happen if damages are claimed? This depends on the construction of s. 33. That section permits the injured husband to claim damages against the adulterer in a petition for dissolution of marriage or judicial separation, or in a petition limited to damages only. Such petition is to be served on the alleged adulterer and the wife, and then follow these words:

“and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules

and regulations, as actions for criminal conversation are now tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment. . . ."

Did the legislature, when it is said that the claim made by every such petition was to be heard and tried on the same principles as actions for criminal conversation, intend to make condonation, which had never before been a defence in actions of criminal conversation, an answer to the claim for damages? If there was nothing more in the section, I should say certainly not; but then follow these words:

"and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment."

Then we must return to s. 30, and there it is made imperative on this court to dismiss the petition if satisfied that the petitioner has condoned the adultery complained of. Here is the crucial question: Does the claim for damages when condonation is proved fall with the petition, or does it survive? I have felt difficulty in giving an effect to condonation since the Act of Parliament which it never possessed before, having regard to the words of s. 33. The chief difficulty arises in the case of a petition limited to damages only when the dissolution of the marriage is not prayed and the adulterer sets up the condonation of the wife. If effect is given to s. 30 the court is compelled to dismiss the petition.

The strongest ground, in my judgment, for thinking that the claim for damages falls with the petition where condonation is proved is this. Under s. 30 the petition is to be dismissed in the following cases: (i) If the court is not satisfied that the alleged adultery has been committed; (ii) if the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage; (iii) if he has condoned the adultery complained of; (iv) if the petition is presented in collusion with either of the respondents. In the first two cases a good defence to the old action of criminal conversation would have existed at common law, yet condonation is put on the same footing as these cases. This leads me to think the legislature intended to re-model the law in respect of condonation, and to make condonation a ground for dismissing a petition claiming damages if condonation was proved, just as if the alleged adultery had not been proved, or it had been proved that the petitioner had connived at the adultery of the other party to the marriage. I read the words at the end of s. 30 thus: "then and in any of the said cases the court shall dismiss the said petition," whether it contains a claim for damages or not, including in the category condonation.

I come, therefore, to the conclusion that, on the true construction of the Act of Parliament, the claim for damages is ancillary to and dependent on the petition and falls with it. It is to be observed, too, that the damages when recovered are to be placed under the control of the court. The claim, too, for damages, if the petition is for damages only, must be made by petition, and it is, therefore, a petition within s. 30. It would be, too, somewhat inconsistent with the definition I have given of condonation implying an absolute and complete forgiveness of the offence complained of followed by cohabitation, to hold that the injured spouse was still entitled to be compensated in damages; it would be analogous to holding that a creditor could sue for a debt which he had released.

I will now deal with the authorities which seem to me to favour the construction which I have placed upon the Act of Parliament. The two directly in point are *Pomero v. Pomero and Hadley* (1), decided in 1884, and *Story v. Story and O'Connor* (11), decided in 1887, taking different views of the matter in controversy. But of those cases presently; I will first deal with earlier cases. *Norris v. Norris, Lawson and Mason* (12), decided in 1861, was a petition for dissolution



A of marriage when condonation was set up. There was no claim for damages, and the decision was on s. 34 of the Act in respect of costs. The Judge Ordinary said (4 Sw. & Tr. at p. 237):

“The petitioner, by condoning his wife’s adultery with Lawson, has waived all right to any proceedings against him in this court.”

B *Seddon v. Seddon and Doyle* (13) was before the court in 1860. It was a petition for dissolution of marriage on the ground of the wife’s adultery, claiming £3,000 damages against the co-respondent. The answer charged that the petitioner, by his wilful neglect and misconduct, had conduced to the adultery of the respondent, and counter-charged adultery. It was contended in argument that a co-respondent is precluded by the terms of s. 33 of the Act from pleading such matters in answer C to a petition in which the husband claims damages. In the course of the argument the Judge Ordinary asked the counsel this question (30 L.J.P.M. & A. at p. 13):

“Suppose a petitioner claims damages, and the adultery is clearly proved, but there is proof also of such misconduct on the part of the husband as would induce the court to refuse a divorce, would the petitioner be entitled to his damages?”

D The learned counsel said, “Yes.” Whereupon the Judge Ordinary said (*ibid.*):

“He certainly would not, if the court is to treat the claim for damages as an action for crim. con., for, the petition being dismissed, he would be in the position of a non-suited plaintiff.”

E This is strong to show the view the Judge Ordinary took of s. 33.

*Ramsden v. Ramsden and Luck*, *Ramsden v. Ramsden* (14), in 1886, were two suits which had been consolidated; the one was a suit to recover damages by the husband against Luck, not praying for a dissolution of the marriage; the other by the wife against the husband for dissolution of the marriage, on the ground of his adultery and cruelty. With regard to the adultery charged by the wife against F the husband, he set up condonation. The adultery by Luck with the wife was admitted. The jury found that Ramsden, the husband, had committed adultery, but that the adultery had been condoned by the wife, but that it had been revived by the cruelty of the husband subsequent to the condonation. They further found that Mrs. Ramsden and Luck had committed adultery, and they assessed damages against Luck and in favour of Ramsden at one farthing. The President dismissed G Mrs. Ramsden’s petition on account of her adultery, but gave her costs against her husband. In the suit of *Ramsden v. Ramsden and Luck* (14) he directed that each party should pay his own costs, and does not appear to have given judgment for one farthing

I now come to *Pomero v. Pomero and Hadley* (1) and *Story v. Story and O’Connor* (11). These cases are directly in point. The first was a husband’s H petition for dissolution and for damages against the co-respondent. The petitioner admitted in his evidence that he had condoned his wife’s adultery and taken her back to live with him. It was urged that condonation of adultery committed by a wife with a particular person was a bar to any proceedings in the court by the husband against that person. BUTT, J., thought s. 33 of the Act clear, and said a great hardship would be inflicted by depriving a husband who had pardoned his I wife of all remedy against the adulterer. He cites s. 33, and then says condonation was no bar to the action for criminal conversation, and, therefore, although condonation is proved and admitted, the case must go to the jury on the issue of connivance, and, if necessary, to assess the damages. The case does not appear to have been very elaborately argued, and the only authority cited was *Norris v. Norris* (12).

It was decided in 1884, and in 1887 *Story v. Story* (11) was heard by SIR JAMES HANNEN, P. It was a suit by the husband for dissolution of his marriage with the respondent, on the ground of her adultery with the co-respondent, and claimed

damages. The respondent in her answer pleaded condonation and counter-charged adultery, which the petitioner did not deny, but pleaded that the respondent had condoned the offence, and lived with him afterwards. The jury found that the respondent and co-respondent had committed adultery, and that the petitioner had not connived at nor condoned the adultery. They assessed the damages at £300. The petitioner admitted his own adultery with a maid-servant, which was condoned by the wife. The learned judge came to the conclusion that the petitioner, having shown himself regardless of the marital tie, was not entitled to come to the court and claim a release from the marriage bond, and dismissed the petition. Counsel for the petitioner inquired as to the damages. The President said (12 P.D. at p. 148):

“They go with my decision on the petition. As the petition is dismissed the petitioner is not entitled to damages.”

*Pomero v. Pomero* (1) was not cited.

These two cases are directly in point, and are in direct conflict with each other. I have to decide which is to be followed. *Story v. Story* (11) is decided in accordance with the construction which I place upon the Act of Parliament, and seems to me to be consonant with the authorities, and I am told it is in harmony with the practice of the court. I think the claim for damages falls within the petition. *Story v. Story* (11) ought, in my judgment, to be followed, and *Pomero v. Pomero* (1) overruled. The judgment of the President must be affirmed, and the appeal dismissed with costs.

**A. L. SMITH, L.J.**—This is an appeal from the judgment of SIR FRANCIS JEUNE, P., in a suit by a husband against his wife for divorce, wherein he charged her with having committed adultery with two co-respondents, Sampson and Turner, and he also claimed damages against Turner. The learned President dismissed the petition against Turner, or, to state it more accurately, dismissed him from the suit, upon the ground that it was established that the petitioner had condoned his wife's adultery with him, and he also adjudged that the petitioner should pay Turner's costs. As regards the case against the co-respondent Sampson, a decree nisi was granted, and no question arises on this appeal thereon. Counsel for the husband asserted that this judgment was erroneous, (i) because there was no evidence to constitute condonation by the petitioner of the adultery of his wife with Turner, and inasmuch as Turner's adultery had been proved he should not have been dismissed from the suit; and (ii) upon the ground that, as damages were claimed by the petitioner against Turner, who had been proved to have committed the adultery charged, the petitioner was entitled as of right to a verdict and judgment for at least nominal damages against him; and consequently the petitioner could not be ordered to pay his costs.

It was proved that the petitioner with full knowledge of his wife's adultery with Turner forgave it and resumed cohabitation with her, but it was argued that, inasmuch as when he did so he did not know of the adultery which had then taken place between his wife and the other co-respondent (Sampson), there could be no condonation of the adultery with Turner, for, to constitute condonation, the husband must forgive all the adulteries of his wife, whether known or not at the time. This raised a point which was new to me, but, as it has been raised, it must be examined. I first turn to the Matrimonial Causes Act, 1857, which founded the present Divorce Court and its proceedings. Section 27 deals with the presentation of a petition for divorce by husband against wife or vice versa, in which damages are not claimed. Section 28 enacts that, unless excused, the husband in such petition shall make the alleged adulterer co-respondent. That means that the alleged adulterers are to be made co-respondents if there are more than one, and it appears to me that in such circumstances the case against each is separate and distinct. Section 29 enacts that the court upon such petition is to satisfy itself, as far as it reasonably can, whether the petitioner has connived at

A or condoned the adultery; that means the separate adulteries charged if more than one, and also to inquire into counter charges, if any; and s. 30 enacts among other things, that if the petitioner has connived at or condoned the adultery complained of, that is, the separate and distinct adulteries complained of in the petition, if more than one, the court shall dismiss the petition.

B But counsel for the husband says that, to constitute condonation, the whole of the adulteries actually committed by the wife must be condoned, whether known or not, or complained of or not in the petition; that condonation is the forgiveness of the wife of all her adulteries, and not the forgiveness of the co-respondents, and that, unless the husband knows of all the adulteries his wife has committed when he forgave a particular adultery and resumed cohabitation, it is not condonation at all, for in such circumstances he does not blot out all the offences of his wife, C which alone constitutes condonation. He also says that, unless the husband is informed of all the adulteries of his wife when he forgives a particular adultery, he is led to do so under circumstances which cause the forgiveness of the particular adultery not to be a forgiveness at all.

It seems to me that, as to this, the most which can be said is that he might not have forgiven the particular adultery if he had known of all; but I do not understand how it can be said that it is not any forgiveness at all. Test the correctness of these propositions in this way. Petition by a husband against a wife charging adultery with co-respondent A. Defence by A. that this adultery has been condoned by the petitioner. Did anyone ever hear of a reply by a petitioner by way of confession and avoidance to such a defence, "I admit that I have forgiven and condoned my wife's adultery with you, but when I did so I did not know that my wife had also committed adultery with X., Y., and Z., and, therefore, I have not condoned the adultery with you." Yet, if the argument addressed to us is correct, this would be a good reply. No such replication can be found in the books, although circumstances must, on very many occasions, have existed whereby a defence of condonation could have been got rid of if the proposition is sound. D *Durant v. Durant* (3), *Turton v. Turton* (4), and *Bramwell v. Bramwell* (5), E wherein somewhat equivocal language was used, were cited to support the point insisted upon, and also *Dempster v. Dempster* (2), where SIR CRESSWELL CRESSWELL pointed to the two constructions which could be placed upon the language so used, and where he left the point undecided. F

In my judgment, the law as to condonation was accurately and clearly stated by SIR CRESSWELL CRESSWELL in *Keats v. Keats* (8), where he described it (1 Sw. G & Tr. at p. 346) as

"a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the offence was committed";

and again in *Peacock v. Peacock* (7), where it is described as the forgiveness of a conjugal offence with the full knowledge of all the circumstances attending it. H There is no authority that to constitute condonation there must be a forgiveness of all conjugal offences whether known or not, and indeed, *Alexandre v. Alexandre* (6) is opposed to this contention. In this case the wife had been guilty of adultery with two different persons, one of which acts the petitioner had condoned and the other he had not, it not being then known to him. Yet the Judge Ordinary (LORD PENZANCE) held that the offence which was disclosed was condoned, although the other was not, and he granted a decree for divorce upon that adultery which the I petitioner had not condoned. His view of the condonation of the known offence is inconsistent with the contention of the husband on the point now taken. We are asked to say that LORD PENZANCE was wrong. I decline to do so, for I believe his view to be in consonance with the law as long since administered in this country as regards condonation, and, in my judgment, the first point raised is untenable.

As to the second point, viz., that where damages are claimed and adultery proved against a co-respondent, the petitioner is entitled as of right to a verdict and judgment for damages against that co-respondent in precisely the same way as if



the suit were an old action for criminal conversation, and that, as condonation was no defence to such an action, so now in a petition by a husband if he claims damages against the co-respondent under s. 33 of the Act of 1857, and the sole defence is condonation, the petitioner is entitled to a verdict and judgment in his favour for damages as of right. The first remark I wish to make upon this is, if this be so, why did the legislature expressly abolish the old action of criminal conversation as it did by s. 59 and frame in its place the somewhat elaborate section, viz., s. 33, and which, beyond question, interfered with the petitioner obtaining the damages for himself as in the action for criminal conversation he would have done. Secondly, if this argument be correct (and as I now assume, only one co-respondent with whom the wife has committed adultery, so as to get clear of the first point), this strange result would follow, that whereas by s. 30 it is unquestionably enacted that if "the adultery complained of" has been connived at or condoned, or if the petition has been presented in collusion, the court shall dismiss the petition, yet, if the adultery has been condoned and the petitioner applies for and obtains damages against the co-respondent, the court shall not dismiss the petition.

I cannot find any indication of this in the statute, which enacts without qualification that, if the adultery complained of be connived at or condoned, the court shall dismiss the petition. It should be noticed that connivance was a defence to an action of crim. con., whereas condonation was not; yet by the Act the same consequences are now to follow from each, viz., the petition shall be dismissed. Section 33 now empowers a husband to make a claim for damages against a co-respondent either in a petition for dissolution of marriage or in a petition for judicial separation, or in a petition for damages only, and enacts that such a claim for damages shall be "heard and tried" upon the same principles, in the same manner, and subject to the same rules and regulations as actions of crim. con. formerly were; that is, by a jury, by examination and cross-examination of witnesses in open court, by admission of the same evidence, by a direction as to how damages were to be assessed, and with like speeches of counsel, but in addition thereto (and this is what also now differentiates a petition asking for damages from the old action of crim. con.), that all the enactments of the Act as to the hearing and "decision" of the petition so far as may be necessary shall apply. Among the enactments which it is necessary to apply when the court has to decide as to what is to be done with a petition proved after hearing and trial to be founded upon condoned adultery is s. 30, for that section enacts that such a petition shall be dismissed.

In my judgment, it is not correct to state that a petitioner is now in the same position as in the old crim. con. action days, for to get damages from an adulterer he is now compelled by statute to proceed by way of petition in the Divorce Court; he cannot as of right get the damages for himself, and the statute is express that, for connived at as well as for condoned adulteries the petition shall be dismissed. It will be seen that even where a petition is brought only to recover damages against an adulterer under s. 33 of the petition is to be served upon the wife unless such service is dispensed with by the court. This was not so in an action for crim. con. In my opinion, when a petition under s. 33 is dismissed, the claim for damages fails, together with all other claims therein, for when the petition is dismissed there is nothing whereon to hang a judgment for damages, as argued by the petitioner. In my judgment, the true construction of the statute is that the petitioner cannot recover damages from an adulterer when he has either connived at or condoned the adultery for which he asks for damages, nor when he has presented his petition in collusion. The legislature has now placed all matrimonial cases, whether damages are sought for therein or not, under the jurisdiction of the court to be dealt with as the statute prescribes.

So much for the statute. I now come to the cases. In the year 1861, in *Norris v. Norris* (12) the husband petitioned for a divorce upon the ground of his wife's adultery with the co-respondents. As to one co-respondent the adultery had been condoned, though revived by subsequent adultery. The Judge Ordinary, as regards

A the condoned adultery, held that the petitioner, by condoning his wife's adultery, had waived all right to any proceedings against the co-respondent in the court. The learned judge acted upon the provisions of s. 30, though it is true that in that case the petitioner did not ask for damages.

B In *Seddon v. Seddon* (15), in 1862, the husband petitioned under s. 33 for a divorce from his wife, claiming damages against the co-respondent. The jury found that the wife had committed adultery with the co-respondent, and that the petitioner had been guilty of conduct conducing to the adultery, and they assessed the damages at one farthing. The Judge Ordinary, acting pursuant to s. 31, dismissed the petition. In a proceeding in that case the Judge Ordinary said (30 L.J.P.M. & A. at p. 14):

C "It is reasonable that a co-respondent should have an opportunity of protecting himself by appealing to the discretion of the court, and asking the court, under the power conferred upon it by s. 31, under certain circumstances, to dismiss the petition. . . . If he can plead such matters in answer to a petition which does not claim damages, it would be a strange thing if a petitioner by making such a claim could preclude a co-respondent from raising a defence he might otherwise have made, by appealing to the discretion of the court. . . . The meaning of s. 33 is, that the question of damages is to be dealt with upon the same principle and in the same manner as in the common law courts, not that the record is to be framed in the same manner."

D In the year 1867, in *Adams v. Adams and Colter* (16), there was a petition by a husband against his wife for a divorce, claiming damages against a co-respondent; E the jury found that the petitioner had connived at and had also condoned his wife's adultery, and found damages one farthing. The Judge Ordinary dismissed the petition, applying to s. 33 the provisions of s. 30. In 1872 LORD PENZANCE decided *Ravenscroft v. Ravenscroft and Smith* (17). In this case the petitioner recovered the sum of £100 damages against the co-respondent, yet, upon the Queen's Proctor intervening and proving that the petitioner had been guilty of adultery, LORD F PENZANCE, applying the provisions of s. 31, dismissed the petition. In 1886 *Ramsden v. Ramsden* (14) was decided. This was a very rare case of a petition by a husband against a co-respondent claiming damages only. The adultery of the co-respondent was proved, and so was a counter-charge against the petitioner. The jury assessed the damages at one farthing. The President, SIR JAMES HANNEN, directed that each party should pay their own costs, and if the argument now G addressed to us be correct, he should have given judgment for the petitioner for one farthing, which apparently from the report he did not. In *Story v. Story* (11), in 1887, a petitioner established that his wife had committed adultery with the co-respondent, and the jury assessed the damages at £300; but they also found that the petitioner had committed adultery which had been condoned by the wife. The President dismissed the petition, and held that the petitioner was not entitled to H damages.

I It will be seen that, in all these cases excepting the first, the petitioner sought and recovered damages at the hands of the jury against the co-respondents, yet in each case the court, when deciding what was to be done with the petition, applied the provisions of ss. 30 or 31, and refused to allow the petitioners to reap the benefits of their verdicts, and not a single case has been produced in which a petitioner to whom the provisions of either s. 30 or s. 31 applied has recovered by judgment the damages assessed. It was, however, pointed out that BUTT, J., in the year 1884, in *Pomero v. Pomero* (1), had decided that condonation of the wife's adultery by a petitioner was no answer to his claim for damages against the co-respondent, and it certainly appears to me that such was the opinion of the learned judge when he decided that case. He held that under s. 33 the claim for damages was to be "heard and tried" on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions of crim. con. were at the time of the passing of the Act; but his attention does not seem to have been

directed to the further provisions of the section—viz., that when hearing and deciding a petition under s. 33 all the enactments of the statute, so far as might be necessary, should apply. That means, when deciding a petition under s. 33, in which the adultery has been condoned by the petitioner, the provisions of s. 30 shall apply; and when deciding a petition in which the petitioner has been guilty of any of the acts mentioned in s. 31, the provisions of the section shall apply.

I can find, neither in the statutes nor in the cases, any indication that, when deciding upon a petition in which damages are sought, and condonation only is set up, s. 30 shall not apply. The words are general and imperative, viz., that if the petition is founded upon condoned adultery it shall be dismissed. In my judgment, the judgment of BUTT, J., cannot be supported, but, when a petition under s. 33 is adjudicated upon, the provisions of either s. 30 or s. 31 apply, as the case may be, and the petitioner is not entitled as of right to a judgment for the damages awarded by the jury; and SIR FRANCIS JEUNE was correct when he dismissed Turner from this suit. For these reasons this appeal fails, and must be dismissed with costs.

**LINDLEY, L.J.**—I have read the judgments which have just been read by the lord justices, and I concur in them. I, however, wish to add some additional observations of my own.

A careful study of the various sections of the Matrimonial Causes Act, 1857, which bear upon the present appeal has convinced me that, when in 1857 the legislature dealt with the whole subject of divorce and adultery, Parliament not only abolished the old action of crim. con. (s. 59), but re-modelled the law applicable to claims for damages for adultery. My reasons are as follows: (i) Such claims are placed wholly under the jurisdiction of the Divorce Court; they can only be made by petition, and the damages recovered are placed under the control of the court (s. 33). (ii) The petition must be served on the wife, unless the court dispenses with such service (s. 33). (iii) The petition must be dismissed, if the petitioner has been accessory to or conniving at the adultery complained of, or has condoned the same (ss. 29, 30, 33). (iv) The claim for damages is, in my judgment, subject to all these overriding provisions. But, subject to them, the claim is to be

“heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations,”

as the old common law action for crim. con. (s. 33). The result is that, if a wife's adultery with a particular man has been condoned, no claim for damages against him is now maintainable. Under the present law such a conclusion is, in my opinion, highly reasonable, for to condone a particular act of adultery, and afterwards to make it the subject of a petition to which the wife is a party, to publish her condoned misconduct, and to expose her to shame and misery, is to pursue a course of conduct so utterly inconsistent with condonation that I cannot bring myself to believe that the legislature intended to allow it.

The view thus arrived at is, no doubt, inconsistent with *Pomero v. Pomero* (1), but it is impossible, I think, to reconcile that case with a long line of authorities on the construction of the Act. The general view which I take of the Act is supported by *Seddon v. Seddon* (13), *Norris v. Norris* (12), *Lyne v. Lyne and Blackney* (18), and *Story v. Story* (11), which is diametrically opposed to *Pomero v. Pomero* (1). The latter case was at one stage of the present case followed by SIR FRANCIS JEUNE, but he did not adhere to it when it became necessary to pronounce his final decision, and, in my opinion, he was right. *Pomero v. Pomero* (1) cannot, in my opinion, be supported, and ought to be distinctly overruled.

With respect to the question whether a husband can effectually condone his wife's adultery with one man, even although he is ignorant of her adultery with another, I have come to the conclusion that he can. I have carefully considered the older authorities, and *Dempster v. Dempster* (2), but, having regard to the language of s. 30 of the Act of 1857, viz., “has condoned the adultery complained of,”



A and having regard to the absurd consequences which would result from the opposite view, now that condonation is an answer to a claim for damages, I cannot judicially hold that a man cannot condone his wife's adultery with one man, although he may be ignorant of her offence with another. This was evidently the view taken by LORD PENZANCE in *Alexandre v. Alexandre* (6). It has been already decided that a subsequent offence by a wife will not enable her husband to obtain damages in respect of a previously condoned offence: *Norris v. Norris* (12); and that the condonation of one offence is no condonation of another which is unknown to the condoning party: *Alexandre v. Alexandre* (6). In my opinion, this appeal fails, and must be dismissed with costs.

Solicitors: *Beyfus & Beyfus; Emmanuel & Simmonds.*

C [Reported by W. C. Biss, Esq., Barrister-at-Law.]

D

## WALLIS v. HANDS AND OTHERS

E [CHANCERY DIVISION (Chitty, J.), November 30, December 1, 6, 7, 8, 13, 1892, February 16, 1893]

[Reported [1893] 2 Ch. 75; 62 L.J.Ch. 586; 68 L.T. 428;  
41 W.R. 471; 9 T.L.R. 288; 37 Sol. Jo. 284; 3 R. 351]

*Landlord and Tenant—Lease—Surrender—Grant of new lease—Need for change of possession at time of grant.*

F The grant of a new lease in possession with merely the oral assent of a person in possession under a prior subsisting lease does not operate as a surrender in law of the prior lease. There is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents. The grant of a new lease to a stranger with the tenant's assent and change of possession preceding or following the lease are acts of notoriety giving rise to an estoppel in pais which a mere oral assent will not do.

G

*Trespass—Action—Plaintiff—Person in possession at time of trespass—Incapacity of person with mere right of property without possession.*

H The proper plaintiff in an action of trespass to land is the person in possession at the time of the trespass. A mere right of property without possession is not sufficient to support the action.

**Notes.** Considered: *Miller v. Emcer Products, Ltd.*, [1956] 1 All E.R. 237. Referred to: *Metcalfe v. Boyce*, [1927] 1 K.B. 758; *Foster v. Robinson*, [1950] 2 All E.R. 342.

I As to surrender of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 683-690; and for cases see 31 DIGEST (Repl.) 565 et seq. As to who may sue for trespass see 38 HALSBURY'S LAWS (3rd Edn.) 744-746; and for cases see 43 DIGEST 379. For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- (1) *Thomas v. Cook* (1818), 2 B. & Ald. 119; 2 Stark, 408; 106 E.R. 310; 31 Digest (Repl.) 577, 6978.
- (2) *Lyon v. Reed* (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 8 Jur. 762; 153 E.R. 118; 31 Digest (Repl.) 570, 6911.

- (3) *Davison v. Gent* (1857), 1 H. & N. 744; 26 L.J.Ex. 122; 28 L.T.O.S. 291; **A**  
3 Jur.N.S. 342; 5 W.R. 229; 31 Digest (Repl.) 577, 6976.
- (4) *Creagh v. Blood* (1845), 8 I.Eq.R. 688; 3 Jo. & Lat. 133; 38 Digest (Repl.)  
797, \*83.
- (5) *Baring v. Abingdon*, [1892] 2 Ch. 374; 62 L.J.Ch. 105; 67 L.T. 6; 41 W.R.  
22; 8 T.L.R. 576; 36 Sol. Jo. 522, C.A.; 11 Digest (Repl.) 11, 93.
- (6) *Harrison v. Blackburn* (1864), 17 C.B.N.S. 678; 5 New Rep. 90; 84 L.J.C.P. **B**  
109; 11 L.T. 453; 10 Jur.N.S. 1131; 13 W.R. 135; 144 E.R. 272; 43 Digest  
392, 154.
- (7) *Turner v. Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932; 20  
L.J.Ex. 71; 16 L.T.O.S. 285; 155 E.R. 407; 43 Digest 390, 139.
- (8) *Gillard v. Cheshire Lines Committee* (1884), 32 W.R. 943, C.A.; 30 Digest  
(Repl.) 480, 1218. **C**

**Action** for a declaration of the plaintiff's title to certain coal mines at Mangotsfield, Gloucestershire, injunctions, and damages.

*Alexander, Q.C.*, and *Christopher James* for the plaintiff.

*Whitehorne, Q.C.*, and *T. L. Wilkinson*; *Levett, Q.C.*, and *Pauli*; *T. Lee Roberts* and *Webster* for the defendants. **D**

*Cur. adv. vult.*

Feb. 16, 1893. **CHITTY, J.**, read the following judgment. This action relates to certain collieries at Mangotsfield in the county of Gloucester. The leases dealing with the property are derived from two adverse titles in the landlords as to part of the property demised, some being granted by Newman, who is a defendant, and others by Emmett's representatives, who are not parties to the action. The relief claimed by the plaintiff is of a peculiar and limited nature. He is not, and never has been, in possession of any part of the property. He does not seek to recover possession; he asks merely for declaration of his title, for injunctions, and for damages. **E**

The plaintiff's title is founded first, and mainly, on a lease executed by Newman, dated Aug. 8, 1887, and, secondly, on a lease granted by Emmett's representatives, dated Sept. 29, 1885. To establish his title under the Newman lease of 1887, the plaintiff seeks to get rid of a prior lease granted by Newman on Nov. 15, 1884. This lease of 1884 was granted by Newman to Powell and two others for a term of forty-five years from June 24, 1884. It comprised the upper series of coal in Mangotsfield, known as the Parkfield seam (but no other series), lying within a district of 700 acres. It included also certain surface rights, and was renewable for a further period of forty-five years. The lessees took possession under this lease, opened some pits and did some working; but their working had practically come to a standstill at or before the beginning of 1887. The means of the lessees were exhausted, and the rent was in arrear when the transactions in which the plaintiff took part were begun. The lease of Aug. 8, 1887, was granted by Newman to the plaintiff for a term of forty-two years from June 24, 1887. It comprised (a) the upper series, as in the lease of 1884, (b) the lower series under the same area, (c) the coal in an additional area, and (d) certain machinery and plant then on the property. The royalty reserved was fourpence a ton, being less by a halfpenny than the royalty under the lease of 1884; the dead rent was £30 a year; the surface rent £4 a year per acre used, and the rent for the machinery and plant was £5 a year. The lease contains a proviso for re-entry for non-payment of rent and for breach of the covenants to work, but there is no clause dispensing with the necessity for a legal demand for the rent. The plaintiff has not entered into possession under this lease, nor has he done any working thereunder according to the covenants. The term, then, is not vested in him, he has only an *interesse termini*. **F**

The other lease under which the plaintiff claims, namely, the lease of 1885, was granted to Powell and four others (being, as to two of them, the co-lessees **G** **H** **I**

A with Powell under the lease of 1884) by Emmett's representatives. It comprises all the coal under twenty-five acres of land known as Church Farm, part of the area of 700 acres mentioned in the Newman leases of 1884 and 1887. The Parkfield seam does not exist within the twenty-five acres, and, therefore, physically it is not included in this lease of 1885, but the lower seams included in the lease of 1887 are included in this lease. The lease is for a term of twenty-nine years from  
B Sept. 29, 1885. Possession was taken under this lease by the lessees; the reason for the lessees taking this lease was, as is alleged by the plaintiff, and no doubt correctly, the existence of a dispute as to ownership between Newman and Emmett's representatives. This lease of 1885 was, under the circumstances hereafter stated, sold by the lessees to the plaintiff for £400, and assigned by them to him by deed dated Sept. 22, 1887. The other dealings with the lease of 1884 and the property  
C comprised in the lease of 1885 will be more conveniently stated later on.

The plaintiff's right to the lease of Aug. 8, 1887, is impeached by the defendants Newman, Hands and Scott, on the ground of fraud. The fraud alleged and insisted on at the trial was (in substance) a false representation made by the plaintiff at an interview which took place in April, 1887, that he had purchased the lease of 1884 upon the faith of which, it is alleged, Newman granted the lease of  
D 1887. The case set up is one, not of innocent misrepresentation, but of fraudulent misrepresentation. [HIS LORDSHIP referred to the evidence.] I hold that the defendants have failed to prove that the representation was in fact made. They have also failed to prove that, if made, it induced Newman to grant the lease of 1887. The result is, that I find the issue of fraud against the defendants who have raised it.

E The next point raised by the defendant Newman against the lease of 1887 was, that it had been determined by re-entry in April, 1888, under the proviso for non-payment of rent; but it was admitted that no legal demand had been made for the rent, and this point was at once abandoned by Newman's counsel at the Bar.

The next question is one of law, whether the lease of 1884 has, as the plaintiff contends, been surrendered by operation of law. The lease itself was not delivered  
F to the plaintiff, nor to the lessor Newman, or to his solicitors, upon the grant of the lease of 1887, which latter lease (as already appears) purported to be a lease in possession. The lease of 1884 had been lent by Mr. Nicholas, the lessees' solicitor, to the plaintiff in April, 1887, for perusal, and the plaintiff had returned it to him. It was not left in the possession of Newman or his solicitors, but apparently remained in the hands of Nicholas or his clients, the lessees. It was  
G produced by the defendant Scott at the trial. Since it was returned to Nicholas it has never been in the plaintiff's possession. It has been dealt with adversely to him as if it were a subsisting lease as follows. It was assigned by the lessees Powell and others to the defendant Scott by indenture, dated Feb. 13, 1888; and it was assigned by Scott to the defendant company by indenture dated May 30, 1888. It has, since the issuing of the writ, been re-assigned by the defendant company  
H to Scott, in whom it is now vested, if subsisting. These three assignments were produced in court. The lease of 1887, which includes all the property comprised in the 1884 lease, was granted with the consent of the lessees of 1884. Such consent was given, but orally only, by Nicholas, acting on their behalf and with their authority, on the occasion of the delivery of the lease of 1887 to the plaintiff on Sept. 27, 1887. But the plaintiff (as already stated) has never been in possession  
I of the property demised by the lease of 1887. Consequently, as between the lessees of 1884 and those claiming under them, on the one hand, and the plaintiff, on the other, there has been no change of possession.

In these circumstances, it is contended for the plaintiff, as a proposition of law, that the grant of a new lease in possession with the oral assent merely of a person in possession under a prior subsisting lease operates as a surrender in law of the prior lease, and, consequently, that such grant and mere oral assent are sufficient to take the case out of the operation of s. 3 of the Statute of Frauds, which enacts that no lease shall be surrendered unless by deed or note in writing, or by act and



operation of law [see now Law of Property Act, 1925, s. 53 (1) (a)]. Section 3 of the Real Property Act, 1845 [see now Law of Property Act, 1925, s. 52], avoids a surrender in writing unless made by deed, except in cases where the lease itself might have been created without a deed. The lease of 1884 required a deed for its creation. All the authorities bearing on the question of surrender by operation of law were cited and commented on at the Bar. The question again raises the controversy which subsisted at one time between the Courts of King's Bench and the Exchequer, illustrated by *Thomas v. Cook* (1), and *Lyon v. Reed* (2), and discussed at length in 2 SMITH'S LEADING CASES (8th Edn.), p. 884 et seq. But it appears to me that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison v. Gent* (3). In *Thomas v. Cook* (1) there was in fact a change of possession, the old tenant Cook having gone out of possession when the plaintiff accepted Perkes as his tenant: see the observations of LORD ST. LEONARDS in *Creagh v. Blood* (4), 3 Jo. & Lat. at p. 160. In his judgment in *Davison v. Gent* (3), POLLOCK, C.B., states the law thus (1 H. & N. at p. 749):

"It must, therefore, be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law."

This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas v. Cook* (1) with the principles enunciated by PARKE, B., in *Lyon v. Reed* (2), so far as relates to leases in possession.

It is not, perhaps, of any great practical importance in which of the two following ways the proposition of law is stated, viz.: (i) There is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (ii) the change of possession is a necessary part of the consent. I prefer, however, the first, as being the more correct form. To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine; it would practically amount to a repeal of the Statute of Frauds, and let in all the mischief against which the statute was intended to guard. The policy of that statute was carried still further by the Real Property Act, 1845, which required a deed in cases where formerly a mere writing would have sufficed. The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act in pais, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger with the tenant's assent and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do: see SHELFORD'S REAL PROPERTY STATUTES (9th Edn.), p. 259. The plaintiff's counsel relied on a dictum of STIRLING, J., in *Baring v. Abingdon* (5), [1892] 2 Ch. at p. 381, that the granting of a new lease to a stranger with the assent of the lessee operates as a surrender of the old lease. But on the facts of the case it appears that there was a change of possession; the learned judge himself refers to *Davison v. Gent* (3), and I have his authority for stating that he did not intend to express any opinion on the point whether a change of possession was necessary. For the reasons stated I am of opinion that the lease of 1884 was not surrendered by operation of law.

[HIS LORDSHIP then dealt with certain questions of fact and a question of law which no longer calls for report owing to the abolition of the doctrine of *interesse termini* by s. 149 (1) of the Law of Property Act, 1925, and continued:] The plaintiff claims damages against the defendant Hands in respect of his working of the coal. The plaintiff's allegation against Hands is that he has worked coal comprised in the lease of 1887 without specifying from what part of the property the coal has been worked. Hands, by his silence in his defence, admits this paragraph. The working may, therefore, have been of coal comprised in the

- A 1884 lease, or in the 1885 lease, or in that part of the property comprised in the lease of 1887 which was not comprised in either of those leases. As regards coal in the 1884 lease the plaintiff cannot sue, inasmuch as that lease which has priority over the 1887 lease has never been vested in him. As regards coal within the 1885 area, the plaintiff cannot sue and does not sue Hands on his title to that lease. As regards any coal worked by Hands not within the area of either
- B of the 1884 or 1885 leases, the plaintiff as against Hands relies on his title under the 1887 lease. Having but an *interesse termini* he cannot maintain an action of trespass against Hands. His proper course as against Hands was to bring an action to recover possession, in which case Newman would have had an opportunity of coming in to defend, and the plaintiff would then have had to face the difficulties in his way arising from his 1887 lease being forfeitable.
- C It is settled law that a person having an *interesse termini* cannot bring an action of trespass: see *Harrison v. Blackburn* (6); and *Turner v. Cameron's Coalbrook Steam Coal Co.* (7); and *WOODFALL'S LANDLORD AND TENANT* (13th Edn.), p. 197. This is in substance an action of trespass. The plaintiff's counsel, however, cited the decision of the Court of Appeal in *Gillard v. Cheshire Lines Committee* (8). The court there held that a person having a mere *interesse termini* could maintain
- D an action for injury to his right. The cases on trespass though not cited, were, of course, present to the minds of the members of the court, who so held; there was no intention to overrule them, either directly or indirectly. The circumstances, shortly stated, were, that the plaintiff had agreed to take a theatre for eight weeks to commence on a future day. Before his right of entry accrued, the defendants, who were strangers, by excavations on their own property deprived
- E the theatre of the support of the adjacent land, so that the theatre was rendered unsafe, and was closed during the eight weeks by the proper authorities. The judgment turned on the proposition that the defendants had injured the plaintiff's proprietary right. While accepting that decision, as I am bound to do without question, I think that it does not apply to the facts of this case, which I need not repeat. The plaintiff has refrained, and, as I think, deliberately refrained
- F from exercising his right of entry under his voidable lease of 1887. I think he is not entitled to any damages; if I thought otherwise I should assess them at a mere nominal sum.

The reasons upon which I refuse to give the plaintiff damages are sufficient, and more than sufficient, to justify my refusing to grant an injunction. The right order will be to give the plaintiff declarations on the two points on which he

G succeeds, and to dismiss the rest of the action. The declarations will be as follows: Declare (i) that the lease of Aug. 8, 1887, was not obtained by fraud on the part of the plaintiff, and (ii) that the same was not duly determined in April, 1888, by re-entry by the defendant Newman by virtue of the condition for re-entry contained in the lease. If the plaintiff asks that judgment shall be without prejudice to any action he may bring to recover possession, and for mesne profits,

H or against Newman for not putting him into possession, then, if such exception is in the judgment, there must be a declaration in effect as follows: (i) That the lease of 1884 was not surrendered by operation of law or otherwise, and (ii) that the plaintiff has no title in law or in equity to that lease. In regard to the costs, the plaintiff would certainly be entitled to the costs of the issues in the action on which he succeeds, and would have to pay the costs of the issues on which he

I fails. That would be the strict order, but I think that there would be much difficulty in the taxing master's office in dividing the costs, and that the right order as to costs is to give no costs except that the plaintiff should pay the costs of the defendant company, against whom he has altogether failed.

Solicitors: *Whites & Co.*; *John Hands*; *Prior, Church & Adams* for *Meade-King & Bigg*, Bristol; *Greenop & Sons*; *Learoyd, James & Mellor*, for *W. J. Nicholas*, Bristol.

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]

## TEMPERTON v. RUSSELL AND OTHERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and A. L. Smith, L.J.J.), April 13, 14, 17, 1893]

[Reported [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376]

*Tort—Contract—Inducement to break—Inducement not to enter into—Malice—Intention to harm other party to contract—Advantage to person inducing—Damage—Competency of action.*

*Conspiracy—Contract—Inducement to break—Inducement not to enter into—Malice—Damage—Competency of action.*

To induce a person who has entered into a contract with another to break that contract in order to harm the other party to the contract or to procure some advantage for the person putting forward the inducement is a malicious act which, if the other party to the contract suffers damage as the result of the breach, is actionable at his suit.

Per LORD ESHER, M.R.: I can see no difference between the case where a person induces another to break a contract and the case where he induces another not to enter into a contract.

An agreement by several persons to induce the breach of a contract, or to induce a person not to enter into a contract with a specified person, which agreement is malicious for the reasons mentioned above, is an actionable conspiracy on proof of damage.

**Notes.** In *Quinn v. Leatham*, [1900-3] All E.R.Rep. at p. 9, LORD MACNAGHTEN said: "The decision in *Temperton v. Russell* was not overruled in *Allen v. Flood*, [1895-9] All E.R.Rep. 52, nor is the authority of *Temperton v. Russell*, in my opinion, shaken in the least by the decision in *Allen v. Flood*."

Considered: *Wright v. Hennessy* (1894), 11 T.L.R. 14; *Lyons v. Wilkins*, [1896] 1 Ch. 811. Doubted: *Allen v. Flood*, [1895-9] All E.R.Rep. 52. Approved: *Quinn v. Leatham*, [1900-3] All E.R.Rep. 1. Considered: *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* (1901), 50 W.R. 44; *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1904-7] All E.R.Rep. 116. Distinguished: *Reynolds v. Shipping Federation, Ltd.*, [1923] All E.R.Rep. 383. Referred to: *Charnock v. Court* (1899), 68 L.J.Ch. 550; *Read v. Operative Stonemasons of England, Ireland and Wales Friendly Society*, [1902] 2 K.B. 732; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Ware and De Freville, Ltd. v. Motor Trade Association*, [1920] All E.R.Rep. 387; *Sorrell v. Smith*, [1925] All E.R.Rep. 1; *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; *Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 742.

As to torts arising from interference with contractual relations, see 37 HALSBURY'S LAWS (3rd Edn.) 123-127; and for cases see 42 DIGEST 986-990.

Cases referred to:

- (1) *Bowen v. Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, 174.
- (2) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.
- (3) *Gregory v. Duke of Brunswick* (1844), 6 Man. & G. 953; 7 Scott, N.R. 972; 2 L.T.O.S. 188; 8 Jur. 148; 134 E.R. 1178; on appeal (1846), 3 C.B. 481, Ex. Ch.; (1849), 2 H.L.Cas. 415, H.L.; 42 Digest 972, 32.
- (4) *Mogul Steamship Co. v. McGregor, Gow & Co.*, ante, p. 263; [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 986, 157.



A Also referred to in argument :

*Salaman v. Warner* (1891), 65 L.T. 132; 7 T.L.R. 484, C.A.; 42 Digest 837, 462.

B Application by the defendants for judgment or a new trial, on appeal from the verdict and judgment at the trial of the action before HENN COLLINS, J., and a special jury at Leeds.

*Robson, Q.C.*, and *H. T. Kemp* for the defendants, *Russell and Stephenson*.

*Tindal Atkinson, Q.C.*, and *Willes Chitty* for the other defendants.

*Lawson Walton, Q.C.*, and *Lush* for the plaintiff.

C LORD ESHER, M.R.—I propose to state what I understand to be the facts of this case according to the evidence given at the trial, and how, upon those facts, the dispute arose, and then my view of the law applicable to those facts.

D The first event was the formation of three trade unions at Hull in connection with the building trade. Those unions are formed by an agreement among certain persons to become members of the unions upon certain terms, that is to say, the members agree together to form a union and to subscribe moneys in order that they may eventually receive certain benefits. They all agree to subject themselves to certain liabilities. Those liabilities were imposed in this case, and the members agreed that they would forfeit all benefits if they did not comply with the terms to which they had agreed. The main condition is that each of them shall, when called upon to act in a particular way by a person authorised by the union, so act, or be fined or expelled from the union, or both. Such a condition is E the foundation of all trade unionism, I believe; it was proved to be so in the case of these three trade unions. Each member has to this extent given up his individual liberty, and if he does not obey he loses the benefits for which he has paid. The unions made rules that certain conditions were always to be observed by builders in Hull, and that if any person did not comply with those conditions the unions would act upon their own members in such a way as to compel compliance.

F They, therefore, agreed to combine upon that point. The three unions formed a joint committee, which was to be the authority to determine what the individual members of the unions were to do. The joint committee was to act, and the agreement was that it should act, for each of the unions and for every member of each union. That joint committee was elected by all the members of the three unions to act as their authorised representative. The members gave to the joint committee G power to delegate their authority to persons appointed by the committee. The evidence shows that the joint committee delegated their authority to act in particular cases to the defendant Russell. Russell, therefore, became the delegate of each of the unions and of the joint committee, and, in a certain sense, the delegate of each member of the unions. He was the person authorised to direct the workmen to do or not do particular things. The three unions agreed to certain H rules, among them being r. 9, which has given rise to this dispute. They had a right to do that and to insist upon compliance with the rules by the members of their own bodies, but those rules could not be binding upon any person who did not belong to the unions.

I That being the state of things, the firm of Myers and Temperton began to exercise their right to carry on their business in Hull in a manner not in accordance with r. 9, as they had a perfect right to do. The three unions and the joint committee objected to this, and resolved to coerce the firm of Myers and Temperton to carry on their business, not in the way in which the firm wished, but in accordance with the rules laid down by the unions. The unions and the joint committee attempted to carry out this resolution, but failed. Myers and Temperton had never agreed to these rules, and refused to be bound by them. The unions then thought that they could coerce Myers and Temperton in another way—by persuading other people not to deal with Myers and Temperton. Among other people, they tried thus to persuade the plaintiff Joseph Temperton, but he was a brother

of a partner in Myers and Temperton, and said that he would not be so coerced, that he had never agreed to r. 9, and that he insisted on carrying on his business in his own way, and in dealing with Myers and Temperton as much as he pleased. It then became necessary for the unions to act with regard to Joseph Temperton and other persons in a similar position. They were unable to coerce Joseph Temperton not to deal with Myers and Temperton by direct means because he refused to cease dealing with Myers and Temperton, and they, therefore, endeavoured to overcome his resistance in another way. They said that, if any other person in the building trade dealt with Joseph Temperton, their members would refuse to work for those people. It is true that those people might or might not break their contracts with Joseph Temperton, but in business fact and truth it must necessarily follow from such a course that the business of Joseph Temperton would come to an end. That would be very strong coercion.

Then the unions, knowing that Joseph Temperton refused to do as they wished, and continued and would continue to deal with Myers and Temperton, began to act upon the persons who dealt with Joseph Temperton, among others upon Brentano and upon Gibson who had dealings with Joseph Temperton. Their intention was to force Joseph Temperton not to do that which by law he had a right to do. The joint committee delegated to the defendant Russell the authority to carry out this intention and to interfere with Joseph Temperton in the way in which he was interfered with. It is clear to me that Russell and the joint committee knew of the contracts which Brentano, Gibson, and others had made with Joseph Temperton, and also that Brentano would enter into other contracts with him. Russell, knowing these facts, informed Brentano that, if he went on dealing with Joseph Temperton, harm would come to him in his business because no workmen who were members of these unions in Hull would touch the goods supplied by Joseph Temperton, but would leave his, Brentano's, work.

Russell's action led to both of these results. The words spoken by Russell and the resolution passed by the joint committee were said and passed for the purpose of preventing Brentano from carrying out his contract with Joseph Temperton and of forcing Joseph Temperton to comply with the union rules, and for that purpose notice was given through Russell to the workmen in the employ of Brentano to leave work. It has been argued that this was only advice to the workmen or notice to them that they could do as they liked in the matter. That is not, in my opinion, the true view; the men were in reality bound to obey such orders. Russell knew this, and he had authority to order them to obey; the consequences of disobedience would be a fine or expulsion from the union. What Russell said, therefore, was in truth an order to the men which the men, being members of the unions, had agreed to obey. The delegate of the unions, therefore, did order or induce the members of the unions, i.e., the workmen, to cease to work for Brentano if he took any goods from Joseph Temperton, whether he had a contract with Joseph Temperton or not. By those means they did not induce or order Joseph Temperton to obey the wishes of the unions, but they acted so as to force him to obey or else be ruined in his business. They did what they did with that intent. It seems to me that there was clearly evidence against all the defendants as to that. They were all members of the joint committee of the three unions, and the matter was called to the attention of each of them. There was, I think, ample evidence against all of them that they were parties to and authorised all that which was done, with the intent which I have explained. The story is the same with regard to Gibson, only that their actions go a step further. They tell Gibson that he can get his goods from one Goode, and advise him to go to that person, and guarantee his transactions with him. This was not done to injure Gibson, but with the purpose and intent of injuring Joseph Temperton in order to force him to obey the behests of the unions, which they had no right to impose upon him.

The main purpose of the arguments used on behalf of the defendants has been to alter the effect of the facts, but those arguments have all failed. The facts are as I have stated them. What, then, is the law? As to the argument that the

**A** rule of law is confined to the case of master and servant, *Bowen v. Hall* (1) has done away with any such distinction. In *Lumley v. Gye* (2) the proposition of law was not confined to cases of master and servant, the opinion of the two judges being against the opinion of the other judge. These different judgments were before the Court of Appeal in *Bowen v. Hall* (1), and the Court of Appeal had to say with which of those judgments they agreed, and they agreed with the judgment of the majority, giving their reasons for doing so in a considered judgment. We tried in *Bowen v. Hall* (1) to state the rule as a general rule of law and to apply it to that particular case. In our judgment we said (6 Q.B.D. at pp. 338, 339):

**C** "The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second case put by COLERIDGE, J., in *Lumley v. Gye* (2) (2 E. & B. at p. 247); but if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a **D** malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye* (2), and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained **E** that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence."

That statement of the law is directly in point in the present case, and exactly describes what was done in the cases of Brentano and Gibson. It could not possibly be made more applicable to this case than it is. I am not aware that that judgment in *Bowen v. Hall* (1) has ever been criticised. It is, therefore, binding upon us now, and applies exactly to this case, in which certain persons were forced to break their contracts with the plaintiff. Is there any real difference when a person, with the same intent and doing the same acts, seeks to force persons not to enter into contracts with the plaintiff? I can see no difference. There is the **G** same intent which is wrongful because it is malicious, and the acts have the same effect of injuring the plaintiff; the only difference is that in the one case the contracts have been made, while in the other case they have not been actually made. Suppose that I know that a man has made a contract with A.B., and that he will make another contract with him to-morrow, and that I tell him that, if he does not break his existing contract with A.B., I will injure him, and also that, if he **H** makes any other contract with A.B., I will do the same. It is argued that the law is different in the two cases. In my opinion, there is no difference. Is there any authority for saying that there is a difference? None has been suggested. It seems to me that *Gregory v. Duke of Brunswick* (3) is an authority the other way for saying that where people combine together to do injury to a particular person their conduct is unlawful and actionable.

**I** The opinions in the House of Lords in *Mogul Steamship Co. v. McGregor, Gow & Co.* (4), which was decided ten years after *Bowen v. Hall* (1), seem to show the difference between the two cases of an indictment and an action for conspiracy; in the former case proof of the conspiracy proves the indictment, whereas in an action the plaintiff must prove the conspiracy and damage resulting therefrom, otherwise there is no cause of action. In the present case, therefore, it would not be enough if it were only found that there was an agreement to injure and that it was unlawful, but it must be found that it caused damage. If the two things are made out, the unlawful agreement and the damages caused thereby, the opinion



of LORD BRAMWELL in *Mogul Steamship Co. v. McGregor, Gow & Co.* (4) shows that there is an actionable wrong. He says (ante p. 272):

"The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that, if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one it cannot be when done by several. I think there is an obvious answer, indeed two: one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes de minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiff's complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several."

That recognises that, if there is an agreement to do a wrongful act, which is called a conspiracy, and that results in injuring some person, if it would not be a wrong if done by a single person, yet an agreement to do it makes it a wrong, as in *Gregory v. Duke of Brunswick* (3). The agreement in this case, therefore, made it a wrongful act as to the interference both with existing and with future contracts. I cannot feel any doubt that there is evidence that people were prevented from making contracts with the plaintiff by reason of the resolution which was passed. The direct evidence indeed is slight, but the plaintiff's business fell off from £60 to £15 a month. It is said that there might be other causes for that, but what is the natural inference to draw from the facts? The proper inference is that the action of the defendants was the cause. There was, therefore, evidence upon both claims upon which the jury might find for the plaintiff. There was no misdirection, and I think that the verdict was the only one which could be found consistently with good sense and truth. This appeal fails, and must be dismissed.

**LOPES, L.J.**—I do not propose to go into the evidence or facts in this case which have been so fully dealt with by the Master of the Rolls. The case which is all important to the decision of this case is *Bowen v. Hall* (1). As I understand that case, the broad principle is laid down that a person who induces a party to a contract to break it, intending thereby to injure another person or to benefit himself, commits an actionable wrong. That is the effect of that case, and the decision has never been doubted since it was given. I take it that the principle is that a contract gives certain rights, that it not only binds the parties by an obligation, but also imposes upon all persons a duty to respect the contract made between the parties.

That being the law, what were the questions left to the jury in the present case? The first question was: "Did the defendants, or any of them, maliciously induce the persons named, or any of them, to break their contracts with the plaintiff"? If the law is as I have stated it to be, there was abundant evidence of everything implied in that question, and the jury answered it in the only way in which they could properly answer it. It has been said that the action of the men was spontaneous, and that they acted within their rights. That suggestion cannot be maintained for a moment. Neither the merchants nor the men acted of their own free will. The defendant Russell was the delegate of the three unions to represent them, and he acted upon instructions received from the joint committee. Then there is the second question left to the jury, as to inducing persons not to enter

- A into contracts with the plaintiff. That question was: "Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts?" The jury found, not only that there was a combination, but also that the plaintiff suffered damage, which was essential to give him a cause of action.
- B Then arises the question whether there was any actionable wrong. I think that there clearly was. The result of all the cases is to show that a combination by two or more persons to induce others not to deal with a particular person or to enter into contracts with a particular person, if done with an intention to injure that person and if it results in damage to that person, is an actionable wrong. That appears from *Gregory v. Duke of Brunswick* (3) and from the opinions
- C in *Mogul Steamship Co. v. McGregor, Gow & Co.* (4). It has been argued that there was no evidence that any persons were induced not to enter into contracts with the plaintiff. The evidence is indeed not so strong upon this question as upon the first question, but I think that there was sufficient evidence; the falling off in the business of the plaintiff was evidence for the jury on that question. The finding, therefore, of the jury upon both questions was not
- D wrong, and their verdicts ought to stand; the direction of the learned judge as to the law was right. The appeal fails and must be dismissed.

A. L. SMITH, L.J.—The plaintiff in this case is a master mason and builder at Hull, who in the course of his business supplies building materials by contract to other persons. He sues the defendants, who are members of a joint committee of the Operative Bricklayers' of the Operative Plasterers' and of the Operative Labourers' Societies in that town (i) for having unlawfully and maliciously procured certain persons to break their contracts with him; and (ii) for having maliciously conspired to induce certain persons not to enter into contracts with him, by reason of which acts he was damaged. The jury have found against the defendants upon each of those alleged causes of action, and have awarded £50 damages upon the first and £200 damages upon the second. A motion has been made to us to set aside the verdict, and to enter it for the defendants, upon the ground that there was no evidence to fix any of the defendants with liability for the acts complained of, and that the learned judge at the trial misdirected the jury in point of law.

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The question he left to the jury as to the first alleged cause of action was whether the defendants or any of them maliciously induced the persons named to break their contracts with the plaintiff, and he fully explained what was the meaning of the word "maliciously" in this question. He said:

G

"In my judgment, it is perfectly clear law that to induce a person who has made a contract with another to break that contract in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure upon him, or to procure some indirect advantage for the person himself—to induce another to break a contract for any of those motives—is in point of law to do it maliciously. Therefore, if in this particular case you are of opinion that the plaintiff has satisfied you that any one of the defendants had induced—I will take one particular instance—Brentano, because he comes first, to break his contract with the plaintiff, of the existence of which he was aware, in order to hurt the plaintiff in his trade . . . and, if his object in doing that was, by hurting him in his trade, to compel him to do something which he did not want to do, . . . that would be 'maliciously' in point of law, and a cause of action would be established."

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Nothing could be clearer than this direction, and that it is correct in point of law will be seen upon examining the opinion delivered by CROMPTON, WIGHTMAN, and ERLE, JJ., in *Lumley v. Gye* (2), and the judgment of this court (LORD SELBORNE, L.C., and BRETT, L.J., LORD COLERIDGE, C.J., dissenting) in *Bowen v. Hall* (1). It is not necessary, in my opinion, in this case to decide the point whether this

cause of action will apply, if there is no contract in existence, and I reserve that point for decision hereafter. A

It was argued for the defendants that there was no evidence that the defendants (who were all members of the joint committee of the three societies, which Russell admitted that he represented) had, with knowledge of the existence of any contract, and with the intention of injuring the plaintiff and of crippling him in his trade, induced Brentano to break a contract with him, and it was said that all that the defendants had done was what was done in every strike, i.e., call out the men, and that this was legal. If this had been all, I should have agreed, for it cannot be doubted that, at any rate since the passing of the Conspiracy and Protection of Property Act, 1875, if not from 1871 [when the Trade Union Act was passed], strikes per se, subject to the exceptions mentioned in ss. 4 and 5 of the Act of 1875, are legal. It was argued that, if the defendants were to be held liable in damages in this case, no trade union could hereafter call out their men, for it might be held that by so doing they were inducing the breach of a contract to the injury of one of the contracting parties, if there happened to be one. I do not agree that a strike is analogous to the present case; for, to maintain the cause of action sued on, there must be evidence that the defendant, with knowledge of the existence of a contract, had induced and succeeded in inducing one of the contracting parties to break his contract to the injury of the other contracting party, and there must also be evidence that the intention of the inducer was by such breach to do harm to the other contracting party, or, to use LORD HANNEN's words in *Mogul Steamship Co. v. Macgregor, Gow & Co.* (4), that the "real object was to injure the individual." The present is a very different case from that suggested, viz., the mere calling out of men on strike, though it does appear to me that, if a strike were used for the purpose and with the intent above mentioned, an action would lie. B C D E

In my judgment, there is evidence in this case, (i) that the defendants intended to coerce the builders, Myers and Temperton, to obey their edicts, and, to bring this about, they determined to cut off from them the supply of all materials they might require for their trade, and also the supply of men: (ii) that, inasmuch as the plaintiff would not fall in with their commands the defendants then determined to cripple and injure him in his trade by inducing Brentano (together with others who were under contract with the plaintiff) to break the contract which they well knew he had with the plaintiff, so that by those means he might be coerced into obedience; it will be remembered that the defendants Russell and Stephenson, in their answer to interrogatories stated that the plaintiff had broken no rules: (iii) that the defendants did induce Brentano to break his contract to the loss and injury of the plaintiff. It was, however, insisted that there was no evidence that the defendants knew that Brentano was under contract with the plaintiff; but I do not think that this can be maintained, having regard to the facts that, at the meeting of the joint committee on or about Sept. 11, 1892, the defendant Russell introduced Brentano to the meeting as having a contract with the plaintiff, that the minutes of the meeting of Sept. 19 state that Brentano attended to give evidence with regard to a contract made between himself and the plaintiff, and that the defendant Russell in his letter to Goode stated that Brentano had signed a contract with a firm who were in a dispute with the building trade, i.e., the plaintiff, and gave the Bricklayers' Society's guarantee to Goode, who was the person they had found to supply materials to Brentano in the place of the plaintiff under his contract with him, Brentano having been induced, or rather forced, to break his contract with the plaintiff. As before pointed out, there was ample evidence that Russell was deputed by the defendants to carry out, if he could, their common intent. In my judgment, not only was there good evidence against the defendants upon this case of Brentano, but I go further, and say that, if the jury had found for the defendants upon this, they would have been wrong. F G H I

I do not propose to discuss the evidence at length as to the other contractors, who, the jury have found, had been induced to break their contracts with the plaintiff by the action of the defendants. I will only call attention to the evidence



A of Gibson, whose contract with the plaintiff, it will be noticed, was produced at the meeting of Sept. 19 at which all the defendants were present. He stated that, at the interview which he had with Russell, the latter said that they meant to bring Temperton to his knees before they had done with him, and he would do no good till he had made his peace with them. This expression was very significant as to what the real intentions of the defendants were towards the plaintiff. Upon the first cause of action, in my judgment, it is impossible to hold that there was not evidence to support the verdict of the jury. As regards the second cause of action, i.e., the count for conspiracy, I agree with what has been said by the other members of the court. I think that the direction of the learned judge on that head was correct as being in accordance with what was said in *Bowen v. Hall* (1) and *Mogul Steamship Co. v. Macgregor, Gow & Co.* (4), and that there was evidence to support the verdict of the jury.

*Appeal dismissed.*

Solicitors: *Shaen, Roscoe, Massey & Co.*; *Collyer-Bristow, Russell & Hill*, for *Laverack & Son*, Hull; *Bell, Brodrick & Gray*, for *J. T. & H. Woodhouse*, Hull.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

## STRETTON'S DERBY BREWERY v. DERBY CORPORATION

[CHANCERY DIVISION (Romer, J.), October 31, November 1, 2, 23, 1893]

[*Reported* [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791;  
42 W.R. 583; 10 T.L.R. 94; 8 R. 608]

*Sewer—Overflowing—Damage to plaintiff's property—No evidence of negligence of local authority—Right of plaintiffs to recover.*

By s. 19 of the Public Health Act, 1875: "Every local authority shall cause the sewers belonging to them to be . . . kept so as not to be a nuisance . . ." Owing to a large increase in the number of buildings in the district of the defendant local authority which drained into a sewer constructed and maintained by the authority in the exercise of their statutory duties and unusually heavy rainfall the sewer overflowed and the premises of the plaintiffs became flooded with storm water and sewage, which caused damage.

**Held:** in the absence of proof of negligence or want of care by the authority in either the construction or the maintenance of the sewer or the provision of sewerage, the authority was not liable to the plaintiffs for a nuisance under s. 19.

**Notes.** Section 19 of the Public Health Act, 1875, was repealed by the Public Health Act, 1936, Sched. 3, Part I, being replaced by s. 31 of that Act which provides that: "A local authority shall so discharge their functions [relating to sewerage] as not to create a nuisance."

Applied: *Lambert v. Lowestoft Corpn.*, [1901] 1 K.B. 590. Approved: *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260. Applied: *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923. Referred to: *Blundy, Clark & Co. v. London and North Eastern Rail. Co.*, [1931] 2 K.B. 334; *North-Western Utilities, Ltd. v. London Guarantee and Accident Co.*, [1935] All E.R.Rep. 196; *J. & J. Makin, Ltd. v. London and North Eastern Railway Co.*, [1943] 1 All E.R. 645.

As to sewers and drains outside London, see 31 HALSBURY'S LAWS (3rd Edn.) 200 et seq.; and for cases see 41 DIGEST 24, 25. For the Public Health Act, 1936, s. 31, see 19 HALSBURY'S STATUTES (2nd Edn.) 335.

Cases referred to :

- (1) *Ruck v. Williams* (1858), 3 H. & N. 308; 27 L.J.Ex. 357; 31 L.T.O.S. 167; 22 J.P. 420; 6 W.R. 622; 157 E.R. 488; 41 Digest 24, 184.
- (2) *Hammond v. St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 41 Digest 27, 217.
- (3) *Bateman v. Poplar District Board of Works* (No. 2) (1887), 37 Ch.D. 272; 57 L.J.Ch. 579; 58 L.T. 720; 36 W.R. 501; 4 T.L.R. 137; 41 Digest 13, 95.
- (4) *Brown v. Sargent* (1858), 1 F. & F. 112; 36 Digest (Repl.) 75, 402.
- (5) *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294, 156 E.R. 1047; 36 Digest (Repl.) 5, 1.
- (6) *Whitthouse v. Birmingham Canal Co.* (1857), 27 L.J.Ex. 25; 30 L.T.O.S. 156; 36 Digest (Repl.) 34, 158.
- (7) *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527; 60 L.J.Ch. 788; 65 L.T. 312; 40 W.R. 185; 41 Digest 42, 304.

Also referred to in argument :

- Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest (Repl.) 35, 178.
- A.-G. v. Dorking Union* (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 30 W.R. 579, C.A.; 41 Digest 42, 308.
- R. v. Tottenham Local Board* (1893), 9 T.L.R. 414, C.A.; 41 Digest 23, 181.
- Chapman, Morsons & Co. v. Auckland Union Guardians* (1889), 23 Q.B.D. 294; 58 L.J.Q.B. 504; 61 L.T. 446; 53 J.P. 820, C.A.; 28 Digest (Repl.) 790, 398.

**Action** by the plaintiffs, Stretton's Derby Brewery, Ltd., for an injunction restraining the defendants, Derby Corporation, from allowing water, sewage, or noxious matter to be discharged or flow from their sewers on to the plaintiffs' land or premises, or from continuing the said sewers so as to cause a nuisance to the plaintiffs.

By s. 19 of the Public Health Act, 1875;

"Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

*Sir Edward Clarke, Q.C., R. Cunningham Glen and Hextall* for the plaintiffs.  
*Neville, Q.C., and William Graham* for the defendants.

*Cur. adv. vult.*

Nov. 23, 1893. **ROMER, J.**, read the following judgment. The plaintiffs' claim arises under the following circumstances. Many years ago, in exercise of their statutory duties, the defendants provided a system of drainage for the district, and, as part of that system, made the sewer that passes under the road in which the plaintiffs' brewery is situated. The brewery was erected some years after the sewer was made, part of it having been built in 1869, and other parts in 1876, 1880, and 1881. As the different parts of the brewery were erected, the owners for the time being exercised their statutory right and drained them into the sewer by communications which had to be and were first approved of by the defendants. These communications respectively run to the sewer from the floors of the cellars of several parts of the brewery, which floors are slightly above the crown of the sewer, so that the cellars cannot be flooded from the sewer until the sewer gets filled and a pressure is caused in it which forces the contents of the sewer up the communications through the floors of the cellars. On June 25, 1891, a heavy storm occurred, which blocked the sewer and drove the sewage up the plaintiff's

A communications to the cellars and flooded the cellars for a short time for a depth of about three feet, and, after the flood retired, left some two inches or so of sewage matter on the floors of the cellars. This undoubtedly caused damage to the plaintiffs, and they complained to the defendants. On May 25, 1892, another but slighter flooding occurred, and on June 28, 1892, there was another heavy storm and a flooding to the extent of about fourteen inches, which left a deposit  
B of sewage, whereupon the plaintiffs made further complaint of the damage which they had sustained. The defendants not admitting liability, this action is brought in August, 1892, for an injunction and damages. After the action was commenced there was another flooding on the occasion of a heavy storm, which took place on July 11, 1893.

In considering the liability of the defendants for these floodings and consequent  
C damage, it appears to me material to decide some questions of fact. In the first place, I find that the defendants, in making their existing system of drainage and in constructing the sewer, exercised due care, and were not guilty of any negligence, that system, as constructed, reasonably providing for the district, and for the then probable increase of buildings which would have to drain into it. In the next place, I find that when the communications between the brewery and the  
D sewer were made, and for some years afterwards, the sewer was well constructed and sufficient for the purposes of draining the district, and could cause no flooding, or probability of flooding, to the brewery. I also find that the floodings arose, not from any want of repair in the defendants' sewer, but from the following circumstances. I think that owing to the large increase in the last few years in the number of buildings and places in the district which drain into the sewer in  
E question, if a very heavy fall of rain occurs in a short space of time, the existing sewer has become insufficient in size to carry off the sudden influx of water, and gets choked, and so drives the contents of the sewer up the plaintiffs' communications, and into the floors of their cellars. It seems to me that such floodings arising from heavy falls of rain are likely, as matters now stand, to occur about once a year, and more frequently in the future, as the number of drains increases  
F with the further buildings which may be erected in the district drained. I further find that, if (as the plaintiffs insist) the floors of their cellars are to remain as low as at present, and their communications are to continue to run from those floors, then the only way to prevent the liability to flooding is by the defendants constructing a new sewer or a new system of drainage for the district.

Assuming, then, that it has become the duty of the defendants as the sanitary  
G authority to consider the question of constructing, and in due course to construct, a new sewer or a new drainage system, I have to consider whether the defendants, when this action was commenced, or up to the date of the trial of this action, were guilty of negligence or (as it is sometimes expressed) of want of reasonable care and diligence in maintaining the existing sewer and in not providing the new sewer or new system of drainage. As to this, I find that the defendants were  
H not guilty of negligence or of want of reasonable care or diligence. In the first place, it is clear that the defendants, so long as the present sewer existed, and until its insufficiency, owing to the increase of buildings, rendered it necessary to construct a new sewer or new drainage system, were not guilty of negligence in maintaining the present sewer, or because, until the new sewer was made, the owners of the new buildings as they were erected exercised their statutory rights to  
I drain into the existing sewer, so that the question of negligence resolves itself into this, whether the defendants were guilty of negligence in not providing a new sewer or new sewer system; and, as to this, I come to the conclusion that there was no negligence for the following reasons: As observed by BRAMWELL, B., in *Ruck v. Williams* (1) negligence is a relative term, and must mean negligence with reference to circumstances of time, place, or person.

The negligence, if any, of the defendants in the present action is not in omitting to do repairs or small works of that kind, which could be speedily done, but in not constructing a new sewer or sewage system for the district in due time after



its necessity had become apparent. I am satisfied on the evidence before me that the construction of such a new sewer or sewer system as is requisite is, having regard to the size of the town and the configuration of the defendants' district, a large, expensive, and very difficult undertaking, and one requiring considerable and careful inquiry and the advice of experts, necessarily occupying a considerable time before any plan or scheme for the new sewer or system could with propriety and in the exercise of reasonable care be adopted or commenced, and the carrying out of such plan or scheme must of necessity occupy a considerable time. The difficulties in the way of the defendants are great. If, for instance, the sewer be lowered or enlarged, or if an additional or storm sewer be provided, a difficulty arises as to how the sewage or waters carried down can be disposed of, and, unless some new way were carefully thought out, it might happen that relief would be granted to the plaintiffs only by flooding the lower parts of the town to which the sewer runs after passing the plaintiffs' premises.

It appears that more than a year ago the defendants considered this question of a new sewer or drainage system and consulted experts of great eminence, who were to report as to what was the best thing to be done under the circumstances; but the report, though expected very shortly, has not yet been sent in, owing to the difficulties and magnitude of the case. Under these circumstances, I do not think that the defendants can be fairly said to have acted unreasonably or negligently in not proceeding with the construction of a new sewer or new drainage system. It was suggested that they might have consulted the experts sooner than they did. But the first complaint to them was only in June, 1891, when the flooding was caused by a storm of a most unusual character—a storm which one of the plaintiffs' witnesses (Malleon) said was the heaviest he ever saw—and the defendants might well regard this as not likely to recur. There was some evidence of overflows at the brewery before June, 1891, but no particulars were given, or dates, except that the overflows were after 1885 and near the year 1890, and no complaint was made about them to the defendants, though one of the plaintiffs' witnesses (Mr. Stretton) said that he verbally complained to a nuisance inspector. Then, after the overflow of June, 1891, nothing occurs until the floodings of May and June, 1892, and, though defendants refused to admit any liability for the damage thereby caused, it must have been shortly after this that they consulted the experts; and under these circumstances I cannot think they were guilty of negligence or of want of reasonable care and diligence in not previously taking active steps in the matter. It is, moreover, noticeable that the plaintiffs' statement of claim does not expressly allege negligence on the part of the defendants, and that on behalf of the plaintiffs in opening their case it was stated that they were not bound to allege or prove negligence.

The question now arises whether, on the above findings of fact, the defendants can be held liable. The plaintiffs put their case in this way. They say, broadly, that, as the sewer was made by and belongs to the defendants, the defendants are liable for the nuisance caused to the plaintiffs by that sewer, whether they have been guilty of negligence or not, and are not protected from such liability by any provisions of the Public Health Act or any other Act. In support of this general proposition the plaintiffs contend (i) that, apart from any statutory duty cast upon the defendants and treating the defendants as strangers who have a private sewer of their own, the defendants must be held liable; and (ii) that the defendants are liable because they have infringed the provisions of s. 19 of the Public Health Act, 1875, which enacts (*inter alia*) that

"every local authority shall cause the sewers belonging to them to be constructed . . . and kept so as not to be a nuisance."

With respect to the first contention, I do not see how the plaintiffs can say that they are entitled to treat the defendants as strangers. The nuisance to the plaintiffs would not have been caused but for the communications opened by their predecessors in title with the defendants' sewer. No part of the sewage or

**A** water in the sewer would have got on the plaintiffs' premises but for those communications which the plaintiffs' predecessors made in exercise of the rights given to them by s. 21 of the Public Health Act or the corresponding section, s. 8 of the Sanitary Act, 1866. It was because the defendants were not strangers, but a public body making and maintaining a sewer for public purposes and for the benefit of the inhabitants of the district, that the above rights were given, and  
**B** that the defendants were bound to allow the communications to be made, subject to the "mode" in which the communications were made being approved. It appears to me that, when under and by virtue of statutory duties and powers works are made and maintained by a public body for the benefit of the public, or of a section of the public, and a member of the public, in exercise of the statutory rights given to him, uses those works, and thus suffers damage, the rights  
**C** of that member, and the liability of the public body in respect of such damage are to be ascertained, not by considering how matters would stand if the parties could be regarded as strangers, but by reference only to the statutes under which the works were made, maintained, and enjoyed. And to make the public body liable under the circumstances you must find that liability cast upon the public body by the statutes in question, either by express provision or reasonable intention.  
**D**

This brings me to a consideration of the plaintiffs' second contention and the statutes governing the present case, and the only statute I need consider is the Public Health Act, 1875. Section 19, on which the plaintiffs rely, is in point of wording unlimited as to the liability it casts upon the defendants. But it has long since been held—and I take it to be now settled—that by reasonable construction of an Act such as this the liability in circumstances like the present,  
**E** though in form not limited, is in fact limited to cases where the local authority has been guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence: see *Hammond v. St. Pancras Vestry* (2) and *Bateman v. Poplar District Board of Works* (No. 2) (3), cases under s. 72 of the Metropolis Local Management Act, 1855, which section is substantially the same as s. 19 of the Public Health Act; *Brown v. Sargent* (4), a case under the Public Health Act, 1848, s. 46 of which is for present purposes practically identical with s. 19 of the present Act; and, on the question of the general principle governing cases like the present, *Blyth v. Birmingham Waterworks Co.* (5); *Whitehouse v. Birmingham Canal Co.* (6); and the above-mentioned case of *Ruck v. Williams* (1). This being  
**G** so, as I have found as a fact no negligence on the part of the defendants, they cannot, in my judgment, be held liable under s. 19. Nor do I find from any other provision of the Public Health Act, nor can I reasonably gather from that Act, that the defendants are to be liable in a case like the present in the absence of negligence.

This disposes of the action, for, as no legal wrong-doing by the defendants has been established, the plaintiffs are entitled neither to damages nor to an injunction, nor are they (as suggested by plaintiffs' counsel) entitled to call upon  
**H** the defendants for any such undertaking as was voluntarily given by the defendants in *A.-G. v. Clerkenwell Vestry* (7). The action must be dismissed with costs.

Solicitors: *Greenfield & Cracknall*, for *W. H. Briggs*, Derby; *Satchell & Chapple*, for *J. & H. F. Gadsby & Coxon*, Derby.

[Reported by R. H. DEANE, ESQ., Barrister-at-Law.]

## MILLER v. HANCOCK

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), June 13, 1893]

[Reported [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758;  
41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478]

*Landlord and Tenant—Liability of landlord—Dangerous staircase—Sole means of access to demised tenement—Injury to person visiting tenant.*

An upper floor in a building was let as a separate tenement, it being approached by a staircase that remained in the possession and control of the landlord. The agreement between the landlord and the tenant contained no provision for the maintenance in repair of the staircase. While ascending the staircase to visit the tenants of the upper floor on business the plaintiff fell owing to one of the stairs being defective and suffered injury. In an action by the plaintiff against the landlord for damages for personal injuries,

**Held:** the landlord must be taken to have known that persons would visit the tenants on the upper floor of the building, and to do so would use the staircase, which was essential to the enjoyment of the premises demised; therefore, he was under an implied obligation to keep the stairs in a reasonably safe condition for that use; he had failed to perform that obligation; and the action succeeded.

**Notes.** This case was overruled by *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, but its effect has been restored by s. 3 (1) of the Occupiers' Liability Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 836.

Considered: *Hargroves, Aronson & Co. v. Hartopp*, [1905] 1 K.B. 472. Distinguished: *Cavalier v. Pope* (1905), 74 L.J.K.B. 857; *Huggett v. Miers*, [1908-10] All E.R.Rep. 184. Considered: *Lewis v. Ronald*, [1908-10] All E.R.Rep. 782; *Powell v. Thorndike* (1910), 102 L.T. 600; *Lucy v. Bawden*, [1914] 2 K.B. 318; *Dobson v. Horsley*, [1915] 1 K.B. 634. Doubted: *Groves v. Western Mansions* (1916), 33 T.L.R. 76. Considered: *Hart v. Rogers*, [1916] 1 K.B. 646; *Dunster v. Hollis*, [1918-19] All E.R.Rep. 949. Overruled: *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74. Considered: *Cockburn v. Smith*, [1924] All E.R.Rep. 59; *Haseldine v. C. A. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Devine v. London Housing Society*, [1950] 2 All E.R. 1173. Referred to: *Hopkins v. Great Eastern Rail. Co.* (1895), 60 J.P. 86; *Blake v. Woolf*, [1895-9] All E.R.Rep. 185; *Cavalier v. Pope*, [1906] A.C. 428; *Murphy v. Hurly*, [1922] All E.R.Rep. 169; *Jacobs v. L.C.C.*, [1950] 1 All E.R. 737; *Sleafer v. Lambeth Metropolitan Borough Council*, [1959] 3 All E.R. 378.

As to the duty of a landlord towards visitors entering premises to visit tenants, see 28 HALSBURY'S LAWS (3rd Edn.) 46, 47; and for cases see 31 DIGEST (Repl.) 100-103.

Cases referred to:

- (1) *Smith v. London and St. Katharine Docks Co.* (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 16 W.R. 728; 3 Mar.L.C. 66; 36 Digest (Repl.) 48, 253.
- (2) *Taylor v. Whitehead* (1781), 2 Doug.K.B. 745; 99 E.R. 475; 19 Digest (Repl.) 127, 807.

Also referred to in argument:

- Colebeck v. Girdlers Co.* (1876), 1 Q.B.D. 234; 45 L.J.Q.B. 226; 34 L.T. 350; 40 J.P. 596; 24 W.R. 577; 31 Digest (Repl.) 378, 5067.
- Pomfret v. Ricroft* (1670), 1 Wms. Saund. 321; 2 Keb. 569; 1 Sid. 429; 1 Vent. 44; 85 E.R. 454; 31 Digest (Repl.) 133, 2713.
- Ford v. Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q.B.D. 12; 55 L.J.Q.B. 296; 54 L.T. 718; 50 J.P. 661; 34 W.R. 426; 2 T.L.R. 281, C.A.; 19 Digest (Repl.) 47, 260.



- A** *Wheelodon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 48, 269.  
*Pearson v. Spencer* (1863), 3 B. & S. 761; 8 L.T. 166; 11 W.R. 471; 122 E.R. 285; sub nom. *R. v. Pearson*, 1 New Rep. 373, Ex. Ch.; 19 Digest (Repl.) 56, 306.

**B** **Appeal** from the verdict and judgment in an action tried before LAWRENCE, J., with a jury.

The action was brought to recover damages from the defendant in respect of his negligence in allowing a staircase to be out of repair and in a defective and unsafe condition, whereby the plaintiff fell and was injured. The defendant was the leaseholder of a building in the city of London, the different floors of which he let out as separate tenements. In 1876, by an agreement in writing, he let the rooms on the second floor for three years to Messrs. Gwynne, engineers, for offices. The agreement contained no provision for the maintenance in repair of the staircase in the building, which was the only means of access to the second floor and remained in the possession and under the control of the defendant. When the three years' agreement expired, Messrs. Gwynne arranged with the defendant to continue in possession as tenants on the same terms, and that arrangement had continued up to the time of action brought. The plaintiff was a collector in the employment of the Midland Railway Co., and was in the habit of calling upon Messrs. Gwynne once a month on business. On the day of his receiving the injury in respect of which the action was brought, he had gone to the house on one of his visits, and was ascending the staircase to Messrs. Gwynne's tenement when he fell and broke his leg. Evidence was given at the trial to show that, at the stair where the plaintiff fell, a hollow had been worn in the surface of the stone of which the stairs were composed. At the trial, LAWRENCE, J., directed the jury that, for the purpose of their verdict, they were to assume that it was the defendant's duty to take care that the staircase was in such repair as to be safe for his tenants and those who had business with the tenants, and left to them the questions whether the staircase was so far out of repair as to be unsafe, and whether that want of repair caused the plaintiff's injury. The jury found a verdict for the plaintiff and awarded him £200 damages. LAWRENCE, J., on further consideration, held that it was the defendant's duty to take care that the staircase was in such repair as to be safe, and entered judgment for the plaintiff. The defendant moved the Court of Appeal for judgment or for a new trial on the grounds of misdirection, that there was no evidence to support the verdict, that the verdict was against the weight of evidence, and that the damages were excessive.

*Bray* (*Murphy*, Q.C., with him) for the defendant.

*Moyses* (*Cock*, Q.C., with him), for the plaintiff, was not called on to argue.

**LORD ESHER, M.R.**—The defendant was the owner of a building in the city of London, consisting of several floors. It appears that he let the rooms on the first and second floors as separate tenements to different tenants. I gather that he kept in his possession some part of the house, at any rate, one room in it, and he did not let the staircase, the only mode of access which the tenants had to their respective tenements. So much of the house as the defendant did not let, and, therefore, the staircase, remained in the possession and control of the defendant.

**I** What, under such circumstances, are the rights of the tenants and the duties of the landlord towards them? Their only mode of access to their tenements was by this staircase. This may be called an easement; it was, in my opinion, such an easement as the landlord was bound to keep so as to afford a reasonably safe entrance and exit to the tenants. It seems to me that there was an implied obligation on the part of the landlord to the tenants to that effect, or else he was letting to the tenants that which would be of no value to them. What is the use of a second floor to anyone, if the staircase, by which alone there can be access to it, is to be allowed to go to ruin? Furthermore, it is obvious that in such a case

the landlord must know that the premises let will be of no use to tenants unless those who supply or deal with the tenants, such as tradesmen or others having business with them, also have access to the premises. He must know that such people will go up and down the stairs; and those who use a staircase left open in premises of this kind would naturally suppose that it would, in the ordinary course of things, be under the control of and looked after by the landlord of the premises. Under those circumstances, I think that there is a relation between the landlord and those who resort to the premises for business purposes, from which a duty arises on the part of the landlord to keep the staircase in reasonably safe repair.

Is there any authority for that proposition? It seems to me that *Smith v. London and St. Katharine Docks Co.* (1) is an authority for the line of reasoning which I have adopted. There the defendants, a dock company, provided gangways as a means of access to ships lying in their dock. There appears to have been no express contract between the defendants and the shipowner as to these gangways, but it was in the ordinary course of business that they provided them, and so there would be an implied contract to provide them. In the nature of things they would be necessary for the use, not only of the crew, but also of other persons having business with the ship. The court said that the defendants must have known that they would be used by such persons; and, that being so, there was a duty on their part towards persons, between whom and them there was no other relation than that created by going on board the ship on business, to have such gangways in a safe condition. Similar reasoning appears to me to apply to this case. For these reasons I think the application must be refused.

It was argued that there was no evidence to support the finding of the jury, or that, at all events, it was against the weight of evidence. I agree that the question for the jury was whether the stairs were so far out of repair as to be unsafe for people going up and down them. As to this, there was evidence both ways, and the question was, therefore, one for the jury. I see no ground for saying that they could not properly find a verdict for the plaintiff, or that the sum which they have awarded him is excessive, and, therefore, the appeal is dismissed.

**BOWEN, L.J.**—I am of the same opinion. The defendant is the owner of premises, which he lets out in flats; and the plaintiff, at the time of incurring the injury which was the subject of the action, was, in the course of his duty as collector of the Midland Railway Co., going up the staircase on the defendant's premises to the flat on the second floor to do business with the tenant of that flat. In going up the stairs the plaintiff put his foot into a hollow that had been worn in the surface of a stair and fell and broke his leg.

The liability of the defendant appears to me to be clear. Beyond all question he let each of the flats to a tenant, but it is equally clear that the staircase remained in his own occupation and control. That is the determining factor in this case. The tenant could only use the flat by using the staircase; therefore, when the defendant let the rooms he must be taken, by necessary implication, to have granted to the tenant an easement to pass over the staircase in going to and from his rooms. Otherwise, as the Master of the Rolls said in the course of the argument, what the defendant would have let would be a nest, and not rooms available for business and living in. It was argued strenuously by counsel for the defendant that the grantor of a way over his own land is not bound to repair it. That is true, with this important qualification that the grantor may bind himself, either expressly or by implication, to repair the way. But this is not the case of the grant of a bare easement of a way over another person's land without special circumstances.

It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go

A up and down the stairs in the ordinary course of business with the tenants. A landlord must know when he lets a flat that tradesmen and other persons having business with the tenant must have access to it. It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises. If B that be so, the case is brought within the dictum of LORD MANSFIELD in *Taylor v. Whitehead* (2), to the effect that by the common law he who has the use of a thing ought to repair it, but the grantor may bind himself. When the conclusion is once arrived at that there is an implied undertaking by the landlord, the rest seems to me to follow by a course of reasoning which is clear and covered by authority. The landlord has given the tenant a right to use the staircase, and undertaken to C keep it in repair; and he knows that persons who have business with the tenant will be coming up and down the stairs, and that those persons will use the stairs on the understanding that they may lawfully do so, and that, in doing so, they will be shielded by the responsibility of the person on whom the liability to repair the staircase may rest.

That being so, the case appears to me to be brought within the principle upon D which *Smith v. London and St. Katharine Docks Co.* (1) was decided. In my opinion, it is clear, both on principle and authority, that a duty was imposed by law upon the defendant towards persons using the staircase in the course of business with the tenants to keep it reasonably safe.

KAY, L.J.—I am of the same opinion. The question here is whether the duty E to keep the staircase in a safe condition fell upon the landlord or the tenant. The staircase was not let, but was retained by the landlord in his own possession; the tenants of the flats, however, had the right to use it, and, therefore, they had an easement over it. It may be that, to preserve that easement, as between himself and the landlord, a tenant might have a right to repair the staircase, but that does not conclude the question whether it was the duty of the landlord, as between F himself and the tenant, or as between himself and persons in the position of the plaintiff, i.e., persons who might go up and down the staircase in the course of business with the tenant, to keep the staircase in such a condition that it might be safely used. It seems to me that, under the peculiar circumstances of this case, a duty existed on the part of the landlord to keep the staircase in a safe condition, and, therefore, that the plaintiff is entitled to maintain his action.

G

*Application dismissed.*Solicitors: *Lovett & Co.; Sandilands & Co.*

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]



## WOLMERSHAUSEN v. GULLICK AND ANOTHER

[CHANCERY DIVISION (Wright, J.), April 15, 17, May 1, 1893]

[Reported [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753;  
9 T.L.R. 437; 3 R. 610]

*Guarantee—Co-sureties—Action for contribution—Claim before payment by plaintiff of proportion of liability—Competency.*

An action for contribution is maintainable by one co-surety against another before the plaintiff has actually paid more than his own proportion of the joint and several liability. Where, therefore, one of several co-sureties, being threatened by the principal creditors with proceedings to enforce payment by her of the whole amount of the guarantee, brought an action against one of the other co-sureties to obtain contribution from him, the court declared the plaintiff's right to contribution and directed that upon her paying her own share the defendant was to indemnify her against further payment or liability, and was by payment to the plaintiff or the principal creditors or otherwise to exonerate her from liability beyond the extent of her own share.

*Bankruptcy—Proof—Debt provable—Liability of co-surety to contribute.*

A bankruptcy petition having been presented against a co-surety for a sum of money advanced by a bank to a company and a receiving order having been made against him on that petition, the debtor made a proposal for a composition in satisfaction of his debts which was accepted by the creditors and approved by the court, the receiving order being rescinded and a final dividend being paid. In an action by the debtor's co-surety for contribution,

**Held:** the liability of the debtor to contribute, although not ascertained at the time of the bankruptcy proceedings, not included in his schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained was nevertheless a liability within the meaning of s. 37 of the Bankruptcy Act, 1883 [see now Bankruptcy Act, 1914, s. 30 (3)], and a debt provable in the bankruptcy, and, accordingly, under s. 18 of the Act [see now s. 16 (13) of the Act of 1914] the debtor was entitled to be dismissed from the action.

*Limitation of Action—Guarantee—Co-sureties—Action for contribution—Ascertainment of plaintiff's liability.*

In an action by a surety against a co-surety for contribution the Statute of Limitations does not begin to run against the plaintiff until his liability is ascertained.

**Notes.** Applied: *Robinson v. Harkin*, [1896] 2 Ch. 415. Followed: *Re Blackpool Motor Car Co.*, *Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77. Considered: *Re Fenton* (No. 1), *Ex parte Fenton Textile Association, Ltd.*, [1930] All E.R.Rep. 15. Approved: *Littlewood v. George Wimpey & Co., Ltd.*, [1953] 2 All E.R. 915. Referred to: *Ellis v. Pond and Bloomsbury Syndicate*, [1898] 1 Q.B. 426; *Shepherd v. Bray*, [1906] 2 Ch. 235; *Ascherson v. Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401; *Re Law Guarantee Trust and Accident Society, Ltd.*, *Liverpool Mortgage Insurance Co.'s Case*, [1914-15] All E.R.Rep. 1158; *Re Chetwynd's Estate, Dunn Trust, Ltd. v. Brown*, [1936] 3 All E.R. 254; *George Wimpey & Co. v. B.O.A.C.*, [1954] 3 All E.R. 661; *Re A Debtor* (No. 66 of 1955), *Ex parte The Debtor v. Trustee of Property of Waite*, [1956] 2 All E.R. 94.

As to the rights and liabilities of co-sureties inter se, see 18 HALSBURY'S LAWS (3rd Edn.) 484-492; as to debts provable in bankruptcy, see *ibid.*, vol. 2, pp. 464-480; as to limitation of actions between co-sureties, see *ibid.*, vol. 24, p. 217. For cases see 26 DIGEST (Repl.) 143 et seq.; 4 DIGEST (Repl.) 276 et seq.; 32 DIGEST 332-334.

## A Cases referred to :

- (1) *Hardy v. Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 277, 2542.
- (2) *Davies v. Humphreys* (1840), 6 M. & W. 153; 9 L.J.Ex. 263; 4 Jur. 250; 151 E.R. 361; 26 Digest (Repl.) 148, 1084.

## B

- (3) *Offley and Johnson's Case* (1584), 2 Leon. 166; 74 E.R. 448; 26 Digest (Repl.) 143, 1040.
- (4) *Anon.*, Cary, 2; 21 E.R. 1.
- (5) *Anon.* (1603), Cary, 23; 21 E.R. 13.

## C

- (6) *Peter v. Rich* (1629), 1 Rep. Ch. 34; 21 E.R. 499; 26 Digest (Repl.) 148, 1089.
- (7) *Morgan v. Seymour* (1638), 1 Rep. Ch. 120; 21 E.R. 525; 21 Digest (Repl.) 147, 1074.
- (8) *Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, 1065.
- (9) *Swain v. Wall* (1641), 1 Rep. Ch. 149; 21 E.R. 534; 26 Digest (Repl.) 149, 1093.

## D

- (10) *Hole v. Harrison* (1673), Cas. temp. Finch, 15; 1 Cas. in Ch. 246; 23 E.R. 9; subsequent proceedings (1675), Cas. temp. Finch, 203; 26 Digest (Repl.) 151, 1126.
- (11) *Lawson v. Wright* (1786), 1 Cox, Eq. Cas. 275; 29 E.R. 1164; 26 Digest (Repl.) 151, 1127.

## E

- (12) *Craythorne v. Swinburne* (1807), 14 Ves. 160; 33 E.R. 482, L.C.; 26 Digest (Repl.) 145, 1063.
- (13) *Ex parte Gifford* (1802), 6 Ves. 805; 31 E.R. 1318, L.C.; 26 Digest (Repl.) 143, 1045.
- (14) *Antrobus v. Davidson* (1817), 3 Mer. 569; 36 E.R. 219; 26 Digest (Repl.) 63, 447.

## F

- (15) *Stirling v. Forrester* (1821), 3 Bli. 575; 4 E.R. 712; 26 Digest (Repl.) 143, 1048.
- (16) *Reynolds v. Wheeler* (1861), 10 C.B.N.S. 561; 30 L.J.C.P. 350; 4 L.T. 472; 7 Jur.N.S. 1290; 142 E.R. 572; 6 Digest (Repl.) 389, 2772.
- (17) *Wooldridge v. Norris* (1868), L.R. 6 Eq. 410; 37 L.J.Ch. 640; 19 L.T. 144; 16 W.R. 965; 26 Digest (Repl.) 131, 921.

## G

- (18) *Cruse v. Paine* (1868), L.R. 6 Eq. 641; 37 L.J.Ch. 711; 19 L.T. 127; 17 W.R. 44; affirmed (1869), 4 Ch. App. 441; 38 L.J.Ch. 225; 17 W.R. 1033, L.C.; 23 Digest (Repl.) 303, 3684.
- (19) *Bechervaise v. Lewis* (1872), L.R. 7 C.P. 372; 41 L.J.C.P. 161; 26 L.T. 848; 20 W.R. 726; 26 Digest (Repl.) 130, 914.
- (20) *Lacey v. Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 22 W.R. 58b; sub nom. *Lacy v. Hill, Crowley's Claim*, 30 L.T. 484; 26 Digest (Repl.) 132, 936.

## H

- (21) *Lloyd v. Dimmack* (1877), 7 Ch.D. 398; 47 L.J.Ch. 398; 38 L.T. 173; 26 W.R. 458; 26 Digest (Repl.) 251, 1915.
- (22) *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch.D. 561; 52 L.J.Ch. 418; 48 L.T. 107; 31 W.R. 285; 26 Digest (Repl.) 131, 927.

## I

- (23) *Hobbs v. Wayet* (1887), 36 Ch.D. 256; 56 L.J.Ch. 819; 57 L.T. 225; 36 W.R. 73; 26 Digest (Repl.) 132, 937.
- (24) *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch.D. 44; 50 L.J.Ch. 540; 44 L.T. 830; 29 W.R. 654, C.A.; 26 Digest (Repl.) 148, 1085.
- (25) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733; 52 L.J.P.C. 70; 49 L.T. 446; 32 W.R. 730, P.C.; 6 Digest (Repl.) 389, 2773.
- (26) *Kemp v. Finden* (1844), 12 M. & W. 421; 13 L.J.Ex. 137; 2 L.T.O.S. 313; 8 Jur. 65; 152 E.R. 1262; 26 Digest (Repl.) 149, 1095.

**Action** by the plaintiff, Emily G. Wolmershausen, the executrix of the will of

George Michael Wolmershausen, her late husband, whose estate was being administered under the order of the court, to obtain contribution from the defendants, Thomas Gullick and John Patton, as co-sureties with the testator under a promissory note given by them to secure an advance by a bank to a company. A

*Farwell, Q.C., and Augustine Birrell* for the plaintiff.

*Haldane, Q.C., and Curtis Price* for the defendant, Gullick. B

*Whitehorne, Q.C., and T. L. Wilkinson* for the defendant, Patton.

*Cur. adv. vult.*

May 1, 1893. **WRIGHT, J.**, read the following judgment. This case raises an important question with respect to which there is a remarkable absence of express authority. The plaintiff is the executrix of a person who became surety with four others for a large sum of money advanced by a bank to a company. The surety's estate is being administered in the court, and the bankers put in a claim as creditors for the whole amount of the guarantee. The plaintiff resisted the claim, and succeeded in reducing it from about £6,000, and it has been finally allowed for a sum of about £4,500. The plaintiff is now called upon to pay that sum, and brings this action against the co-sureties for contribution. The plaintiff has not yet paid anything. C D

The defendant Patton I have dismissed from the action on the ground that he is discharged by a composition under s. 18 of the Bankruptcy Act, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, not included in his schedule of liabilities nor in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, was nevertheless a liability within the meaning of s. 37 of the Act, and, therefore, a debt provable in the bankruptcy: cf., *Hardy v. Fothergill* (1). The principal defence of the other defendant Gullick is that the plaintiff is not entitled to maintain this action until she has paid more than her proportion, or, at any rate, until she has paid her proportion. The plaintiff is willing to pay her proportion, but she insists that the actual payment of it is not a condition precedent to her right to sue; and she says that at any rate she is not obliged to pay the whole in the first instance and then sue for reimbursement. If she is obliged to pay the whole before actual contribution from the co-surety, the business in which the testator's assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time. Obviously, if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once, and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties. The questions are, whether the action can be maintained, and what is the precise extent of the relief (if any) which can be given. E F G

By the Roman law, as it stood in the time of JUSTINIAN, sureties had, generally speaking, the right to compel the creditor to enforce payment against them pro rata only. The superior courts of common law in this country have never entertained any action for contribution by a surety against his co-surety, except the action for money paid, and from the time of *Davies v. Humphreys* (2), which was decided in 1840, it has been treated as settled law that the surety cannot maintain this action until he has actually paid more than his own proportion, because this action assumes a debt due and payable to the plaintiff, and there is no legal debt due and payable, and the creditor may yet enforce payment of the whole balance from the co-surety. Nor did the courts of common law ever give in the case of co-sureties the equitable relief which they were accustomed to give in many other cases of joint or common liability, by compelling contribution after judgment and before execution by means of a writ of *audita querela* or *scire facias* to limit the creditor's execution to the proper share payable by the particular defendant. This will be seen from the collection of ancient cases in 3 Co. Rep., p. 12 et seq. By the custom of the city of London an equitable action lay in the city courts by a H I



A surety before he had paid anything to have it ordered that he and his co-sureties should be charged pro rata only—ut uterque eorum oneretur pro rata: *Offley and Johnson's Case* (3).

In the earliest reports and abridgements of cases in Chancery there is frequent mention of contribution, but there seems to be no reported instance of contribution between sureties before the seventeenth century; and even in modern times there is very little express authority that the surety has any remedy until he has actually paid too much, and still less authority to show the precise extent of the relief to which he may be entitled before such payment. In nearly every reported case the surety had before action paid more than his share. Nearly every case and text-book refers to his right to contribution as the right of a surety who has paid more than his proportion. In a few cases the ambiguous expression is used, "when he is called upon to pay more than his proportion."

The following are, I believe, the only reported cases which throw any light on the subject. I begin with two, which are not cases of suretyship, but which illustrate a principle of equity apparently established in other cases of contribution and applicable to this. They are cited in VIN. ABR., tit. "Contribution," pp. 32, 33, from CARY'S REPORTS, and are as follows:

D "If a man grants a rentcharge out of all his lands, afterwards sells his land by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in Chancery by a contribution from the rest of the purchasers, and the grantee shall be restrained by order to charge the same upon him only": (*Anon.* (4)).

E In the second case (*Anon.* (5)) the facts were as follows:

"In 1603 Sir Edmund Morgan married the widow of Fortescue; he had his wife's lands distrained alone by the grantee of a rentcharge from her former husband, and therefore sued the grantee in Chancery to take a rateable part of the rent, according to the lands he held, subject to the distress; and notwithstanding POPHAM, L.C.J.'s report, who thought this reasonable, the LORD CHANCELLOR EGERTON would give him on his bill no relief, but ordered that he should exhibit his bill against the rest of the tenants and grantee both, the one to show cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee which the law gave him."

Three cases of contribution between sureties in the time of Charles I are reported. G In *Peter v. Rich* (6) the principle was established that in equity, if one of several co-sureties is insolvent, the others contribute as if he had not been a surety. There the plaintiff had paid the whole. In *Morgan v. Seymour* (7) the principle upon which the above-cited cases from CARY'S REPORTS and the subsequent leading case of *Dering v. Earl of Winchelsea* (8) were decided, seems to be applied in the fullest extent to the case of co-sureties, the principal creditor being made a party H to the suit, and the co-surety being ordered to pay direct to the creditor. The report is as follows (1 Rep. Ch. at pp. 120, 121):

"The plaintiff, with Sir Edward Seymour, the defendant, being bound with Sir William St. Johns for the proper debt of the said St. Johns to the defendant Rowland in a bond of £200 for the payment of £100, and the said Rowland sued the plaintiff only on the said bond, the plaintiff seeks to have the said Seymour contribute and pay his part of the said debt and damages, the said St. Johns being insolvent. This court was of opinion that the said Seymour ought to contribute and pay one moiety to the said Rowland, and decreed Rowland to assign over the said bond to the plaintiff and Seymour, to help themselves against the said St. Johns for the said debt."

I In *Swain v. Wall* (9) the plaintiff surety had paid the whole of the creditors' demand, and the only point decided was that his claim for contribution might be controlled by express contract.

In *Hole v. Harrison* (10) (1673) the rule in *Peter v. Rich* (6) was followed. In 1786, in *Lawson v. Wright* (11) the plaintiff co-surety had paid off the whole liability, and he sued for contribution. SIR LLOYD KENYON said that it had been established ever since the origin of the courts of equity that one surety had a right to call upon another for contribution in cases of this nature. The only question was whether proof of payment by the surety was enough without proof that the principal debtor was insolvent. The arguments seem to show that counsel and the court thought that an action could be maintained by a surety for contribution before he had paid anything, if he could prove the principal debtor to be insolvent. In 1787 the leading case of *Dering v. Earl of Winchelsea* (8) was decided in the Exchequer as a court of equity by EYRE, L.C.B. There a surety by bond for £4,000 to the Crown had had judgment against him at the suit of the Crown for nearly the whole amount, and he filed his bill for contribution against sureties bound by distinct bonds to the same creditor to secure the same liability of the same debtor, and the only point reported as argued or decided was whether there should be contribution between sureties bound under distinct contracts of suretyship without privity of contract between themselves. After deciding that the right to contribution depends primarily, not upon contract, but upon the equitable principle that

“in equali jure the law requires equality—the charging one surety discharges the other, and each therefore ought to contribute to the onus,”

the court proceeded to declare the plaintiff's right to contribution, and ordered the other sureties to pay their shares to the creditor.

No similar order is to be found in any other case of sureties except that of *Morgan v. Seymour* (7). But it is in strict accordance with the principle of the cases cited from CARY'S REPORTS, and it is hardly possible to suppose that so obvious and important a matter as the jurisdiction to make such an order could have been overlooked. It appears, from the report of the case in 2 Bos. & P., though not from the report in 1 Cox, Eq. Cas., that the Crown as creditor was made a defendant to the bill under the name of the Attorney-General; and there could not have been any object in this except that the creditor should be controlled and prevented from enforcing his legal right inequitably against one alone of the sureties. That nothing so important was overlooked may be inferred from the remarkable observations of LORD ELDON, who had himself argued the case, and said in *Craythorne v. Swinburne* (12) (1807) (14 Ves. at pp. 165, 169, 171) :

“In the case of *Dering v. Earl of Winchelsea* (8), which, I recollect, was argued with great perseverance . . . it is decided that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim, that equality is equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the court will do it for him. . . . I argued that case, and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced that the decision was upon the right principles. LORD EYRE, C.J., in that case decided that this obligation of co-sureties is not founded in contract, but stands upon a principle of equity; and SIR SAMUEL ROMILLY has very ably put, what is consistent with every idea, that, after that principle of equity has been universally acknowledged, then persons acting under circumstances, to which it applies, may properly be said to act under the head of contract implied from the universality of that principle. Upon that ground stands the jurisdiction assumed by courts of law. . . . The doctrine of contribution . . . stands upon this, that all sureties are equally liable to the creditor, and it does not rest with him to determine, upon whom the burden shall be thrown exclusively; that equality is equity; and, if he will not make the contribution equally, this court will finally by arrangement secure that object.”

A Several other cases of contribution between sureties occur in the books in LORD ELDON's time, but in none of them is there any reference to the point in question. In *Ex parte Gifford* (13) (1802), LORD ELDON said (6 Ves. at p. 808):

B "The principle is to discharge all the obligations of all the sureties; but they stand with regard to each other in a relation, which gives rise to this right among others, that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which in all events he is to pay."

In *Craythorne v. Swinburne* (12) (1807) LORD ELDON states the right of the surety in these terms (14 Ves. at p. 164):

C "It has long been settled that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt or any part of it, that surety has a right in this court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution."

D In *Antrobus v. Davidson* (14) (1817) it was held that the creditor cannot bring an action quia timet against a surety to force him to set apart money to provide for the mere possibility of a debt becoming due from the principal debtor. In 1821, in *Stirling v. Forrester* (15), in the House of Lords, LORD REDESDALE said (3 Bli. at pp. 590, 596):

E "The principle established in the case of *Dering v. Earl of Winchelsea* (8) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, so far as he is able to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Dering v. Earl of Winchelsea* (8). . . . The question depends upon equity; not upon contract, and in this case a contract is to be implied. The decision in *Dering v. Earl of Winchelsea* (8) proceeded on a principle of law which must exist in all countries that when several persons are debtors all shall be equal."

G In *Reynolds v. Wheeler* (16) (1861), which was an action for money paid, ERLE, C.J., said:

"If one surety is called on to pay the whole debt, he is entitled to have contribution from his co-surety";

H and WILLIAMS, J., said:

"It is now well established by many cases that, where two parties stand in the relation of co-sureties, and one of them is applied to for more than his share, he is entitled to call upon his companion for reimbursement."

I Having regard, however, to the common law, as settled by *Davies v. Humphreys* (2), it seems plain that these expressions must be understood as assuming actual payment by the plaintiff of more than his share. In 1868, in *Wooldridge v. Norris* (17), executors of a surety obtained an order for indemnity and payment by a person who had covenanted to indemnify the testator against his liability as surety, although the executors had not paid or been sued. The judgment, however, proceeded on the particular terms of the covenant. In the same year, in *Cruse v. Paine* (18), where a vendor of shares was entitled to be indemnified by his vendee against calls, LORD HATHERLEY declared the liability of the vendee for future calls, and ordered him to indemnify the vendor's estate, and to procure its release or



discharge "either by payment of the calls or otherwise," with liberty to apply in chambers, etc. A

In 1872, in *Bechervaise v. Lewis* (19), WILLES, J., said (L.R. 7 C.P. at p. 377):

"The surety . . . as soon as his obligation to pay is become absolute, has a right in equity to be exonerated by his principal."

In 1874, in *Lacey v. Hill, Crowley's Claim* (20), upon a creditor's claim in an administration action, SIR GEORGE JESSEL, M.R., said: B

"Whatever may be the case at law . . . it is quite plain that in this court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe it has been decided that the party seeking indemnity may be entitled to have the money paid over to him." C

In 1877, in *Lloyd v. Dimmack* (21), FRY, J., refused to declare prospectively the right of the assignor of a long lease to indemnity against future breaches of contract by the assignee; and in *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (22) the same learned judge refused to make an order quia timet against a person for whom the plaintiff held shares to indemnify the plaintiff, there being no evidence that calls were likely to be made; but said (22 Ch.D. at p. 565): D

"There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last [4th Edn.] edition of SETON ON DECREES, and they show that where a person has taken shares for another, and a call has been made, which has not been met by the person liable to pay it, the trustee, who is entitled to an indemnity, may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out." E

So, also in the similar case of *Hobbs v. Wayet* (23), where a call on shares was also threatened, KEKEWICH, J., made a declaration of the right to indemnity. The preceding cases from *Cruse v. Paine* (18) downwards have been referred to, not as having any direct bearing on the rights of co-sureties, but as throwing some light on the nature and extent of the relief which can be given in equity in analogous matters. F

There are only two remaining direct authorities. In 1881, in *Ex parte Snowdon* (24), a surety who had paid his own share and no more, and who had not been called upon to pay more, issued a debtor's summons against his co-surety for half of what had been paid, and he obtained an adjudication of bankruptcy, which the Court of Appeal annulled on the ground that, until a surety had paid more than his share, there is no legal or equitable debt to sustain bankruptcy proceedings. In the report in 17 Ch.D. at pp. 46, 47, JAMES, L.J., is reported to have said: G

"I think your proper remedy is to call on Snowdon to pay back the £541. . . . I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor just as he would be entitled to call on them for contribution if he had been sued by the creditor asking that he should be indemnified by his co-sureties against paying the whole debt or whatever risk he ran." H

The report in 50 L.J.Ch. at p. 541 is as follows: I

"The proper course when a surety is called upon to pay the whole debt for which he is liable with his co-surety is to call upon his co-surety for contribution, and to indemnify him against paying the whole, and the only mode in

**A** which in equity you can compel a co-surety to pay his proportion of the debt is to show that you have paid your proportion or more than your proportion of the debt, and are liable for the residue."

In 29 W.R. 654 it is as follows :

**B** "The proper course when a surety is called upon to pay the whole debt for which he is liable would be to call upon his co-sureties for contribution . . . just as he would be entitled to have done if a bill had been filed against him by the principal creditor asking that he should be indemnified against paying the whole."

**C** In 1883, in *Macdonald v. Whitfield* (25), LORD WATSON, pro cur., declared the right to contribution of a surety who had not paid his share, but had had judgment against him in the form that he was "entitled and liable to equal contribution inter se."

In LINDLEY, L.J.'s work on PARTNERSHIP (5th Edn.), p. 374, it is observed that :

**D** "Before the passing of the Judicature Acts, a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all Divisions of the High Court. Therefore, a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damaged; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or, if he is dead or insolvent, the full amount provable against his estate, and not only the amount of dividend which such estate can pay. In strict conformity with these principles partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. So a trustee of shares, liable to calls, is entitled to be indemnified by his cestui que trust against them before they are paid."

**H** This statement of the law is an authority in favour of the view that some relief can be given, but it does not specify the form or limit of the relief; nor do any of the authorities cited in the notes throw any further light on the matter. Nor have I been able to obtain any assistance from English or American writers on equity or on the law of suretyship. The plaintiff's difficulties have been increased by this, that an application by her for leave to use the third party procedure ordinarily applicable in cases of contribution or indemnity was refused in the administration action on the ground that this procedure is not available in an administration action. Even if the question had arisen upon third party procedure, nearly the same difficulty would have occurred. In this state of the authorities I think that, if the plaintiff had made the creditors defendants to the present action, I ought to have held that the allowance of the principal creditors' claim in the administration action was equivalent to a judgment against the plaintiff for the whole amount of the guarantee, and that on the precedent of *Morgan v. Seymour* (7) and of *Dering v. Earl of Winchelsea* (8) the plaintiff would have been entitled to a declaration of her right to contribution, and to an order

upon the solvent co-surety to pay his proportion to the principal creditors. The principal creditors not being parties, I think that I cannot order payment to them or directly prevent them from enforcing their judgment against the plaintiff alone. Nor could I at present order the co-surety to pay his half to the plaintiff, for the plaintiff cannot give him a discharge as against the principal creditors; and this case is not like the case of a plaintiff who merely claims indemnity, as in the cases referred to by SIR GEORGE JESSEL, M.R., in *Lacey v. Hill, Crowley's Claim* (20) (L.R. 18 Eq. at p. 891), in which no question arises as to any other party. But I think that I can declare the plaintiff's rights, and make a prospective order under which, whenever she has paid any sum beyond her share, she can get it back. A

I, therefore, declare the plaintiff's right to contribution, and direct that, upon the plaintiff paying her own share, the defendant Gullick is to indemnify her against further payment or liability, and is by payment to her or the principal creditors or otherwise to exonerate the plaintiff from liability beyond the extent of her own share. The plaintiff must have liberty to apply in chambers generally. B

A point was made as to the Statutes of Limitation. The principal creditors' claim was made in 1879, but I think that I must hold that, even if the statute began to run before the surety has paid more than his proportion, at any rate it does not run until his liability is ascertained, and that did not occur until 1890. D There was a further point made that the plaintiff ought to have proved against the estate of the co-surety Patton; but, if that were so, so also might have the defendant Gullick. It is agreed that, if such proof could have been and had been made, it is to be taken that £200 would have been received. I think that the plaintiff and defendant should each bear half of this, and the defendant's liability to the plaintiff will be reduced accordingly by £100. I think that the plaintiff acted E reasonably, and in the interest of all parties in resisting and reducing the principal creditors' claim, and that the defendant ought in equity to contribute half the costs of those proceedings. As to the question of costs, see *Kemp v. Finden* (26), *Lawson v. Wright* (11), *Hole v. Harrison* (10). I, therefore, give judgment in that form in favour of the plaintiff, with costs.

Solicitors: *Davidson & Morriss; Frederick Taylor; Greenop & Sons.* F

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]



## LEMMON v. WEBB

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Macnaghten and Lord Davey),  
November 23, 27, 1894]

B [Reported [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647;  
59 J.P. 564; 11 T.L.R. 81; 11 R. 116]

*Tree—Overhanging neighbouring land—Right of adjoining owner to cut overhanging branches—Need to give notice to owner of trees.*

C Where branches of trees overhang the soil of an adjacent landowner he is entitled to remove those branches without notice to his neighbour on whose side of the boundary the trees grow, provided that in abating the nuisance he does acts exclusively on his own land and does not trespass on the land of his neighbour.

*Easement—Tree—Right to allow tree to overhang neighbouring land.*

D Trees grow as time passes and their condition each year is different from what it was the year before, and, therefore, the owner of trees which overhang his neighbour's land cannot acquire an easement giving him a right to continue to allow the trees so to overhang although his neighbour has acquiesced in the overhanging for more than twenty years.

E **Notes.** Considered: *Cheater v. Cater*, [1916-7] All E.R.Rep. 239; *Collis v. Amphlett* (1919), 89 L.J.Ch. 101. Referred to: *Reynolds v. Presteign U.D.C.*, [1896] 1 Q.B. 604; *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; *Smith v. Giddy*, [1904] 2 K.B. 448; *Mills v. Brooker*, [1918-19] All E.R.Rep. 613; *Job Edwards v. Birmingham Navigations*, [1924] 1 K.B. 341; *Noble v. Harrison*, [1926] All E.R.Rep. 284; *Sedleigh-Denfield v. O'Callagan*, [1940] 3 All E.R. 349.

As to the right of an individual to abate a nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 150-152; and for cases see 36 DIGEST (Repl.) 303-306.

F Cases referred to:

(1) *Earl of Lonsdale v. Nelson* (1823), 2 B. & C. 302; 3 Dow. & Ry.K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 36 Digest (Repl.) 303, 486.

(2) *Pickering v. Rudd* (1815), 1 Stark. 56; 4 Camp. 219; 2 Digest (Repl.) 89, 542.

G (3) *Penruddock's Case* (1598), 5 Co. Rep. 100 b.; Jenk. 260; 77 E.R. 210; 36 Digest (Repl.) 303, 488.

Also referred to in argument:

*Jones v. Williams* (1843), 11 M. & W. 176; 12 L.J.Ex. 249; 152 E.R. 764; 36 Digest (Repl.) 305, 520.

*Norris v. Baker and Baker* (1616), J. Bridg. 47; 1 Roll. Rep. 393; 123 E.R. 1190; sub nom. *Morris v. Baker*, 3 Bulst. 196; 2 Digest (Repl.) 88, 532.

H **Appeal** by the plaintiff in the action from a decision of the Court of Appeal (LINDLEY, LOPES and KAY, L.JJ.), reported [1894] 3 Ch. 1, reversing a decision of KEKEWICH, J.

I In 1869 the appellant purchased a property called Malquoits, situated near Guildford, Surrey, and comprising about twenty-one acres. In 1879 he purchased another estate, called Ewhurst Place, of about 106 acres, the boundaries of which marched with those of Malquoits. In 1881 the appellant sold Malquoits to the respondent. At that time there were growing along the boundary between the two estates, but upon the land of Ewhurst Place, a number of large trees, the branches of which overhung the soil of Malquoits. The respondent, without giving any notice to the appellant, lopped off the branches that overhung his land, whereupon the appellant instituted the present proceedings with the object of obtaining a declaration that the respondent was not entitled, without giving notice to the

appellant, to cut any branches of the appellant's trees which overhung the respondent's land when such overhanging had continued for many years, an injunction to restrain the respondent from cutting the branches, and damages. The action was heard by KEKEWICH, J., who gave judgment for the appellant, and ordered the respondent to pay him £5 damages and costs. The respondent having appealed, the Court of Appeal reversed the decision of KEKEWICH, J., and directed judgment to be entered for the respondent. The appellant appealed.

*Warmington, Q.C., and R. F. Norton* for the appellant.

*Marten, Q.C., and J. Bradford*, for the respondent, were not called on to argue.

**LORD HERSCHELL, L.C.**—The question raised by this appeal is a very short one, namely, whether where branches of trees overhang the soil of another person, the person whose soil they overhang is entitled to remove those branches without notice to his neighbour on whose side of the boundary the trees grow. It is not disputed that, if such notice be given, and if the neighbour do not remove the boughs, the person whose land they overhang would be entitled to do so. That is subject to the questions raised on the Prescription Act and the Statute of Limitations, which I will deal with in a moment. This, of course, involves an admission that against the will of the owner of the land over which the branches hang, the owner of the timber cannot insist that the boughs shall remain on it, the only question being whether he is entitled to notice so that he may remove the boughs himself, or whether the person complaining of them may remove them without giving notice.

As regards the right, the difference does not seem to me to be one of extreme importance. In the present case, I think it is extremely probable that the appellant would not have removed the boughs, and that the respondent would have removed them after all. Nevertheless if, in point of law, the person complaining of them can only remove them after notice, then the plaintiff in such an action as this action would be entitled to recover. It might be a reasonable provision of the law that such a notice should be required, but whether it would be any great protection to the owners of trees near the boundary of their neighbour's land may be doubted. It might be very reasonable that there should be some law regulating the rights of neighbours in respect of trees which, if planted near the boundary, necessarily tend to overhang the soil of a neighbour. It may be, and probably is, generally a very unneighbourly act to cut down the branches of overhanging trees unless they are doing some substantial harm to the neighbour. The case is a very common one. Trees constantly do overhang, and it certainly might call for the intervention of the legislature if it became a common practice for neighbours to exercise what may be their legal rights in thus cutting off what would frequently be a considerable portion of trees which grow on the other side of their boundary.

But the question is whether there is any authority for the proposition that notice must be given by the owner of the land over which the trees overhang before removing the encroaching boughs. In support of the proposition that notice is requisite not a single authority has been cited. It is certain that the boughs of trees have overhung, and that those whose land they have overhung have removed them, on many occasions. Actions in respect of such removal have occurred from time to time, the point at issue generally being whether the soil over which the branches spread was the soil of the one person or the other; but I never heard it suggested in any of those cases (and certainly I can remember more than one within my own experience) that notice ought to be given to the adjoining owner before the boughs could be removed.

What are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil, and the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour. There, no doubt, it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance, except in the case of emergency, unless he has first

A given his neighbour notice to remove. That is because his act involves an interference with his neighbour's soil—a trespass. Those cases are clearly distinguishable from the present case where the act does not involve a trespass, but what is complained of is an encroachment on the soil of the man who removes the boughs, and what he does in getting rid of the encroachment is done on his own land, and, therefore, *prima facie* needs no excuse so far as the place where he is doing the act is concerned.

The only dictum that can be found on the subject is a dictum of BEST, J., in *Earl of Lonsdale v. Nelson* (1) (2 B. & C. at p. 311), a case which is not in point, inasmuch as there the court had to determine whether the defendant could do acts upon his neighbour's land which involved considerable interference with his rights of property. BEST, J., says:

C “Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them.”

D There is, therefore, that dictum of BEST, J., on the point, but what seems to me more important is that there is no dictum whatever to be found to the contrary, nor any decided case. If we held otherwise we should not be interpreting the law, we should be making the law—and making the law, not by the application of old principles to meet a new case, but by laying down conditions and limitations for the exercise of rights in a class of cases which has existed so long as the growth of trees and boundaries between neighbours have existed. Therefore, it seems to me to be a case in which it is out of the question that we should lay down any law beyond that which, so far as we can find, has been regarded as the law in times gone by. In my opinion, therefore, there is no warrant for saying that notice was requisite.

F As regards the question whether the appellant has acquired any right by reason of the length of time these trees have overhung, I think it is impossible to say that he has either acquired a right to the land over which they hang or to their overhanging. The trees grow from time to time, and their state each year is different from what it was the year before. The same remark applies to the suggestion that a prescriptive right has been obtained. The tree of today is not in the condition in which it was twenty years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was twenty years ago, and that it was open to the adjoining owner to put back the tree into the conditions in which it was twenty years ago, because it is only a right to what has remained for twenty years that is gained by prescription, and the exercise of such a right would be almost always, if not always, completely destructive of the tree. It seems to me impossible to say, in a case of this description, that a right is gained either by statute or under the ordinary law of prescription. Those points, indeed, were very faintly urged (and one can quite understand why) by the learned counsel for the appellant. They rested their appeal mainly on the allegation that the appellant was entitled to notice before the respondent did the acts complained of, and I think they have not established the proposition for which they contended. I move your Lordships that the judgment I appealed from be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. I think it is clear that a man is not bound to permit a neighbour's tree to overhang the surface of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that, if he can get rid of the interference or encroachment without committing a trespass, or entering upon the land of his neighbour, he may do so whenever he pleases, and that no notice or previous communication is required by law. That, I think, is the good sense of the matter;



and there is certainly no authority or dictum to the contrary. Whether the same rule would necessarily apply to the case of trees so young that the owner might remove them intact if he chose to lift them, or to the case of shrubs capable of being transplanted, may perhaps be worthy of consideration. That, however, is not the case here. It is admitted that the trees here are of great age, and the only possible remedy was by cutting or lopping the offending branches. I am of opinion that the respondent has not exceeded his legal right, and that the appeal must be dismissed.

**LORD DAVEY.**—The only question which is submitted to your Lordships is whether the respondent was within his rights in taking upon himself to cut the branches of certain trees so far as they overhung his land, or whether, before taking that step, he ought to have given notice to the appellant of what he proposed to do. Your Lordships are asked, in a question affecting real property, to lay down a proposition which, so far as I can see, has no authority in support of it; indeed, the authorities, so far as they go, seem to me to be opposed to any such idea. It is true that where a person desires to abate a nuisance which can only be abated by going on the land of the person from whom the nuisance proceeds, he must give notice of his intention to do so. That seems to me to be reasonable, because his act of going upon his neighbour's land is *prima facie* a trespass, and I can understand that he should be bound to give notice of his intention to do that which would be *prima facie* a trespass before doing it. But in the cases of which the present is an example, where a man proposes to abate a nuisance exclusively by doing acts upon his own land without going upon the land of his neighbour from whom the nuisance proceeds, the same reasoning does not seem to me to apply.

The appellant's counsel very fairly admit that they have no authority directly in point; but they base a very ingenious argument upon *Earl of Lonsdale v. Nelson* (1). They say that BEST, J., there lays it down that cutting trees which overhang your land is an exception from the general rule that nuisances of omission cannot be abated without notice to the person from whom they proceed. Stopping there, if we are to adopt BEST, J.'s judgment as stating the law, it is really an authority against the appellant. But the learned counsel for the appellant go on to say that there is no authority except the dictum of BEST, J. (which is not binding as an authority upon your Lordships' House), for the exception. It was naturally asked what was the authority for the rule from which this is supposed to be an exception; and I confess that, notwithstanding the evident industry which the learned counsel for the appellant have bestowed upon the case, they have not satisfied my mind that there is any authority for the rule from which BEST, J., is supposed to have treated the case of trees as an exception. Whether that rule exists or not I know not—at least beyond this, that no authority has been cited to us in favour of that proposition. *Earl of Lonsdale v. Nelson* (1), so far as it goes, is an authority against the appellant, because, if the rule exists, then we have the authority of LORD WYNFORD for saying that the case of trees is an exception from it.

The dictum of CROKE, J. (1 Roll. 394), seems to me to be against the appellant:

“Si les rames de vestre arber exresce en mon terre, jeo poio eux succider, mes jeo ne poio justefier le succider de eux devant ils exresce en mon terre pur timor de l'exrescer.”

That is to say, if the boughs of your tree encroach upon my land I may cut them. He says not a word about notice. Therefore, so far as that goes, it is an authority against the appellant. Then, my Lords, it appears to me that *Pickering v. Rudd* (2) is also an authority against the appellant. In that case the defendant managed, by an arrangement of poles, and scaffolding, and ropes, to cut away so much of a Virginian creeper planted on the plaintiff's land as encroached upon his land. There was no allegation that notice had been given, and no point was made either way of notice having been given or not having been given. So far as that case

A goes, it is an authority against the appellant, because it was held there by the court that the defendant was justified in cutting away so much of the Virginian creeper as encroached upon his land; and although, no doubt, every point was taken in that case that could be taken, nothing was said about the necessity for any notice beforehand. *Penruddock's Case* (3) does not seem to me to assist the appellant, because the point which was decided in that case was, whether a writ of quod permittat prosternere would lie against the alienee of the person who had levied the nuisance, and the judges in that case said this:

B

"It was moved in the King's Bench, if the feoffee might abate the nuisance as the feoffor himself, and as well in the hands of the feoffee who did not the nuisance as in the hands of the tort-fesor himself; and if the feoffee of the house to which the nuisance was made might do it (if he could do it) before he had some special prejudice, as in the dropping of the water, or if he ought to stay till he had special prejudice. And POPHAM, C.J., held that in both cases the feoffee might abate the nuisance, and that before any prejudice, for it is reasonable that he should prevent his prejudice and not stay till it be done, which was granted by the whole court."

C

D It is quite true that it was held that in that case the writ quod permittat prosternere would not lie against the feoffee of the person who levied the nuisance without notice to him; but from the facts of that case it is perfectly obvious that what had to be done in order to abate the nuisance, which would involve the removal of a portion of the defendant's house, could only be done by going on the land. Therefore, I do not think that *Penruddock's Case* (3) affords any authority to the learned counsel for the appellant for the proposition which they have submitted to your Lordships' House.

E

I think it sufficient, therefore, to say that no authority has been cited to this House for the appellant's proposition; the authorities, so far as they go, are rather against it than in favour of it; and when we come to look at the reason of the thing I entirely agree with what has fallen from my noble and learned friend on the Woolsack, that there is no such obvious consideration of justice as would induce this House to lay down, for the first time, the proposition contended for by the appellant.

F

*Appeal dismissed.*

Solicitors: *Broughton, Nocton & Broughton; Walter Webb & Co.*

G [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## NORTH-WESTERN BANK, LTD. *v.* POYNTER, SON, AND MACDONALDS

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson and Lord Macnaghten),  
November 15, 16, 1894]

[Reported [1895] A.C. 56; 64 L.J.P.C. 27; 72 L.T. 93; 11 R. 125]

*Pledge—Pledgee's rights—Extinction—Delivery of pledge to pledgor—Delivery for sale.*

Where a pledgee gives possession of the pledge to the pledgor for a specific purpose, such as for a sale on behalf of the pledgee, the property does not revert to the pledgor, so as to give his creditors a claim on it.

*Tod & Son v. Merchant Banking Co. of London* (1), (1883), 10 R. (Ct. of Sess. Cas.) 1009, distinguished.

*Agent—Sale of goods—Sale by agent to implement contract already made by him with third party—Liability of third party to principal.*

Per LORD HERSCHELL, L.C.: If an owner of goods places them for sale in the hands of an agent, and if that agent, to implement an open contract into which he has already entered, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much a sale of the principal's goods to that person, and just as much makes the purchaser liable to the principal and liable to be sued by the principal, as if the agent had had no contract before the goods were delivered and had afterwards made the only contract that was ever made.

*Conflict of Laws—Personal property—Moveable fund, situated abroad, property of one or other of two domiciled Englishmen—Question of ownership determinable by English law.*

Per LORD WATSON: When a moveable fund, situated in another country, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *prima facie* one to be determined by English law.

**Notes.** Distinguished: *Inglis v. Robertson*, [1898] A.C. 616. Applied: *Re David Allester, Ltd.*, [1922] All E.R.Rep. 589. Considered: *Pennington v. Reliance Motor Works, Ltd.*, [1922] All E.R.Rep. 466; *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669. Followed: *Official Assignee of Madras v. Mercantile Bank of India, Ltd.*, [1934] All E.R.Rep. 237. Referred to: *Albemarle Supply Co. v. Hind* (1927), 43 T.L.R. 652; *Lloyds Bank, Ltd. v. Bank of America National Trust and Savings Association*, [1937] 3 All E.R. 312.

As to the extinction of the contract of pawn, see 29 HALSBURY'S LAWS (3rd Edn.) 214, 215; as to rights of a principal under a contract made by his agent, see *ibid.*, vol. 1, pp. 215-221; as to the jurisdiction of English courts over moveables, see *ibid.*, vol. 7, p. 42 et seq. For cases see 37 DIGEST, 7, 8; 1 DIGEST (Repl.) 653 et seq.; and 11 DIGEST (Repl.) 384 et seq.

Case referred to:

(1) *Tod & Son v. Merchant Banking Co. of London* (1883), 10 R. (Ct. of Sess.) 1009; 37 Digest 7, 30i.

Also referred to in argument:

*Clark v. West Calder Oil Co.* (1882), 9 R. (Ct. of Sess.) 1017.

**Appeal** from a decision of the majority of the Second Division of the Court of Session, the Lord Justice-Clerk (LORD MACDONALD), and LORD TRAYNER, LORD YOUNG dissenting, affirming a decision of the Sheriff Court of Lanarkshire in an action of multiple pawning.



A *Finlay, Q.C., Sanderson, and Aitken* (the last-named of the Scottish Bar) for the appellants.

*Sir Richard Webster, Q.C., and Leck* for the respondents.

B LORD HERSCHELL, L.C.—This action was tried in the Sheriff Court of Lanarkshire, and an interlocutor was pronounced in favour of the present respondents in that court. This interlocutor was affirmed in the Court of Session by the Lord Justice-Clerk (LORD MACDONALD) and LORD TRAYNER, LORD YOUNG dissenting. The proceedings arose out of the arrestment by the present respondents of a debt due or alleged to be due from Alexander Cross & Co. to the firm of Charles Page & Co. The respondents were undoubtedly creditors of Page & Co.; and if that debt, which certainly was due by Cross & Co., was a debt due to Page & Co., such that it was the property of Page & Co., then clearly the arrest was good, and there would be no ground for this proceeding. The appellants, however, contend that the debt which Cross & Co. owed was the price of a cargo sold to them, that the cargo was sold to them by Page & Co. as the agents of the appellants, the North Western Bank, and that, therefore, the debt was really the property of the North Western Bank, and consequently could not be arrested by a creditor of Page & Co. I do not understand it to be disputed that, if in fact the goods sold were the property of the North Western Bank, then, although the sale may have been a sale by Page & Co. to Cross & Co., yet, being then made, if it was made, on their behalf as owners by Page & Co., it could not be attached by a creditor of Page & Co., and certainly there is no decision or indication of any opinion to the contrary in the court below.

E The transaction between Page & Co. and the North Western Bank upon which the appellants rely took place in April, 1892, the arrest being on May 3, 1892. Messrs. Page & Co. had on their way certain goods for which they held a bill of lading, and they desired upon this bill of lading to obtain an advance. On April 4, 1892, a letter was written by the manager of the bank (which was admitted by a subsequent letter of Page & Co. to detail correctly the conditions on which the advance was made), in which the terms on which the bank were willing to make the advance were stated. The letter was as follows :

G “Dear Sirs,—We now beg to put in writing the conditions on which we advance to you the sum of £5,000, say five thousand pounds, repayable by you on or before June 1, on the security of the undermentioned merchandise, which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time at our request to give us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf. You are to insure the merchandise against all fire risks.”

H At the end of the letter there is a statement of the particulars of the merchandise—1,629 tons of phosphate rock by the ship *Cyprus*, and 1,826 tons of phosphate rock by the ship *Storra Lee*.

I On the occasion when that letter was written and the arrangement entered into, the bill of lading for the phosphate rock per the *Cyprus* was handed, endorsed in blank, by Messrs. Page & Co. to the bank. On April 12 the bank handed the bill of lading to Messrs. Page & Co., with a letter in these terms :

“In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you as trustees for us the bill of lading, etc., for 1,628 tons phosphate rock, per *Cyprus*, which we now hold as security for payment of the advance specified at foot, and we request you to

obtain delivery on our account of the merchandise referred to in such bill of lading and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us immediately on receipt thereof."

That letter was received and acknowledged, and an undertaking was signed by Page & Co. to carry out the directions given in the letter. The transaction between the parties which gives rise to the controversy was thereupon complete. The bill of lading so received by Page & Co. was afterwards delivered by them, in implement of a contract of sale, to Cross & Co., and it is with respect to the price of the goods comprised in the bill of lading that the debt of Messrs. Cross arises.

I cannot help saying at the outset that, in my opinion, it is abundantly clear that the rights of Messrs. Page & Co. and the bank respectively must be determined, if the strictly legal course is to be followed, by the law of England. A transaction between a merchant in England and a bank in England, and the rights which arise out of that transaction, cannot, as it seems to me, fall to be determined by anything else but the law of England, just in the same way as, if this had been a transaction between a banker and a merchant in Glasgow, and the question had arisen in an English proceeding as to the rights that arose out of that transaction, it would have fallen to be determined according to the law of Scotland. But in the present case it appears that, there being a suggestion in the pleadings that the matter was one to be determined by the law of England, when the case came on for trial before the sheriff, those who maintained that proposition were not desirous of leading evidence as to what the law of England upon the point was. They were content to rest their case upon the law of Scotland, and have it decided as if the law of Scotland were applicable; or, perhaps, one may put it otherwise and say, as if there were no difference between the law of England and the law of Scotland.

That being so, I enter into no controversy whether it would have been open, in the present case, to this House to consider what the law of England was, and to determine the case according to the law of England. I am content to base my decision upon the conclusion at which I have arrived as to the law of Scotland. Of course, when I say that the rights arising out of this transaction between these parties would probably fall to be determined by the law of England, I do not for a moment intend to dispute that, where such a transaction has been entered into, there may be proceedings or transactions in Scotland as to which it would be necessary to have recourse to the law of Scotland to ascertain the rights which had arisen in respect of or arising out of the transactions relating to the contract which had its basis and origin in England. Those are considerations quite beside the present case, because it seems to me that, in the present case, there is nothing really which needs to be determined for the purpose of arriving at a conclusion in this action, except what was the real nature of the transaction at Liverpool between Messrs. Page & Co. and the North Western Bank. It appears that in the month of September of the previous year Messrs. Page & Co. had entered into an agreement to sell to Messrs. Cross & Co. several hundred tons of phosphate which were to be shipped between certain dates. It was not a sale of any specific goods; it was merely a contract to sell goods of a particular quality and quantity to be shipped at a particular time. When the bill of lading was handed to Messrs. Page & Co. on April 12, 1892, Messrs. Page & Co. transmitted that bill of lading to Messrs. Cross & Co. in implement of their contract with them. Upon their thus receiving the bill of lading in implement of the contract, that which down to that time had only been an agreement to sell became a sale, and Messrs. Cross became liable for the price of the goods so sold.

Was that or was it not a sale of the bank's goods? Was it a sale for or on behalf of the bank, or was it a sale of Page's goods in respect of which the bank

**A** could not claim to be principals? The only ground upon which the courts below have decided that it was a sale, not of the bank's goods, but of Page's goods, is that in order that a pledge may be effectual possession must continue in the pledgee; that parting with the possession is parting with his security and with any property which the pledge gives; that, even if the possession of the pledge may be parted with to a stranger so that the possession of the stranger should be still **B** the possession of the pledgee, that possession cannot be so parted with to the pledgor himself; and that if the pledgor receive back possession of the goods pledged, however clear it may be that he was to receive them only as the agent of the pledgee to do something with them on the pledgee's behalf, they were delivered for that purpose and received for that purpose. It is said that in those circumstances the law of Scotland inexorably requires that it shall be held that the **C** pledge is at an end, and that the entire property has reverted to the pledgor because he has regained possession of the goods which he had pledged.

I need hardly say that, if the law of England were applied, no such point would for a moment be arguable. There can be no doubt the pledgee might hand back to the pledgor as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force **D** and effect of his security. But it is said that the law of Scotland is different; and the point upon which this case must turn cannot be more distinctly put than it was put in the judgment of LORD TRAYNER. He says :

“That a pledgee may part with the pledge temporarily for a necessary purpose, or for safe custody without the loss of this right, may be admitted, provided **E** he has not so parted with it to the owner. If he parts with it to a third party, the temporary possession of the latter is possession for the pledgee; he has no right in or to the subject except that which the pledgee gave him, and may at any time take away. But if the pledgee parts with the pledge to the owner the result is that the owner resumes possession of his own property freed from the security burden; the owner acquires no new right; but the pledgee's right, **F** as a real right, flies off, leaving him only his personal right against his debtor. This distinction between the delivery of the subject of pledge to a third party and to the owner is recognised in the passage in BELL'S COMMENTARIES which I have already cited.”

The question is whether that can be maintained as a proposition of the law of Scotland. Certainly there are cases where some rule of law defeats the object and **G** intention of the parties—where there is some technical rule which prevents effect being given to their intentions. The question is whether such a rule applicable to the present case has been shown to be established as part of the law of Scotland or not. I turn to the authorities upon which it is rested, because I confess that, with all respect, as a matter of principle I am unable to see why any such rule should exist. It does not seem to me to be a reasonable rule. If the rule exists, **H** it is one which runs counter to everyday commercial practice, and, I am satisfied, to the everyday commercial understanding of business transactions. Nevertheless, it may be that it is an established rule.

The only authorities cited are three. The first is in ERSKINE'S INSTITUTES, 3. 1. 33, where it is said :

**I** “In a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it.”

As a general proposition, that may be perfectly true. It is to be observed that in the present case this is really something more than a pledge. In the paragraph from which I have quoted those words it is pointed out that a pledge gives a right of detention only of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee; he has a right which a mere pledge does not convey. But the general



proposition that the parting with possession puts an end to the pledge is one with which I suppose no one would quarrel; but it does not touch the question with which your Lordships have to deal—namely, whether a delivery of possession for a particular purpose on the part of the pledgee to the pledgor is a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person. A

The next authority referred to is in *BELL'S COMMENTARIES ON THE LAW OF SCOTLAND*. He there alludes to the real right of a creditor being completed by delivery and continued by possession, which I suppose no one would doubt, and then occurs this discussion: B

“By the Roman law, it was lawful for the creditor, after the constitution of pledge by delivery, to restore the subject to the possession of the debtor on the footing of location, or any other legitimate contract. *PAULUS* lays down this doctrine very explicitly. But *VOET* very justly observes, in criticising this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to movables; and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession presumes property.” C  
D

He continues:

“It is true that, in the course of many contracts, there is a necessity for separating property and possession, and that the mere circumstance of goods being in the hands of another on a temporary contract will not deprive the real proprietor of his right in favour of the creditors of the temporary possessor.” E

That is stated generally; there is no exception made in the case of the person in whose hands the pledged goods are placed himself being the pledgor. He proceeds:

“And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession, in the course of necessary operations on it; the manufacturer or other holder being custodier for the pledgee without injury to the real security. But the doctrine delivered by *VOET* is sound, where the possession is given up without necessity to the owner of the goods.” F

That is, confined to a case of possession being given up, without necessity, to the owner of the goods, and does not, and, as it seems to me, never was intended to, cover the case where possession is given to the person who happens to be the pledgor, just for the same legitimate purpose and in the same business manner as it might be given to any third person filling the same commercial capacity—that is to say, if it is given to a broker for sale or to a warehouseman to warehouse, or in other cases which might be put. There is nothing in that passage to warrant the conclusion that where the parties intended that to be, and it really was, the nature of the transaction, nevertheless their intention shall be held to be ineffectual because against their will the pledge or security is thereby destroyed. Where it is a pledge, as here, with the power of sale, I cannot think that anything I have yet read warrants the assertion that the delivery to the pledgor, who is a broker, for the purposes of sale would destroy all the rights of the pledgee. G  
H  
I

Beyond those general statements, which do not seem to me necessarily at all to cover or to touch this case, there is only one authority cited, and that is *Tod & Son v. Merchant Banking Co. of London* (1). That case would be open to review in your Lordships' House; but I confess, with all deference to the learned judges in the court below who took that view, I am unable to see that it governs the present case, or that it necessarily leads to the conclusion which the respondents seek to induce your Lordships to arrive at in the present case. The whole judgment here

A is based upon the proposition that delivery by the pledgee to the pledgor puts an end to the pledge. In *Tod & Son v. Merchant Banking Co. of London* (1) the bank, who were the pledgees, never did deliver at any time to any person to hold for them as their agent. The only deliveries which they ever made in that case were deliveries to a purchaser, who received the goods, not for the bank, but to hold from the moment of receipt as owner under the purchase. I confess I am at

B a loss to see how a case which deals with facts such as I have described can be held to be an authority for the proposition that the delivery of the goods by a pledgee to a pledgor as his agent puts an end to the pledge. In that case the bank were pledgees without any power to sell at all—they were mere pledgees. Messrs. Bryant and Ridley, who had pledged the goods, came to the bank, and obtained from the bank a promise that, if they sold the goods and obtained from

C the purchaser an obligation to pay the price to the bank, the bank would then be willing to deliver the goods to him. In the first instance, before the bank parted with the goods they obtained a direct undertaking from the purchaser of a portion of the pledged goods to pay them, and then they gave the order for the delivery of them to the purchaser.

In the second case, which was the transaction giving rise to the litigation in

D *Tod & Son v. Merchant Banking Co. of London* (1), the bank were content to make delivery of the goods without having got a direct undertaking on the part of the purchaser, but having obtained an undertaking by the pledgor that he would get such an undertaking. Having got that undertaking from the pledgor, they then made delivery of the goods. In that case it was impossible to say, or at all events it was very difficult (it is not necessary to go further) to say, that the pledgor in

E making those sales made them on behalf of the bank. He did not purport to do so; he made those sales on his own account as carrying on his own business. All that the bank did was to tell him that, if he should make such sales, and if he would get or give a certain undertaking, then they would be prepared to make delivery of the goods and take in place of the goods, which were their security, an undertaking from his purchaser or the undertaking which he promised to get from

F his purchaser. In that case the question which arises here did not arise, and could not arise, because the whole point of this case turns upon the fact that Messrs. Page & Co., in making this sale to Messrs. Cross & Co., were selling the goods of the North Western Bank by their direction and as their agents. Therefore, I am quite unable to see that *Tod & Son v. Merchant Banking Co. of London* (1) is any authority for the proposition upon which the decision of this case

G has proceeded.

It was argued at the Bar that this could not be said to be a sale by the bank of the bank's goods to Cross & Co., because Page's contract with Cross was of prior date to the bank's interest in the goods. But I apprehend that if an owner of goods (for this purpose it may be taken as precisely the same as if the bank had been absolute owners) places his goods for sale in the hands of an agent, and

H if that agent for the purpose of implementing an open contract which he has, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal and liable to be sued by his principal, as if he had had no contract before the goods were delivered,

I and had afterwards made the only contract that was ever made. I do not think that could be doubted for a moment in the English law; and I have heard no argument to suggest to me any substantial ground for holding that the law of Scotland is different in that respect. It seems to me, therefore, upon the whole that the right of the bank to these goods was continuous, that it was still effectual at the time of the delivery to Messrs. Cross & Co., that it was effectual at the time when this arrest of the price was made, and that a creditor of Page could not in Scotland any more than in England insist that that was a debt due from Cross to Page which he had a right to arrest as being a creditor of Page.

[His LORDSHIP dealt with two questions arising on the evidence which do not call for report, and concluded:] I move that the interlocutors of the sheriff and of the Court of Session appealed from be reversed, and the cause be remitted to the Court of Session to rank and prefer the appellants to the whole fund in medio, and to find the respondents liable to the appellants in their expenses of process in both courts below. The appellants, of course, will have their costs in this appeal.

**LORD WATSON.**—This appears to me to be a remarkably plain case. Concurring, as I do, in what has been said by the Lord Chancellor, I shall only make these very general observations. When a movable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belong is *prima facie* one to be determined by English law, and ought to be so treated by the courts of Scotland. In this case the respective rights of Page & Co. and the appellant bank depend on transactions which took place between them in England. I see no reason to doubt that, had there been any conflict between the law of Scotland and that of England upon the questions arising in this case, it would have been proper for your Lordships to consider and apply the law of England. But, according to my apprehension, there is no difference whatever between the law of the two countries applicable to the decision of this case. Upon the point of law which was mainly discussed in the courts below, and is disposed of by the last finding in the interlocutor appealed from, I have no hesitation in differing from the majority of the Second Division and concurring in the clear and satisfactory judgment of LORD YOUNG. The argument submitted for the respondents upon that point is, in my opinion, not borne out by the dicta of institutional writers to which they referred, and *Tod & Son v. Merchant Banking Co. of London* (1), upon which they also relied, if it has any bearing upon this case, is an authority the other way. I was somewhat impressed at the time by the argument of counsel for the respondents in regard to the respondents' alternative claim for £164 19s. 2d. But, assuming that the appellants may be liable to satisfy the claim, that circumstance can give the respondents no nexus upon the fund in medio, and they could not obtain any preference by an arrestment directed against Page & Co. In these circumstances I think the respondents must enforce their demand in a new action, and that this suit ought not to be prolonged by a remit to have it tried as a riding claim.

**LORD MACNAGHTEN.**—I concur.

*Appeal allowed.*

Solicitors: *Wynne, Holmes & Wynne*, for *Webster, Will & Ritchie*, Edinburgh; *Lowless & Co.*, for *Campbell Faill*, Edinburgh.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]



## MUSURUS BEY v. GADBAN AND OTHERS

[COURT OF APPEAL (A. L. Smith and Davey, L.JJ.), May 10, 28, 1894]

[Reported [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51;  
42 W.R. 545; 10 T.L.R. 493; 38 Sol. Jo. 511; 9 R. 519]*Constitutional Law—Diplomatic privilege—Action against ambassador—Debt—  
Accrual of cause of action—Diplomatic Privileges Act, 1708 (7 Anne, c. 12),  
s. 3.*

By s. 3 of the Diplomatic Privileges Act, 1708, a writ cannot be issued against the ambassador of a foreign State accredited to the Sovereign of this country while he is so accredited.

**Held:** (i) a writ at the suit of a creditor for the recovery of a debt could not be issued against such an ambassador during that time; nor (ii) after he had presented his letters of recall, during a reasonable period for which he remained in this country to wind-up and hand over to his successor his official business and to settle his own affairs; (iii) a writ could not be issued against an ambassador and renewed from six months to six months under R.S.C., Ord. 8, r. 1, because that order contemplated the case where there was a defendant capable of being sued, which an ambassador was not, and it would be the duty of the court to refuse an application for renewal of the writ when informed that it had been sued out against an ambassador; (iv) R.S.C., Ord. 11, which provided for service of a writ out of the jurisdiction did not impliedly repeal the Administration of Justice Act, 1705, s. 19, so as to prevent a plaintiff from bringing an action against a defendant after his return from beyond the seas within the time limited by the Limitation Act, 1623; and, therefore, time did not begin to run against the creditor until the former ambassador, or his personal representative after his death, returned to this country.

**Notes.** The Limitation Act, 1623, s. 3, and the Administration of Justice Act, 1705, s. 19, set out *infra* and referred to in the judgment, have, so far as material been replaced by s. 2 of the Limitation Act, 1939.

Considered: *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Re Suarez, Suarez v. Suarez*, [1916–17] All E.R. 641. Applied: *The Tervaete*, [1922] All E.R. 387. Referred to: *R. v. A.B.*, [1941] 1 K.B. 454.

As to diplomatic privilege, see 7 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 11 DIGEST (Repl.) 628 et seq. For the Diplomatic Privileges Act, 1708, see 4 HALSBURY'S STATUTES (2nd Edn.) 591.

Cases referred to:

- (1) *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur.N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, 513.
- (2) *Murray v. East India Co.* (1821), 5 B. & Ald. 204; 106 E.R. 1167; 32 Digest 315, 1.
- (3) *Douglas v. Forrest* (1828), 4 Bing. 686; 1 Moo. & P. 663; 6 L.J.O.S.C.P. 157; 130 E.R. 933; 32 Digest 328, 140.
- (4) *Wilding v. Bean*, [1891] 1 Q.B. 100; 60 L.J.Q.B. 10; 64 L.T. 41; 39 W.R. 40, C.A.; Digest (Practice) 332, 502.
- (5) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, 516.
- (6) *Taylor v. Best* (1854), 14 C.B. 487; 8 State Tr.N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, 517.

Also referred to in argument :

*Hodson v. Mochi* (1878), 8 Ch.D. 569; 47 L.J.Ch. 604; 38 L.T. 635; 26 W.R. 590; 40 Digest (Repl.) 449, 357.

*Gladstone v. Musurus Bey* (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 9 Jur.N.S. 71; 11 W.R. 180; 71 E.R. 216; 11 Digest (Repl.) 628, 514.

*Marshall v. Critico* (1808), 9 East, 447; 103 E.R. 643; 11 Digest (Repl.) 633, 575.

**Appeal** by the plaintiff from a decision of the Divisional Court (WRIGHT and LAWRENCE, JJ.), upon a Special Case stated, before trial, under an order of the judge made by consent.

By the Limitation Act, 1623, s. 3 :

"... all actions of ... debt, grounded upon any lending or contract without specialty ... shall be commenced and sued within the time and limitation hereafter expressed and not after (that is to say) ... within six years next after the cause of such actions or suit, and not after. . . ."

By s. 19 of the Administration of Justice Act, 1705 (4 & 5 Anne, c. 16 (c. 3 in Revised Statutes)) :

"... if any person or persons against whom there ... shall be any cause of action of ... debt grounded upon any lending or contract without specialty ... be or shall be, at the time of any such cause of suit or action given or accrued ... come beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this Act, and by the [Limitation Act, 1623]."

By s. 3 of the Diplomatic Privileges Act, 1708 :

"... all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or State, authorised and received as such by Her Majesty, her heirs or successors, or the domestic, or domestic servant of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever."

*Pollard* for the plaintiff.

*Lawson Walton, Q.C.*, and *G. P. Macdonell* for the defendants.

*Cur. adv. vult.*

May 28, 1894. The following judgments were read.

**A. L. SMITH, L.J.**—This is an appeal from the judgment of my brothers LAWRENCE and WRIGHT, JJ., who held that the executor of Musurus Pacha could not set up the Statute of Limitations in answer to a claim made against him by Messrs. Gadban and Watson for money lent by them to his testator for nearly twenty years ago—viz., in the year 1873. Musurus Pacha for some thirty years prior to Dec. 7, 1885, on which day he presented his letters of recall, was ambassador in London accredited by the Sultan of Turkey to, and received by, Her Majesty as such. He left England two months afterwards—viz., in February, 1886, having been engaged during that interval in winding-up and handing over his official business and settling his own affairs. He then returned to Turkey, where he resided until his death in 1890, having appointed the plaintiff his executor. It must be

**A** taken for the purposes of this case that in the year 1873 Musurus Pacha, while ambassador in London, borrowed of Messrs Gadban and Watson, who were then trading in partnership, the sum of £3,107, and that this debt has never been repaid. After the death of Musurus Pacha, his executor, in the month of November, 1891, came to this country and engaged Mr. Gadban to collect certain bonds of the nominal value of £28,000 and other moneys belonging to the estate of his testator, and this action is brought, the writ being issued on Oct. 12, 1892, to recover from Mr. Gadban's executors these bonds and moneys which Mr. Gadban had collected in his lifetime pursuant to his agreement with the plaintiff. Mr. Gadban's executors do not dispute that they are in possession of these bonds and moneys, but they assert that they are, as against the plaintiff, who, as executor, is suing them in this country, entitled to be paid the £3,107 lent in 1873, which **C** is still unpaid, and the real point in this case is whether the recovery of this debt of Musurus Pacha is or is not barred by the statute of limitations.

It is true that the executors of Mr. Gadban, of whom Mr. Watson is one, have set up this claim by way of counterclaim dated Dec. 7, 1892, and counsel for the plaintiff raised a technical point whether this claim is the subject-matter of counterclaim, the action being against the executors of Mr. Gadban, and the counterclaim **D** being by Mr. Gadban's executors and Mr. Watson. [His LORDSHIP disposed of the point, which does not call for report, and continued:] It cannot be disputed, as this debt of £3,107 was contracted in this country in 1873, and as the present claim to be paid it (whether raised by counterclaim or independent cross-action is immaterial) was not raised till December, 1892, that *prima facie* the Statute of Limitations is an answer, for the six years would have run out in 1879; but this is **E** an exceptional case, and it is said that as Messrs. Gadban and Watson had no cause of action against Musurus Pacha, for the money lent in 1873, before he left this country in February, 1886—for until then he was not capable of being sued in the courts of this country, he being an ambassador thereto—and as since then he has continuously lived beyond seas, the Statute of Limitations did not begin to run until his executor took proceedings in this country. Counsel for the plaintiff, **F** the executor of the ambassador, having strenuously urged the technical point raised in the amended Special Case, proceeded to minimise as best he could the recognised privileges and immunities of an ambassador accredited to this country. He did not assert, for this would have been useless, that Musurus Pacha could have been effectively sued during the period he was *de facto* ambassador in London, for *Magdalena Steam Navigation Co. v. Martin* (1), which has never been doubted, **G** settled that he could not, for during that period he was exempt from the jurisdiction of the courts of this country. He said, however, and in this I agree, that no case had actually decided that a writ could not be sued out against an ambassador if it were not served, and he asserted that this unserved writ, as I will call it, might have been sued out prior to 1879 by Messrs. Gadban and Watson and kept alive by renewal every six months under R.S.C., Ord. 8, r. 1, until Musurus Pacha **H** ceased to be ambassador and became a private gentleman in 1886, and that the Statute of Limitations began to run from the date when this unserved writ might have been sued out, which constituted a cause of action which was long prior to six years before the making of the present claim.

He also argued, if wrong as to this, that Musurus Pacha could have been effectively sued to judgment by suing out and serving a writ upon him during the **I** two months between Dec. 7, 1885, and February, 1886, while he was making ready to leave this country, and that a cause of action arose then which was also more than six years prior to the present claim. Lastly, he said, even if wrong upon both these points and no cause of action arose until after Musurus Pacha had left this country in February, 1886, a cause of action arose then, for Musurus Pacha after his return to Turkey might have been sued by Messrs. Gadban and Watson by means of the procedure which permits notice of a writ to be served upon a foreigner resident out of the jurisdiction for breach of a contract to be performed within it (Ord. 11), and that the cause of action, therefore, arose in



February, 1886, which was more than six years before the present claim, so that whichever way it was taken, he said, a cause of action had arisen to Messrs. Gadban and Watson more than six years before they set up their claim to the £3,107 in 1892, and, therefore, it was statute barred. A

There are three statutes applicable to this case—the Limitation Act, 1623, s. 3, which enacts that all actions shall be commenced and sued within six years after the cause of action, and not after, with an exception in s. 7, that plaintiffs, if beyond the seas, may bring such actions within six years after their return; the Administration of Justice Act, 1705, s. 19, which enacts that, if a defendant is beyond seas at the time of the accrual of the causes of action, the plaintiff shall be at liberty to bring such action within six years after the defendant's return from beyond seas; and, lastly, the Diplomatic Privileges Act, 1708, which by s. 3 declares B C

“that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador . . . authorised and received as such by Her Majesty, her heirs or successors . . . may be arrested and imprisoned, or his . . . goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.” D

The writs and processes mentioned in the Act are not confined to such as directly touch the person or goods of an ambassador, but extend to such as in their usual consequences would have this effect, as was held in *Magdalena Steam Navigation Co. v. Martin* (1). That case renders it unnecessary to resort to text writers and other cases prior thereto, for it lays down in clear and unambiguous language the principles upon which an ambassador is free from being impleaded in the courts of this country. LORD CAMPBELL, in delivering the considered judgment of the Court of Queen's Bench, which consisted of himself, WIGHTMAN, ERLE and CROMPTON, JJ., used this language (2 E. & E. at p. 111): E

“[An ambassador] does not owe even temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not even supposed to live within the territory of the Sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes supposed still to be in his own country.” F

These being the principles upon which an ambassador is independent of the civil jurisdiction of the country to which he is sent, in my judgment, it is clearly inconsistent with them to hold that an ambassador who has at least as great privileges from suits as the Sovereign whom he represents, can, even apart from the Act of 1705, have a writ sued out against him commanding him in the name of Her Majesty to appear in her courts to answer the claim of one of her subjects, even although such writ is not to be served. Moreover, what jurisdiction is there to sue out a writ in the form of a writ for service in this country against a Turk resident in Turkey, or to serve such a writ upon a Turk in Turkey? And yet this was and is the true legal position of Musurus Pacha from the date he first became ambassador in London till he died in Turkey, in 1890. If, however, such a writ were sued out, in my judgment, it could not be renewed from six months to six months as proposed in this case, for such a renewal is only to be had “when the court or judge is satisfied that reasonable efforts have been made to serve the defendant, or for other good reasons”: R.S.C., Ord. 8, r. 1. This order clearly contemplates the case where there is a defendant capable of being sued and served when the writ is issued, but who cannot be found, or there is some other good reason for the renewal of such a writ, and it does not apply to a case like the present, where there is no such defendant at all when the writ is sued out. In my opinion, when the court or judge ascertained that the writ which they or he were asked to renew had been sued out against an G H I

**A** ambassador at the time accredited to this country, their duty would be to refuse the application for renewal, and to hold that the writ, as in my judgment it was, had been improvidently issued. I am aware that it may be said that this view would work a hardship upon a creditor of an ambassador, for he would be unable to prevent the Statute of Limitations from running while the ambassador is accredited to this country, and, therefore, there would be "good reason" for granting the renewal; but, in my opinion, the true answer is given by LORD CAMPBELL in the *Magdalena Co. Case* (1) (2 E. & E. at p. 115) that

**B** "Those who cannot safely trust to the honour of an ambassador in supplying him with what he wants, may refuse to deal with him without a surety who may be sued, and recourse is always open of making a complaint to the government by which the ambassador is accredited."

**C** For these reasons, in my judgment, it is not competent either to sue out a writ, even though it is not to be served, or to renew it against an ambassador, and that, therefore, Messrs. Gadban and Watson had no cause of action against Musurus Pacha prior to Dec. 7, 1885, when he presented his letters of recall. But there is another ground which is also fatal to this contention of the plaintiff's. It has been held that as, on the one hand, there cannot be a cause of action within the meaning of the Limitation Act, 1623, from which the six years will commence to run, unless there be a person in existence capable of suing: *Murray v. East India Co.* (2); so, on the other hand, there can be no such cause of action until there is somebody who can be sued: *Douglas v. Forrest* (3). BEST, C.J., said (4 Bing. at p. 704):

**E** "Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue."

As Messrs. Gadban and Watson had no such person—at any rate, down to Dec. 7, 1885, the statute had not commenced to run before that date. As to the second point—viz., that Messrs. Gadban and Watson had an effective cause of action against Musurus Pacha during the two months between December, 1885, and February, 1886—in my judgment, it was decided in *Magdalena Steam Navigation Co. v. Martin* (1) that this is not so. It was there held that there could be no execution against an ambassador while he is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall, and that is precisely what Musurus Pacha did in the present case. During those two months Musurus Pacha was in the same position as he was in before his recall, as to immunity from being sued. It has been said that this was obiter. I do not think so; but, even if it be, in my judgment, considering the position of an ambassador, it is good law and sound sense. This point, therefore, fails the plaintiff.

**G** I now come to consider the last point. It cannot, I think, be doubted that the Queen's Bench Division correctly held that the s. 19 of the Administration of Justice Act, 1705, which suspended the running of the Statute of Limitations if the cause of action accrued while the defendant was beyond seas till he returned, is an enactment passed in favour of plaintiffs, as, indeed, is s. 7 of the Limitation Act, 1623, though now restricted by s. 10 of the Mercantile Law Amendment Act, 1856. It is, in my judgment, impossible to hold that a rule of practice and procedure, which R.S.C., Ord. 11, is, repeals the provisions of a statute. By s. 19 of the Act of 1705, plaintiffs in the position of Messrs. Gadban and Watson are to have six years in which, after their debtor's return from beyond seas, to prosecute their claims. If Ord. 11 is to be read as repealing the statute, in my judgment, it must at the same time be held to be ultra vires; but the truth is that this order does nothing of the kind. It gives the court or a judge in its or his discretion power to allow service of a writ of summons or notice of a writ out of the jurisdiction in certain specified cases, but this rule in no way conflicts with the statute, which enacts that, if a cause of action accrues against a person beyond seas, the plaintiff shall have six years within which to bring his action after the defendant's

return. The rule has nothing whatever to do with the privilege conferred by s. 19 A of the Act of 1705 upon plaintiffs. In *Wilding v. Bean* (4), the court were not dealing with a case like the present, and the dictum of the Master of the Rolls, reported in 64 L.T. 41, does not appear in the LAW REPORTS, but, even if it did, it is not applicable to the present case. For these reasons the last point also fails the plaintiff. The Queen's Bench Division were, in my judgment, right when they held that the plaintiff could not set up the Statute of Limitations to the claim of B Messrs. Gadban and Watson, and this appeal must be dismissed, with costs.

DAYEY, L.J., stated the facts, dealt with the technical preliminary point, and continued: The question of substance which has been argued before us is whether the debt claimed by the plaintiff in this action is barred by the statute. The question is a curious one, and of some general interest. Not the least singular feature C is, that it is the representative of the ambassador who wishes to limit and minimise the privilege. Counsel for the plaintiff contends: (i) that to issue a writ without serving it, would have been no breach of the ambassador's privilege, and, therefore, a writ might have been issued for the purpose of saving the statute, and renewed from time to time; (ii) that, at any rate during the two months or more that D Musurus Pacha remained in this country after his recall, the writ might have been issued and served; (iii) that after his return to Turkey the writ might have been served on him abroad under R.S.C., Ord. 11, and therefore, the statute began to run from at least that time, or (in other words), that Ord. 11 has had the effect of repealing the provisions of s. 19 of the Administration of Justice Act, 1705.

I am against the plaintiff's argument on each of these contentions. With regard to the first, it is in my opinion sufficient to refer to s. 3 of the Diplomatic Privileges Act, 1708, which is in these terms: E

"... all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or State, authorised and received as such by Her Majesty, her heirs or successors, or the domestic, or domestic servant of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever." F

It has been decided in *Magdalena Steam Navigation Co. v. Martin* (1), that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to, and would in ordinary course have the consequence of, attaching his goods or person. If so, I am of opinion G that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law), is to make such a writ void and of no effect. Counsel for the plaintiff is quite right in saying that the writ had been served in *Magdalena Steam Navigation Co. v. Martin* (1), H and that all that it was necessary to decide was that the service was bad. But the grounds upon which the decision was based in LORD CAMPBELL's judgment go beyond that point, and, in my opinion, show a total want of jurisdiction of the court to entertain the action at all. LORD CAMPBELL thus states the principle (2 E. & E. at p. 111):

"He is to be left at liberty to devote himself body and soul to the business I of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not even supposed to live within the territory of the Sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes, supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambas-



- A sador is exempt from the jurisdiction of the courts of the country in which he resides as ambassador. . . . It certainly has not hitherto been expressly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles."
- B The passage quoted, in my opinion, correctly states the legal principles on which the exemption is founded, and is in accordance with the course of decision in our courts: see the latest case of *The Parlement Belge* (5) in the Court of Appeal, in which it was said that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its courts any of its territorial jurisdiction
- C over the person of any Sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action, which action the court has no jurisdiction to entertain, and which writ, therefore, the court has no jurisdiction to issue, can prevent the statute running. I agree with, and will not
- D repeat, what has been said by my learned brother on the practical difficulty of supposing that the leave of the court would be given to the renewal of such a writ. I am, therefore, of opinion that Gadban and Watson, or Gadban or his executors, could not have issued a writ properly against Musurus Pacha, or (in other words) had no right of action against him while he was ambassador. The doubts suggested in *Taylor v. Best* (6) cannot, in my opinion, be supported.
- E The answer to the plaintiff's point that the writ might have been served on Musurus Pacha while he was still in this country is given by WRIGHT, J., and, in addition to the authority cited by him, I may refer to LORD CAMPBELL's judgment in *Magdalena Steam Navigation Co. v. Martin* (1), in which he says (2 E. & E., p. 114):
- F "There can be no execution upon the writ while the ambassador is accredited, nor even when he is recalled if he only remains a reasonable time in this country."
- Paragraph 2 of the reply avers that,
- G "Musurus Pacha remained in England only for the purpose of making the necessary preparations for his departure, and no longer than was necessary for the purpose."
- Nothing to the contrary is stated in the Special Case, and there is nothing from which we can infer that he stayed longer than a reasonable time. I am, therefore, of opinion that the privilege continued until his return to Turkey, and it appears to me it would be almost an outrage on common sense to say that the privilege
- H ceased the moment he had presented his letter of recall. In handing over the affairs of the embassy to his successor the ex-ambassador is still engaged in his Sovereign's business, and must have a reasonable time allowed for that purpose.
- The last point taken by counsel for the plaintiff is one of some novelty, and, if I may be permitted to say so, of some boldness. In the first place R.S.C., Ord. 11, does not purport to repeal the statutes of limitation or any of them, or
- I say anything about them. If repeal there be, therefore, it is not by express words, but must be implied from the inconsistency of the provisions of the Order with the provisions of the statute in question. This must, in order to effect a repeal, be a necessary implication. I do not see any necessity in the case. Order 11 provides a means by which litigants may in certain cases, with the leave of the court, serve a writ upon a defendant out of the jurisdiction. The Administration of Justice Act, 1705, in effect provides that the statute of limitations shall not run in favour of a defendant who is beyond the seas. Where is the inconsistency? A plaintiff

has the alternative right. He may either apply for leave to serve the writ abroad, or he may wait till his defendant comes within the jurisdiction. I ought, however, to add that I should hesitate some time before I expressed any opinion that the judges, under a power to make rules relating to the practice and procedure of the courts, can repeal statutes of limitation, although they are, no doubt, part of the *lex fori*. Could they, for example, say that the time for recovery of debts shall be five years instead of six? It is unnecessary, however, to say more about this as, in my opinion, the point does not arise. I am, therefore, of opinion that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Bush & Mellor; Austin & Austin.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

## ALLINSON *v.* GENERAL MEDICAL COUNCIL

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), February 23, 1894]

[Reported [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471;  
58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217]

*Domestic Tribunal—Bias—Incapacity of member of tribunal—Reasonable suspicion of bias.*

In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in the same sort of capacity, public policy requires that, in order that there may be no doubt as to the purity of the administration, any person who takes part in it shall not be in such a position that he might reasonably be suspected of being biased. The question is not whether he was or was not biased, nor is it whether he may be suspected by some perversely-minded person. The question is whether he bears such a relation to the matter which is being adjudicated that he can reasonably be suspected of being biased. If he can, the proceedings of the tribunal in which he has taken part will be invalidated.

*Medical Practitioner—Infamous conduct—Act with respect to profession regarded as disgraceful or dishonourable by professional brethren of good repute and competency.*

By s. 29 of the Medical Act, 1858 [which has been re-enacted in almost identical terms by s. 33 (1) of the Medical Act, 1956]: "If any registered medical practitioner . . . shall after due inquiry be judged by the General [Medical] Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they think fit, direct the registrar to erase the name of such medical practitioner from the register."

If it be shown that a medical man, in the pursuit of his profession, has done something with respect to it, i.e., with regard either to his patients or to his professional brethren, which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect." The question is not whether what a medical man has done would be an infamous thing for anybody else to do, but whether it is infamous for a medical man to do it, for an

- A** act done by a medical man may be infamous although it would not be infamous if done by anybody else.

**Notes.** Considered: *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104; *Maclean v. Workers' Union*, [1929] All E.R.Rep. 468; *Rajasoaria v. Disciplinary Committee* (1955), 99 Sol. Jo. 256. Referred to: *R. v. Burton, Ex parte Young*, [1897] 2 Q.B. 468; *R. v. London County Justices, Ex parte South Metropolitan Gas Co.* (1907), 98 L.T. 519; *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; *Re A Solicitor, Ex parte The Law Society*, [1911-13] All E.R.Rep. 202; *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276; *R. v. General Medical Council*, [1930] 1 K.B. 562; *Re Lawson* (1941), 57 T.L.R. 315; *General Medical Council v. Spackman*, [1948] 2 All E.R. 337; *Healey v. Minister of Health*, [1954] 2 All E.R. 580; *Felix v. General Dental Council*, [1960] 2 All E.R. 391.

As to disciplinary proceedings against medical practitioners, see 26 HALSBURY'S LAWS (3rd Edn.) 59 et seq.; and for cases see 34 DIGEST 543 et seq. For the Medical Act, 1956, s. 33, see 36 HALSBURY'S STATUTES (2nd Edn.) 597.

Cases referred to:

- D** (1) *Leeson v. General Medical Council* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.  
 (2) *R. v. Allan* (1864), 4 B. & S. 915; 33 L.J.M.C. 98; 10 Jur.N.S. 796; 122 E.R. 702; sub nom. *R. v. Hodgson*, 3 New Rep. 503; 9 L.T. 761; 28 J.P. 484; 12 W.R. 423; 33 Digest 298, 128.

Also referred to in argument:

- E** *R. v. Gaisford*, [1892] 1 Q.B. 381; 61 L.J.M.C. 50; 66 L.T. 24; 56 J.P. 247, D.C.; 33 Digest 295, 102.  
*R. v. Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R. v. Harrison*, 24 W.R. 392; 33 Digest 294, 100.  
*R. v. Henley*, [1892] 1 Q.B. 504; 61 L.J.M.C. 135; 66 L.T. 675; 56 J.P. 391; 40 W.R. 383; 36 Sol. Jo. 233; 17 Cox, C.C. 518, D.C.; 33 Digest 297, 121.  
**F** *R. v. Handsley* (1881), 8 Q.B.D. 383; 30 W.R. 368; sub nom. *R. v. Handsley etc., Burnley Justices, Ex parte King*, 51 L.J.M.C. 137; 46 J.P. 119, D.C.; 33 Digest 297, 125.  
*Partridge v. General Medical Council* (1890), 25 Q.B.D. 90; 59 L.J.Q.B. 475; 62 L.T. 787; 55 J.P. 4; 38 W.R. 729; 6 T.L.R. 313, C.A.; 34 Digest 544, 31.  
**G** *R. v. Farrant* (1887), 20 Q.B.D. 58; 57 L.J.M.C. 17; 57 L.T. 880; 52 J.P. 116; 36 W.R. 184; sub nom. *R. v. Taunton (Mayor)*, 4 T.L.R. 87, D.C.; 33 Digest 289, 52.  
*R. v. Rand* (1866), L.R. 1 Q.B. 230; 7 B. & S. 297; 35 L.J.M.C. 157; sub nom. *R. v. Rand, R. v. Bradford Justices*, 30 J.P. 293; 33 Digest 292, 84.  
*Allbutt v. General Medical Council* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 34 Digest 544, 28.

**H** **Appeal** by the plaintiffs from a decision of HENN COLLINS, J., at the trial of the action by him without a jury.

The plaintiff was a medical practitioner, and, the defendants, the General Medical Council, having ordered his name to be erased from the register which is kept by them under the Medical Act, 1858, he brought this action claiming an injunction to restrain the council from keeping his name erased and a mandatory injunction ordering them to put his name back in the register. In May, 1892, the council gave the plaintiff notice to appear before them and answer a complaint made against him that he had been guilty of "infamous conduct in a professional respect," within the meaning of s. 29 of the Medical Act, 1858, which provided:

"If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence,



or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they think fit, direct the registrar to erase the name of such medical practitioner from the register."

Two grounds of complaint were brought forward. One was advertisements which the plaintiff had been publishing for some time in a newspaper in which he made serious accusations against all medical men, except himself, and against many of the methods of medical science generally followed by the medical profession, and also held himself out as the one person to whom people in ill-health should come for relief. These advertisements, it was alleged, were published with the view of increasing his medical practice and obtaining fees. The other ground of complaint referred to a book on vaccination which the plaintiff had published. This book met with great disapproval among the medical profession, and the plaintiff had promised to withdraw it from circulation. In fact, however, his interest in the book passed from him to the Anti-Vaccination Society, and it was said that the plaintiff continued afterwards to advise his patients to go to the Anti-Vaccination Society and indirectly promoted the sale of the book.

The complaints against the plaintiff were laid before the defendant council by the committee of the Medical Defence Union, a society of medical men, one object of which was the protection of the honour of the medical profession. A Dr. Phillipson had been for some time a subscribing member of this society, and was also a vice-president, and as such was an ex officio member of its committee. On May 3, 1892, he was elected a member of the defendant council, and he thereupon sent in to the Defence Union a resignation of his membership. By the rules of the Defence Union a resignation of membership was not complete until the lapse of two months from the day when it was sent in. On May 28 he attended a meeting of the defendant council, at which the complaints against the plaintiff, which were brought by the committee of the Defence Union, came on for hearing. After due inquiry the council judged the plaintiff to have been guilty of "infamous conduct in a professional respect," and directed the registrar to erase the plaintiff's name from the register. Dr. Phillipson had not attended any meeting of the committee of the Defence Union at which complaints against the plaintiff were discussed, and until May 28, when the defendant council heard the case against the plaintiff, he had no personal knowledge whatever of the complaints made against the plaintiff.

When the present case came before HENN COLLINS, J., it was contended that, Dr. Phillipson, being a member of the committee of the Defence Union and a member of the body who tried the plaintiff's case, was in the position of both judge and accuser, and his position rendered the decision of the council wholly void, for public policy required not only that persons acting judicially should in fact be free from any bias or prejudice, but also that they should be free from any suspicion of bias. It was also contended that there was no evidence of any "infamous conduct in a professional respect" on the part of the plaintiff. HENN COLLINS, J., gave judgment for the defendant council, and the plaintiff appealed.

*Coleridge, Q.C., and Schultess Young* for the plaintiff.

*Reid, Q.C., and Muir Mackenzie* for the council.

**LORD ESHER, M.R.**—In this case the grounds of the plaintiff's claim are two. The first is, that Dr. Phillipson, one of the members of the defendant council who adjudicated upon the plaintiff's case, was disqualified from so acting, so that the decision of the council was rendered not only illegal but void. The second ground is that there was no evidence upon which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in a professional respect." It is admitted that, if the plaintiff can make good either of these two objections, the decision of the council is illegal and void, and in either case, I presume, the plaintiff would be entitled to the relief which he asks for.

The first question, then, is this: Was Dr. Phillipson in such a position as to

- A make his participation in the decision of the council illegal as being against public policy? If he was in such a position, then the decision of the council was rendered wholly void. It is said that he was incapacitated from taking part in the decision because he was, or might be, biased. That he had any pecuniary interest in the matter is not suggested, but it is suggested that he might have had a bias. We are bound to act according to the decision of this court in *Leeson v. General Medical Council* (1). It may be that some of us (of whom I am not one) would have preferred that that case should have been decided according to the view which was taken by Fry, L.J., but, as we are now bound by that decision, all we have to do with regard to it is to discover rightly what it did decide and whether it embraces the present case. It seems to me that, in that case, the majority of the court decided that where a person who has taken part in a judicial proceeding, or, in other words, has sat in judgment on a case, has any monetary interest in the result, however small, the court will not inquire further whether he was really biased or in any way likely to be biased. The court will say at once that it is against public policy. But *Leeson's Case* (1) also decides that a person who is to sit as a judge may have other relations to the matter under consideration which may incapacitate him from acting as a judge, as to which it may be a crucial question whether he was in substance and in fact incapacitated by bias from sitting as a judge.

- The question then is one of substance and of fact in each particular case. What is the fact to be decided? If his relation to the matter which is the subject of the judicial proceeding is such that he can by no possibility be biased, it seems clear that there is no objection to his acting as judge. The question is not whether in fact he was or was not biased. The court cannot inquire into that. But there is something between those two propositions. In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in the same sort of capacity, public policy requires that, in order that there may be no doubt as to the purity of the administration, any person who takes part in it shall not be in such a position that he might be suspected of being biased. In *R. v. Allan* (2), MELLOR, J., said (4 B. & S. at p. 926):

"It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives."

- If those words be taken literally I think that they are rather too large, because I know of no case in which a man cannot be suspected. There are some persons whose minds are so perverse that they suspect other people without any ground whatever. The question of incapacity is to be one of substance and of fact, and, therefore, as it seems to me, the man's position must be such that, in substance and in fact he cannot be suspected. The question is not whether he may not be suspected by some perversely-minded person, but whether he bears such a relation to the matter that he cannot reasonably be suspected of being biased. I think that, for the sake of the character of the administration of justice, we ought to go as far as that, but we ought not to go any further. That I take to be the rule for the application of the test laid down in *Leeson's Case* (1).

- Turning now to the present case, could Dr. Phillipson be reasonably or substantially suspected of bias? The question depends in each case upon the relation of the judge who is impugned to the matters which he has had to adjudicate upon. The relation of Dr. Phillipson to that matter in this case was as follows. He had been a subscriber to and member of a society called the Medical Defence Union, a society formed for the defence of the honour of the medical profession, to protect that honour against the improper conduct of any individual member of the profession. He had been a vice-president of the society, and was in consequence an ex officio member of the committee to which was entrusted an authority to complain before the defendant council of improper conduct by any medical man. He was only an ex officio member of the committee, and in fact never acted as a member of it. Moreover, before the plaintiff's case came on for hearing by the defendant

council he had resigned his membership of the Defence Union, so that when the plaintiff's case was heard, he was not only not a subscriber to the Defence Union, but was not a vice-president nor a member of the committee. A

Under these circumstances, it seems to me impossible that any reasonable person should think him biased, or that substantially and really he could be liable to be even suspected of bias. There is nothing upon which to found the suspicion. The first objection, therefore, taken to his decision fails. As to the second ground, it is admitted that, if there was no evidence upon which the council might fairly and reasonably say that the plaintiff had been guilty of infamous conduct in a professional respect, they went beyond the jurisdiction given them by the Medical Act, 1858, in entertaining or adjudicating upon the case. If there was no such evidence they ought to have refused to interfere. Was there any evidence of misconduct by this plaintiff that justified the defendant council in finding him guilty of "infamous conduct in a professional respect?" I am prepared to adopt this statement of one ground of guilt which has been drawn up by my brother LOPES. It is this. If it be shown that a medical man, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect." The question is not merely whether what a medical man has done would be an infamous thing for anybody else to do, but whether it is infamous for a medical man to do it. An act done by a medical man may be infamous though it would not be infamous if done by anybody else, but to bring such an act within s. 29 of the Medical Act, 1858, it must also be shown to have been infamous "in a professional respect." There may be some acts which, although not infamous if done by any other person, yet if done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered as "infamous conduct in a professional respect." Such acts would, I think, come within s. 29. B C D E

I adopt that statement of my brother LOPES as a good definition of at least one state of circumstances in which the General Medical Council would be justified in finding a medical man guilty of "infamous conduct in a professional respect." F Was there any evidence in the present case of any such conduct by the plaintiff? It seems to me that this question must be solved thus. Taking the evidence before the defendant council as a whole, did it bring the plaintiff within the definition I have read? Was the evidence, taken as a whole, reasonably capable of being treated by the council as bringing the plaintiff within that definition of "infamous conduct in a professional respect?" I cannot doubt that it was. It seems to me that it may be fairly said that the plaintiff endeavoured to defame his brother practitioners, and to induce suffering people, by means of his defamation, to avoid going to them for advice, and to come to himself, in order that he might obtain the remuneration or fees which otherwise he would not obtain. If, on the whole, his conduct could reasonably be construed as amounting to that, it seems to me to come within the definition, and the defendant council were justified in saying that the plaintiff had been guilty of "infamous conduct in a professional respect." G H I think it could be, and, therefore, the plaintiff's second ground of appeal fails, and in my opinion the judgment of HENN COLLINS, J., was right, and the appeal must be dismissed.

**LOPES, L.J.**—I am of the same opinion. That an accuser must not be a judge is in accordance with public policy and natural justice, and is a principle too well established to require any comment. A person who has a pecuniary interest in the result of an accusation cannot adjudicate on it. The inference at once arises that he is interested. But where there is no pecuniary interest nor any suggestion of pecuniary interest, it is, to use the words of BOWEN, L.J., in *Leeson's Case* (1), "a question of substance and of fact whether one of the judges has in truth also been an accuser." Again adopting the words of BOWEN, L.J.: "Has the judge



**A** whose impartiality is impugned taken any part whatever in the prosecution either by himself or by his agents." And in the same case, which was very similar to the present one, the General Medical Council and the Medical Defence Union both being concerned in it, *COTTON, L.J.*, said (43 Ch.D. at p. 381):

**B** "Then as regards the question whether they are to be considered as complainants here, we ought to look to substance and not, because this complaint is brought by the council in the name of the union, to say that a person, a member of the union, who has nothing to do, or can have nothing to do, with bringing forward this complaint, is to be treated as a prosecutor, or as one of the persons who are bringing forward this complaint."

**C** Those words are very applicable to the present case, and the conclusion which I draw from that case is, that in such a case as the present the proper question to be asked is whether there is any reasonable, any real and substantial, ground for suspecting bias.

Let me apply that to this case. Was there any reasonable ground in substance and in fact for suspecting any bias in Dr. Phillipson? He was a subscriber to the Medical Defence Union. He had been a vice-president, and as such he was **D** an ex officio member of the committee, the body which on behalf of the union instituted complaints such as that against the plaintiff. Dr. Phillipson never acted upon that committee, and at the time when this inquiry took place he had resigned his membership of the union. It was contended that his resignation did not take effect, or was not complete, for a period of two months after he had sent it in, but I think that in effect he had resigned his membership. It must also be recollected that the evidence shows that he had never heard of the plaintiff's case **E** before the inquiry. In these circumstances I think that *HENN COLLINS, J.*, was quite right in coming to the conclusion that there was no reasonable ground in substance or in fact for suspecting any bias in Dr. Phillipson. If that is so, the first objection relied on by the plaintiff fails.

Then I come to the other question as to the meaning of the expression "infamous conduct in a professional respect," contained in s. 29 of the Medical Act, 1858. I think that, if there was any evidence on which the council could reasonably have come to the conclusion which they did come to, their decision is final. If, on the other hand, there was no evidence upon which they could reasonably arrive at that conclusion, then their decision can be considered by this court, and reversed if it is thought necessary. It is important first to consider what is meant by **G** "infamous conduct in a professional respect." My Lord has adopted a definition which with his assistance and that of my brother *DAVEY* I had prepared. I do not for a moment imagine that that is an exhaustive definition, but I think it is one which is strictly and properly applicable to the present case. Assuming it to be a sufficiently good definition for the purpose of the present case, was there any evidence before the General Medical Council which justified them in coming to the conclusion that the plaintiff had been guilty of infamous conduct in his **H** profession within that definition? It appears to me that there was abundant evidence upon which they might find as they did. In addition to the publications in the newspaper there was the plaintiff's conduct with regard to his pamphlet on vaccination. His conduct in that matter appears to me to come distinctly within the definition I have given. In 1887 or 1888 he published a pamphlet against **I** vaccination which met with great disapproval, and he promised to withdraw it, and, so far as he was concerned, it appears that he did withdraw it from circulation. But it had passed from his hands into those of the Anti-Vaccination Society, and, well knowing that, he advised his patients to consult that society, being perfectly aware that the advice they would get from the society would be to adopt a method of effacing the effects of vaccination. In fact, he was indirectly advising those who consulted him to violate the law which the legislature has thought desirable for enforcing vaccination. [Note.—The provision in s. 16 of the Vaccination Act, 1867, that the parent of a child or other person having its

custody should procure the vaccination of the child within the prescribed period A  
was repealed by s. 26 of the National Health Service Act, 1946.]

On both these grounds I think there was ample evidence to justify the council  
in coming to the conclusion that the plaintiff was guilty of "infamous conduct  
in a professional respect."

DAVEY, L.J.—Nothing can be more important than to maintain intact the B  
principle that a man shall not be judge in his own cause, and to preserve every  
tribunal which has to adjudicate upon the rights or status or property of any of  
Her Majesty's subjects from any suspicion of partiality. Speaking for myself,  
if I were at liberty to discuss the judgments which were delivered by the lords  
justices in *Leeson's Case* (1), I confess that my mind would go rather with the  
judgment of FRY, L.J. He appears to me to state a general principle, easy of C  
application to the circumstances of any particular case, whereas I find a difficulty  
in extracting from the judgments of COTTON and BOWEN, L.JJ., the exact prin-  
ciple to be applied. Their judgments also seem to me to leave too much to the  
inferences to be drawn from the circumstances of each particular case. The true  
rule to be applied seems to me to be one which ought to be above and beyond the  
circumstances of any particular case, whether the facts suggest bias or not. The D  
true rule, I think, was that laid down by MELLOR, J., in *R. v. Allan* (2), to which  
my Lord has already referred. But we are bound by the judgments of the majority  
of the court in *Leeson's Case* (1), and I adopt them in the sense in which they  
have just been explained by the Master of the Rolls and LOPES, L.J.

Applying to the best of my power the principle which is to be evolved from  
those judgments, I am of opinion that there is no ground for holding that Dr. E  
Phillipson was disqualified from taking part in the decision of the present case.  
I must add that, even if I were to adopt the judgment of FRY, L.J., or the words  
of MELLOR, J., in their most extreme application, I should come to the same con-  
clusion that Dr. Phillipson was not disqualified. What are the facts of the present  
case? Dr. Phillipson was a vice-president of the Medical Defence Union, and as  
such he was, according to the constitution of the society, a member of their com- F  
mittee, but he did not attend any of the meetings of the committee, and it appears  
that he was not even aware of the plaintiff's prosecution before the defendants  
until he had taken his seat as a member of the defendant council. That shows  
that he was not a party or privy to what has been called the plaintiff's prosecution.  
Still he might be held to be disqualified if members of the committee of the union  
were as such disqualified. But there is a fact to which I attach much more im- G  
portance than was apparently attached by HENN COLLINS, J., viz., Dr. Phillipson's  
resignation. The inquiry by the defendant council was held on May 28. On the  
previous May 3, Dr. Phillipson had ceased, so far as lay in his power, to be a  
member of the union, and, that being so, the mere fact that under the rules of  
the society two months must elapse before a resignation is complete, does not  
seem to me to be of any consequence. It would, I think, be a straining at a gnat H  
to hold that under these circumstances a rule which the society chose to adopt dis-  
qualified Dr. Phillipson from taking any part in the decision of the plaintiff's case.

On the second point I agree that there was sufficient evidence upon which the  
defendant council might reasonably and properly infer that the plaintiff was  
endeavouring to discredit and defame the medical profession generally, and to  
shake the confidence of the public in other medical men, with a view to his own  
profit and pecuniary advantage. The question is not whether the plaintiff is I  
right or wrong in his views on the subject of medicine and hygiene. He may be  
right, notwithstanding his differences from the majority of his professional  
brethren. He may be in the position of *athanasius contra mundum*. But there  
are different modes of stating one's opinions and views, and a man may be actuated  
by different motives in enforcing his views and opinions on the world. In the  
present case the language in which the plaintiff has thought fit to express his  
views, and the circumstances, and the surroundings with which his advertisements

- A** were issued, coupled with the notices to which our attention has been drawn, recommending his own works and his own advice, seem to me, when taken together, to be evidence from which the medical council might reasonably hold that his conduct was "infamous in a professional respect." I adopt the definition which has been drawn up by LOPES, L.J., and approved by the Master of the Rolls as being at any rate a test and a standard by which those words may be defined.
- B** There is also the plaintiff's conduct with regard to the leaflet on vaccination, after he had undertaken not to publish it. I repeat, in order that there may be no mistake about it, that I do not think the observation to be well founded that upon the evidence before the council they must be taken to have condemned the plaintiff on the ground of his peculiar opinions on the subject of medicine and hygiene. We have not got to say whether the council were right or wrong in the
- C** inference which they drew. All that we have to decide on this point is whether there was evidence on which they might, as reasonable men, have come to the conclusion which they did come to, and in my opinion there was.

*Appeal dismissed.*

Solicitors: *Francis Miller & Co.; Warren, Murton & Miller.*

- D** [Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

**E**

## Re ENGLISH, SCOTTISH AND AUSTRALIAN CHARTERED BANK

[COURT OF APPEAL (Lindley, Lopes and A. L. Smith, L.JJ.), July 12, 13, 1893]

- F** [Reported [1893] 3 Ch. 385; 62 L.J.Ch. 825; 69 L.T. 268; 42 W.R. 4; 9 T.L.R. 581; 37 Sol. Jo. 648; 2 R. 574]

*Company—Scheme of arrangement—Duty of court—Duty to protect minority from coercion and see that statutory meeting was duly convened and that scheme reasonable.*

- G** By s. 2 of the Joint Stock Companies Arrangement Act, 1870, the court was given power, subject to certain conditions, to sanction a compromise or an arrangement proposed between a company and its creditors or any class of its creditors. If sanction were given, the arrangement or compromise became binding on all the creditors or the particular class of creditors.

- H** **Held:** the duty of the court was not merely to ascertain that the statutory conditions had been fulfilled and then sanction the arrangement: the court must be satisfied that the statutory majority which were to bind the dissentient minority had acted bona fide and that the dissentient minority were not unduly coerced; that the various classes of creditors had been properly consulted; that the meeting at which the arrangement was agreed on was properly convened; and that the arrangement contemplated was reasonable having regard to the circumstances of the case and one of which a business man would, in those circumstances, reasonably approve: the court must also examine the scheme lest there be some defect hitherto unobserved, and consider any possible alternative scheme: at the same time, if the creditors in accepting the arrangement had acted honestly and on sufficient information, with time to consider what they were about, they were better judges than the court of what was to their commercial advantage, and the court should be slow to differ from them in the absence of some great oversight or mis-carriage.
- I**



**Notes.** Section 91 of the Companies Act, 1862, has been replaced, with additions, by s. 346 of the Companies Act, 1948, and s. 2 of the Joint Stock Companies Arrangement Act, 1870, by s. 206 (1) (2) of the Act of 1948. A

Considered: *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540; *Re Dorman, Long & Co.*, *Re South Durham Steel and Iron Co.*, [1933] All E.R.Rep. 460; *Re Imperial Chemical Industries, Ltd.*, [1936] Ch. 587; *Re Suidair International Airways, Ltd.*, [1950] 2 All E.R. 920. Referred to: *Re Queensland National Bank* (1893), 37 Sol. Jo. 632; *Re Canning Jarrah Timber Co.* (1900), 69 L.J.Ch. 416; *Re Syria Ottoman Railway* (1904), 20 T.L.R. 217; *Re Tea Corpn.*, *Sorsbie v. Tea Corpn.*, [1904] 1 Ch. 12. B

As to schemes of arrangement, etc., see 6 HALSBURY'S LAWS (3rd Edn.) 764 et seq.; and for cases see 10 DIGEST (Repl.) 1126 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452. C

Case referred to:

- (1) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213; 60 L.J.Ch. 221; 64 L.T. 127; 7 T.L.R. 171; 2 Meg. 377, C.A.; 10 Digest (Repl.) 1133, 7887.

**Appeal** by depositors in the English, Scottish, and Australian Chartered Bank against a decision by VAUGHAN WILLIAMS, J., on a petition presented by the official receiver and liquidator in the winding-up of the bank, for the sanction of the court to a scheme under the Joint Stock Companies Arrangement Act, 1870, for the reconstruction of the bank. D

*Finlay, Q.C.*, *Beale, Q.C.*, and *C. E. E. Jenkins* for the appellants.

*Sir Horace Davey, Q.C.*, and *Whinney* for the bank. E

*Cozens-Hardy, Q.C.*, and *Swinfen Eady* for creditors who supported the scheme. *Latham, Q.C.*, and *Howard Wright* for the official receiver.

**LINDLEY, L.J.**—This is an appeal from an order made by VAUGHAN WILLIAMS, J., which has not been drawn up and laid before us in the ordinary way, but the nature of which may be shortly stated to be the approval provisionally of a scheme for reconstructing the English, Scottish, and Australian Chartered Bank. I say provisionally because, in the absence of the formal order, I must be guided by what I see in VAUGHAN WILLIAMS, J.'s judgment. F

The depositors who have appealed are creditors of the bank to the extent of £92,000. They are mainly Scottish companies who have advanced by way of deposit to this bank. The bank itself is a chartered bank. It is not registered under the Companies Acts. It has a nominal capital of a million and a half. It has £900,000 paid up, and there is a reserve liability to the same amount. It stopped payment on April 12, 1893. A petition to wind it up was presented on April 13, and on April 26 an order was made and a provisional liquidator was appointed. On May 18 an order was made for meetings to be held. The constitution of the bank is important. The bulk of the shareholders are English people. They are not Australians; and that is a matter which strikes me as extremely important in considering some of the objections which have been made to the votes of the Australian creditors. It has been represented that they have been induced by the feelings of patriotism and a desire to support this bank and to reconstruct it and make it a strong bank. That observation would have twice the force it has if those people were shareholders. But they are not; they are creditors. The liabilities of this bank are stated very succinctly in the table which is contained in the petition. The main liabilities are on the deposit and current accounts which come to close upon five millions. The assets are set down on the other side, and the main assets—the assets which have to be got in somehow in order to pay these liabilities—are represented as bills receivable, loans and advances against securities, £5,300,000. G

Everything depends upon the realisation of those assets. The bank is represented to be solvent. The table which is before me shows it, and it shows further H

**A** that there is a very considerable margin on paper of excess of assets over liabilities, and that, if the assets could be realised, there would be enough, and more than enough, to pay 20s. in the pound. Further, the affidavits show that, if these assets could be realised, I do not say now, but if times got better and the assets were realised, and the creditors could wait, they might get their money in the long run. But the state of things is very anomalous in Australia. It is impossible to shut one's eyes to the fact that this is not the only bank that has stopped payment. There are a great many others, and the consequence is that it is impossible at this present moment to realise these assets at anything like 20s. in the pound. The assets consist of loans made on land, sheep farms, and what not. There is such an enormous quantity of that kind of property on the market, and there are so few purchasers of that kind of property, that, if these properties are brought on the market rapid realisation is utterly hopeless.

In considering this or any other scheme for paying creditors less than 20s. in the pound, it is absolutely necessary not only to look at the scheme but to look at the other side. Where is the money to come from? We start with this, that the creditors ought to be paid 20s. in the pound. There is no question about that, in this country at all events. If sufficient money is in existence for them to have 20s. in the pound, they ought to have it at the expense of the shareholders. If they cannot get it, it becomes necessary to decide upon some alternative scheme for giving them less than that to which they are entitled. I have come to a conclusion concerning the evidence upon two or three points which I think are perfectly plain. The first point is this. It is agreed on all hands that anything like sudden realisation—anything like a forced sale—would be utterly ruinous to the creditors. They would have so large a loss that any different scheme—any alternative scheme—would reasonably appear better than that to the great bulk of them. I think the evidence also shows that time may be usefully gained in one way only and that is by keeping the bank going somehow. If you cannot keep the bank going that alternative scheme of terminable payments will fall through. Having arrived at that, there comes the various modes of keeping the bank going. The scheme before us is one of them. Whether it is the best one is another matter altogether, but I do not think it is just to say that this is a mere scheme to resuscitate the bank and not pay the creditors. If I thought that that was the object of the scheme, I should negative it without the slightest hesitation. But I think the true view of it is that it is a scheme for paying the creditors by resuscitating the bank, and I do not believe the creditors can get paid in any other way. That is the result, to my mind, from the perusal and study of this evidence.

Having arrived at that conclusion, I shall say no more about the so-called patriotism of the Australians. I dare say they are patriotic, but they are creditors, and nothing else. They are not shareholders. They have no more to do with the bank than I have. They care nothing about it except for the purpose of getting their money out of it. And although they take different views from the Scottish creditors, and may be influenced, for anything I know, by a desire to keep the bank going, yet their main object of keeping the bank going is to get their money. Beyond that there is no reason to suppose that they care anything about the bank.

That being the broad conclusion from the facts, I come now to consider the objections which have been made to this scheme, and to consider the function of the court. The scheme has been carried by an enormous majority of creditors if they are all accounted for; but that is not enough. By s. 2 of the Joint Stock Companies Arrangement Act, 1870:

“Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound-up, either voluntarily or by or under the supervision of the court, under the Companies Act, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful

for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court shall direct; and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

The duty of the court in acting upon that section has been discussed and explained more than once, and I do not know that I can usefully add anything to what I said, and to what BOWEN and FRY, L.JJ., said, in *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.* (1). I adhere to what I said there, and I will read a short passage from my judgment ([1891] 1 Ch. at pp. 238, 239):

"What the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one, or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

FRY, L.J., said something to the same effect in somewhat different language. He said (*ibid.* at p. 247):

"Under what circumstances is the court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the court may take into consideration I will not attempt to forecast."

It is quite obvious from the language of the Act and from the mode in which it has been interpreted that the court does not simply register the resolution come to by the creditors, or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed unobserved and which might be pointed out later. But giving them the opportunity of observation, I repeat that I think they are much better judges of a commercial matter than any court, however constituted, can be. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view—that is, with a view to the interests of the class to



**A** which they belong, and that which they are empowered to bind—the court ought to be slow to differ from them. It should do so unhesitatingly if there is anything wrong about it. But it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some great oversight or miscarriage.

**B** With these observations, I pass on to consider what the objections made to this scheme are. First of all, I will take the objections, which I will refer to as technical, that is to say, the objections relating to the proxies. I have read from the statute words which show that there must be three-fourths of the creditors present in person or by proxy. “Proxy” there means by some agent properly appointed. In this case the Australian creditors were present by the person whom they had in fact appointed. He was there. They were, therefore, present not in person, but by proxy. Then comes the difficulty that the proxy papers—the authority authorising their agent to appear and vote for them—were not in this country. That difficulty was foreseen and was provided for by that part of **C** VAUGHAN WILLIAMS, J.’s order convening the meeting. The position of affairs is peculiar. This bank had main offices in various places in Australia—Sydney, Melbourne, Brisbane, and one or two other places. They had also depositors, the **D** great bulk of whom were Australians, who had to be consulted as to how the scheme was to be carried out. Time was important, and VAUGHAN WILLIAMS, J., in the order convening the meeting directed that the service by post of a circular letter with form of proxy and copy scheme should be deemed to be good service as if the same had been posted and sent in the ordinary course of post seven days before the day appointed for the meeting.

**E** Then there follows a special provision which is quite novel—I do not think any of us have seen it before—and which is extremely ingenious. The question is whether the learned judge exceeded his powers by putting it in. It was ordered that the creditors and contributories should be at liberty to vote at the meeting personally or by proxy, and that the creditors and contributories in Australia **F** should be at liberty to give proxies to persons to be designated for the purpose by the official receiver for or against the scheme, or to any other persons entitled to vote at the meeting whom they might think proper, provided that such proxies were deposited at the offices of the company in Melbourne or Sydney not later than three days prior to the holding of the meetings in London, and that particulars of the proxies so deposited should be communicated by telegram to the official receiver for use at the meeting. That, I repeat, is an entirely new form of order. **G** I need hardly say that it is adapted to the necessities of the occasion. It is ingeniously using the improved methods of communication by telegraph which it would be folly to shut out and not to use if it can be done.

**H** The question is whether the learned judge had power to make any such order as that. That turns upon the powers conferred upon him by the statute under which he convenes meetings. The most important provision with reference to this particular point will be found in s. 91 of the Companies Act, 1862, which has to be read coupled with s. 2 of the Act of 1870 to which I have already referred. Section 91 of the Companies Act, 1862, provides :

**I** “The court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company.”

Section 2 of the Act of 1870 enables the court

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"in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors, or class of creditors shall be summoned in such manner as the court shall direct."

The section goes on to deal with the question about the majority. It appears to me that, under the authority of s. 91 of the Act of 1862, this novel form of order is not beyond the powers of the judge. It appears to me that he had power to direct that these proxies should be filled up in Australia; that they should be deposited in the offices which are mentioned; and that the result of the proceedings might be acted upon in this country, even before the proxy papers came over. I think it was within his power to do it; and being within his power to do it, I do not hesitate to say it is a power with which we should not think of interfering. That is what was done. Therefore, so far as that somewhat important point is concerned it appears to me that there was nothing irregular in the proceedings at this meeting.

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[His LORDSHIP then dealt with a point under the Stamp Act, 1891, s. 80, which no longer calls for report owing to the repeal of that section by the Finance Act, 1949, and the exemption from stamp duty of letters or powers of attorney for appointing or authorising a proxy to vote at a company meeting.]

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I pass on now to consider the real substance of this matter. It is urged before us that the scheme was one which ought not to be forced on dissentient creditors. I have already read the statutory provisions, and explained the function of the court in seeing that a dissentient minority are not unduly coerced. One must look now at this scheme, and, as I have already said, one must bear in mind the alternative. Bearing in mind the alternative to which I have alluded, can we say that this scheme is one which creditors cannot reasonably think to be to their advantage, and the advantage of those who belong to the same class as themselves? That depends upon the scheme itself. Looking at the scheme, one sees objections to it. If I were a creditor I should see objections to it. I do not say I should not vote for it; probably I should. But that is neither here nor there. Every creditor who does not get his due may have objections to the scheme if he can in any other way get it; but if he cannot get it, it is another thing. The scheme is, first, that there should be debenture stock bearing interest at the rate of £4 per cent. per annum, in sums of £10 and upwards, to an amount equal to one-fourth of the total amount owing by the old bank in respect of the terminable deposits, current accounts, or other liabilities not thereafter specifically provided for. The nature of that debenture stock is apparent from papers which are laid before me. It does not mean debentures which are charged upon assets. The expression "debenture stock" is ambiguous. We all know that sometimes it merely means a certificate for a debt owing by an incorporated company and secured by the instrument under seal. Sometimes it means more than that. Sometimes it means a mortgage, if not on specific lands at all events on what is called "The undertaking." That is another form of debenture stock. There is no ambiguity about what is meant here. The papers show it. It is merely an acknowledgment of indebtedness that the holder is entitled—subject to a provision to which I will refer presently—to a certain sum of £10 bearing interest at 4 per cent. As far as I have gone at present, that debenture stock does not constitute a debt for which an action at law would lie, because there is no time fixed for payment.

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Secondly, it is proposed that terminable deposit receipts payable by five equal annual instalments commencing in the seventh year from the date of the incorporation of the new bank for a further fourth of the liabilities are to bear interest at the rate of 4 per cent. per annum, and at the option of the holders are to be convertible at par into debenture stock as above at any time before Jan. 1, 1898, on such extended time as the new bank shall permit. There you get the introduction

**A** of the terminable feature. These things are not like debenture stock. They are to be payable at certain specified times, namely, by equal annual instalments commencing in the seventh year from the date of the incorporation of the new bank.

The third proposal is that there should be inscribed deposit stock for the remaining half of the liabilities of the old bank entitled to cumulative interest at the rate of £4 10s. per cent. per annum payable only out of the profits of each year. The holders of the inscribed deposit stock are only to be paid out of the profits, and they are to be paid, before the shareholders, but after other people and after creditors. The only other clause I will refer to at present is cl. 6, which provides that interest shall be payable on the debenture stock and terminable deposit receipts on Jan. 1 and July 1 of each year. On default of payment of interest for six months or on a winding-up the principal of the debenture stock and such receipts is to mature. So that on the happening of these events even the money represented by the debenture stock would become a debt clearly payable and enforceable. The principal of the inscribed deposit stock is to mature on winding-up, but, save as aforesaid, the debenture stock and the inscribed deposit stock is to be perpetual.

Those are the main features. The objections to them are manifest enough.

**D** They are converting the creditors to a certain extent into annuitants, and they are postponing their payment to an extent to which a creditor objects. But still, we must face the alternative. It is by facing the alternative that one is led to sanction the scheme. It appears to me, I confess, after what took place in Australia when this scheme was laid before the creditors that it is impossible for us to say that this matter was not fairly and fully brought before the attention of the creditors. It was for them to decide, and they have decided in favour of this scheme. Why? Because they see plainly enough that unless they have this scheme they will be in great danger of being in a very much worse plight than they will be if they accept it. I can understand a great corporation saying: "We would rather face our loss; we have got £92,000 in this out of about two and a half millions, but though £92,000 is not a sum to be sneezed at, we want to know where we are, and we would rather put up with the loss; we will get it if we can get it, and bear the loss if we cannot." The great bulk of the depositors are not in so happy a position. They say: "We would rather not insist on facing the loss, which means ruin to us; we would much rather give time for this scheme, which appears to us sincerely and honestly framed in our interests."

I do not hesitate to say that, forming the best judgment I can of this scheme, it has been honestly framed in the interests of the creditors, and, giving the Australian creditors all their due for patriotism, I fail to see that they have sacrificed their interests as creditors to any patriotism for the colony or love for the bank. I have already observed that they have not got one farthing interest in the bank except as paymasters. They see plainly enough that in the condition of affairs in the colony they cannot get their money unless they adopt some such scheme as this. It is said they have not had an opportunity of considering all sorts of other schemes. I do not think that is necessary. If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the court to say that every possible and conceivable scheme which the ingenuity of man can suggest was not laid before them and submitted to them. They are business men. They have looked at it; they know their own interests, and they have approved the scheme by a vast majority in favour of it. It appears to me that the learned judge was perfectly right; that this scheme ought to be confirmed; and that this appeal must be dismissed with costs.

**LOPES, L.J.**—Two objections are taken to this scheme. The first is an objection to it on the merits. The second is a more technical objection, namely, that it has not been approved of by the statutory number of creditors. It would be quite true to remark that if the English creditors alone were considered they might have said that. But if the Australian creditors are counted as well as the English



there is no doubt the scheme would be carried by an overwhelming majority. A  
What is contended is that the votes of the Australians ought not to be counted,  
having regard to the mode in which those votes were obtained. The scheme of  
arrangement is a scheme under s. 2 of the Joint Stock Companies Arrangement  
Act, 1870, and the material part of the section is this:

"...if a majority in number representing three-fourths in value of such B  
creditors, or class of creditors, present either in person or by proxy at such  
meeting, shall agree to any arrangement or compromise, such arrangement or  
compromise shall, if sanctioned by an order of the court, be binding on all  
such creditors, or class of creditors, as the case may be, and also on the  
liquidator and contributories of the said company."

This enables a majority of creditors—provided that there is a proper statutable C  
number—to bind the dissentient minority.

The mode in which this power is to be exercised has, to my mind, been very  
well and correctly laid down in the *Alabama Co.'s Case* (1), which has already  
been referred to. What I understand to be decided by that case is that it is not  
sufficient for the court to ascertain that the statutory conditions have been com- D  
plied with. The court must go further than that and be satisfied that the statu-  
tory majority which are to bind the dissentient minority have acted bona fide, that  
they have not acted adversely to those whom they professed to represent; and  
lastly, that the arrangement contemplated is a reasonable arrangement such as  
that which a man of business would reasonably approve. With regard to the  
word "reasonably," it must always be borne in mind that the word "reasonably" is  
a relative term. It means reasonably with regard to the particular circumstances E  
of the case. What is reasonable in one case might be unreasonable in another.  
What is unreasonable in the abstract might be reasonable in the particular circum-  
stances. The reasonableness must be always regarded with reference to other  
alternatives. For instance, take an arrangement giving a very small benefit to  
creditors. If the alternative were absolute ruin to the company and no benefit  
to the creditors, I should think that the original arrangement would be reasonable. F

In the present case, I do not doubt for a moment that the maintaining of  
the bank as a strong bank, and in the interests of the community in Australia  
has to some extent influenced the votes of the Australian creditors, but I have  
come to the conclusion that the dominant idea of these Australian creditors has  
been the preservation of the assets of the bank for the benefit of themselves and  
all the creditors, because, as has been already observed by LINDLEY, L.J., and it is G  
a matter not to be forgotten, the creditors are Australian and the shareholders  
are English. Having regard to the state of things in Australia, according to  
the evidence before us, it seems to me impossible at the present time to realise the  
assets of the company except at a ruinous sacrifice. Other banks are failing all  
round; there are very large overdrafts due to this bank, and I have not the slightest  
doubt to the other banks. Anything like a realisation of these overdrafts or calling H  
them in would compel very large sales of sheep stations, and sheep stations would  
become a drug in the market. The result would be either that sheep stations  
would be absolutely unsaleable, or, if sold, they would be sold at prices ruinously  
below their real value. Putting it very shortly, it seems to me that the evidence  
clearly establishes that.

What is the other view—the view put forward if this arrangement is sanctioned? I  
It is said—and I cannot myself help thinking that there is a good deal in this—that  
the goodwill of the bank, which is a very valuable security, may be maintained.  
We have been told, and there is evidence to that effect, that the government have  
promised to continue to remain a customer of the bank. We have also been told  
that such is the confidence in the successful resuscitation of this bank that large  
sums amounting to half a million have at the present time been deposited in trust  
with this bank. All this makes it, to my mind, perfectly clear that anything like  
liquidation would be out of the question. Then it is said, and it was strongly

**A** urged by counsel for the appellant depositors that "even assuming that, why not adopt the course which seems to have been adopted by other banks, and let there be a moratorium or something of that kind—something short of the scheme, something that would not make the creditors annuitants, and would not postpone their claims to new creditors of the bank—something short of that of which we highly disapprove." I answer that suggestion in this way. I say that, for anything I  
**B** know, this is a better scheme than the schemes of these other banks. I am very much influenced by this. The Australian creditors almost unanimously approve of this scheme. Who can better know the state of things in Australia than these Australian creditors. They are there upon the spot; they know all the details connected with the bank; they know all the circumstances which are likely to make the bank a flourishing concern, or the contrary. And it appears to me that  
**C** none of us—nobody in this country or anywhere else except in Australia—can express a view so cogent with regard to this matter as these Australian creditors. It does not stop there, because we have also a strong body of expert evidence obtained from stockbrokers in this country to the effect that they highly approve of the scheme. They believe, having regard to all the circumstances of the case, that it is a scheme which would be most likely to end in a benefit to the creditors  
**D** at large.

In these circumstances, I am unable to say that this scheme is unreasonable. I think that the learned judge has come to a very proper conclusion in sanctioning this scheme. I will refer to the other objections. With regard to the votes, although it is said that these Australian votes ought not to be counted, the first question raised is whether the judge had any power to make the order he did.  
**E** No doubt, it is a new form of order, and I take it that it is an order which would only be made in very exceptional circumstances, such as the present. It appears to me, when you refer to s. 91 of the Companies Act, 1862, that it clearly authorises that which the learned judge has done. It is also to be borne in mind that the Act of 1870, under which this scheme is sanctioned, incorporates the Act of 1862. The words are that it is to be read and construed as part of that Act. The  
**F** words of s. 91 of the Act of 1862 are these: [His LORDSHIP read the section] That appears to me to confer upon the learned judge power to do precisely that which he has done in these circumstances, so that what he has done is a proper and desirable thing having regard to the circumstances. The object being to ascertain the wishes of the creditors both in England and elsewhere it is a matter upon which I do not think anybody can have any doubt. I come to the conclusion that this  
**G** appeal must be dismissed with costs.

**A. L. SMITH, L.J.**—I wish to add a few remarks upon a point which, for the first time, arises in this case, that is, whether or not the electric telegraph can be brought into play to carry out what was eminently needed, and indeed was absolutely necessary to carry out, justice in this case. In my judgment, this  
**H** depends in the main upon what power VAUGHAN WILLIAMS, J., had in this winding-up matter, because it must be admitted that he has not had before him the best evidence of these instruments of proxy, as I will call them. What are the powers given to the learned judge in winding-up matters? I turn to s. 91 of the Companies Act, 1862, and there is a phrase there which to me is very significant. It says this:

**I** "The court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence."

That last phrase is put in for the purpose of enlarging the power of the judge who has to adjudicate in these winding-up matters. It clearly abrogates the necessity of his acting upon strict legal evidence. It also clearly allows him to act upon secondary evidence if he thinks fit. When he desires to ascertain what are the wishes of the creditors, he may act upon any evidence which he thinks sufficient

for the purpose of arriving at the truth with regard to their wishes. That I apprehend to be the true meaning of the words "upon any sufficient evidence." We have next to turn to the section of the Act which provides how and in what way it is to be ascertained whether three-fourths in value of the creditors agree to the proposed scheme. That brings me to the Act of 1870, under s. 2 of which the majority must be present "either in person or by proxy at such meeting." It will be noted that it is not stated "by an instrument of proxy." In other sections of the Companies Acts you will find a distinction drawn between an instrument of proxy and a proxy itself. It seems to me to be manifest that reading that line in this section "either in person or by proxy" means either in person or by his lawfully constituted agent, and not by the instrument of proxy or the proxy paper. Suppose these Australians, by a duly-signed instrument of proxy, and a duly deposited instrument of proxy under Table A, if that applies here, had delegated the authority to a Mr. Smith to go to this meeting in London and vote for the Australian creditors, where is there anything to say that Mr. Smith must show an instrument of proxy to satisfy the meeting or the court afterwards that he is the duly authorised agent of the Australians? Counsel for the appellants depositories was asked that, and he was unable to point to any statute that says it is necessary for the agent to have the instrument of proxy with him. It seems to me that it is not necessary in this case, where a judge has to decide whether the votes are to be counted or not, because he may act as regards entertaining the wishes of the creditors upon any evidence which is sufficient to him. Mr. Smith comes and Mr. Smith says to him: "I can assure you upon oath that I have these proxies, and that they are deposited in Melbourne." Why will not that do, I ask? Supposing there had been a letter written from Melbourne, why should not the letter be accepted if the judge has no reason to doubt it, and considers it sufficient? A telegram is sent; the judge has no reason to doubt it, and believes it. Why should not he act upon it? Has he authority to act upon it? It seems to me he has, and that is the answer to all the legal argument about not being able to count these Australian votes as matter of law. It was to meet those points that this order of VAUGHAN WILLIAMS, J., was made. He was in a difficulty about time; everybody was in a difficulty about time. In my judgment, he had jurisdiction to make the order which he did. Therefore, as a matter of law, if the judge considered the evidence sufficient, and if there was no reason to doubt the truthfulness of it, as VAUGHAN WILLIAMS, J., had not, in my judgment, these votes were countable, and should not have been rejected.

Therefore it seems to me that both the points of law which were raised about these Australian votes not being counted fail. With regard to the judgment of VAUGHAN WILLIAMS, J., I agree with him in the main, but I must say I think he was hypercritical in the remarks he made regarding the judgment of this court delivered by LINDLEY, BOWEN, and FRY, L.JJ., in the *Alabama Co.'s Case* (1). I declare that I cannot conceive anything clearer than the judgments of the lords justices in that case. I agree with what has fallen from LINDLEY and LOPES, L.JJ., as to the law which ought to be applied to this case, and I think that VAUGHAN WILLIAMS, J., with a willing mind could have applied the law to this case perfectly easily. I am not going to question whether this scheme on the facts ought to be sanctioned or not. I agree with what has fallen from the lords justices who have preceded me. I think that this appeal fails, and should be dismissed.

*Appeal dismissed.*

Solicitors: *Freshfields & Williams; Slaughter & May; Parket, Garrett & Co.; Murray, Hutchins & Co.; Young, Jones & Co.; Bell, Brodrick & Gray; F. Rudall; Allen & Edwards.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]



A

## STUMORE v. CAMPBELL &amp; CO.

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), November 28, 1891]

B

[Reported [1892] 1 Q.B. 314; 61 L.J.Q.B. 463; 66 L.T. 218; 40 W.R. 101; 8 T.L.R. 99; 36 Sol. Jo. 90]

*Execution—Garnishee order—Debt due from garnishee to judgment debtor—Garnishee entitled to counterclaim against judgment debtor—Right of garnishor to attach.*

C

A judgment debtor deposited a sum of money with his solicitors for a purpose which failed. The judgment creditor issued a garnishee summons against the solicitors to attach the debt, which they refused to pay on the ground that, having a bill of costs against the judgment debtor to an amount larger than the deposit, they could successfully set up a counterclaim in any action which he might bring against them for its recovery. Upon an issue being directed to determine whether the solicitors were indebted to the judgment debtor,

D

**Held:** there was a debt due from the solicitors to the judgment debtor which the judgment creditor would attach for the following reasons: (i) as the money had been entrusted for a particular purpose which had failed, a resulting trust to hand it back to the debtor was imposed on the solicitors who had no lien on it; (ii) before the Judicature Acts the solicitors would have been entitled to any right of set-off, and those Acts had not altered the rights of the parties to an action in the matter of set-off; and (iii) those Acts had not altered the rights of the parties by allowing a counterclaim, as that was nothing more than a change in procedure, a counterclaim by a defendant with no set-off being for all purposes except execution an independent action, and, if both parties were successful, each would get judgment for the full amount.

E

F

*Brandao v. Barnett* (1) (1846), 12 Cl. & Fin. 787, applied.

Dictum of WILLS, J., in *Westacott v. Bevan* (2), [1891] 1 Q.B. 774, disapproved.

**Notes.** For the procedure for the trial of liability of a garnishee, see now R.S.C., Ord. 45, r. 4.

G

Distinguished: *Runtz v. Longbourne* (1892), 8 T.L.R. 568; *Loescher v. Dean*, *Loescher v. Dean and Woodbridge & Sons*, [1950] 2 All E.R. 124. Referred to: *Levi v. Anglo-Continental Gold Reefs of Rhodesia*, [1902] 2 K.B. 481; *Kinnaird v. Field*, [1905] 2 Ch. 361; *Sharpe v. Haggith* (1912), 106 L.T. 13; *Aktieselskabet Ocean v. Harding*, [1928] 2 K.B. 371; *Hanak v. Green*, [1958] 2 All E.R. 141.

H

As to set-off and counterclaim, see 34 HALSBURY'S LAWS (3rd Edn.) 395 et seq.; as to attachment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq.; as to solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq. For cases see 40 DIGEST (Repl.) 444; 21 DIGEST (Repl.) 717; 42 DIGEST 261.

Cases referred to:

(1) *Brandao v. Barnett* (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 32 Digest 227, 111.

I

(2) *Westacott v. Bevan*, [1891] 1 Q.B. 774; 60 L.J.Q.B. 536; 66 L.T. 263; 39 W.R. 363; 7 T.L.R. 290, D.C.; 40 Digest (Repl.) 443, 311.

Also referred to in argument:

*Hill v. Smith* (1844), 12 M. & W. 618; 13 L.J.Ex. 243; 2 L.T.O.S. 424; 8 Jur. 179; 152 E.R. 1846; 3 Digest (Repl.) 278, 828.

*Re Cullen* (1859), 27 Beav. 51; 54 E.R. 20; 42 Digest 355, 4042.

*Sampson v. Seaton and Beer Rail. Co.* (1874), L.R. 10 Q.B. 28; 44 L.J.Q.B. 31; 31 L.T. 672; 23 W.R. 212; 21 Digest (Repl.) 744, 2315.

*Tapp v. Jones* (1875), L.R. 10 Q.B. 591; 44 L.J.Q.B. 127; 33 L.T. 201; 23 W.R. 694; 21 Digest (Repl.) 723, 2210. A

*Webb v. Stenton* (1883), 11 Q.B.D. 518; 52 L.J.Q.B. 584; sub nom. *Re Hatton, Webb v. Stenton*, 49 L.T. 432, C.A.; 21 Digest (Repl.) 723, 2212. B

**Appeal** by the plaintiff, a judgment creditor of the estate of Colonel Betty, from a decision of A. L. SMITH, J., on an issue holding that there was no debt due from the defendants, Messrs. Campbell & Co., solicitors, to the estate of Colonel Betty which the plaintiff was entitled to attach. B

The issue was directed by VAUGHAN WILLIAMS, J., to try whether on Oct. 2, 1890, the defendants, Messrs. Campbell & Co., were indebted to the estate of Colonel Betty, deceased, in the amount of £133 16s., or any part thereof. It was proved that on Oct. 2, 1890, Messrs. Campbell & Co. had in hand the sum of £121 2s. 2d., being part of the sum of £500 handed by the late Colonel Betty to them for the purpose hereinafter mentioned; and it was also proved that at that date Colonel Betty's estate owed Messrs. Campbell and Co. £121 2s. 2d. for law costs. Prior to Oct. 4, 1889, the plaintiff in this issue had recovered a judgment against Colonel Betty for the sum of £1,600, and had also taken proceedings against him in bankruptcy. In this month negotiations were commenced between the defendants acting as the solicitors for Colonel Betty and Messrs. Crump & Sons, acting as solicitors for the plaintiff, as to the way in which this judgment could be satisfied, and thereupon a proposal was made by the defendants, acting for the colonel, that he should pay down £500 and give a bill for the balance of the £1,600 at six months, to be renewed from time to time upon certain suggested conditions. This proposal was being entertained by Messrs. Crump & Sons, the solicitors of the plaintiff, when, upon Nov. 23, 1889, Colonel Betty died. Prior to the colonel's death, namely, on Nov. 19, 1889, he sent to the defendants, and they received from him the sum of £500 for the specific purpose of being applied towards the part payment of the judgment for £1,600 when the negotiations then in progress were completed. Upon the colonel's death the plaintiff demanded of the defendants this £500, which they then had in hand. They refused to hand it over to him, and he thereupon, on Dec. 3, 1889, commenced an action against them to recover it as being money had and received to his use. This action was subsequently discontinued, the plaintiff being advised that he could not support an action for money had and received by the defendant to his use, inasmuch as the terms upon which the judgment was to be settled had not been agreed upon. On Oct. 2, 1890, the plaintiff being still execution creditor of Colonel Betty for the £1,600, issued a garnishee summons against the present defendants, alleging that they were debtors of his judgment debtor. An order nisi was obtained, but it was subsequently discharged by the master, and on appeal to VAUGHAN WILLIAMS, J., the present issue was directed. C D E F G

A. L. SMITH, J., held that there was no debt due from the defendants to the estate of Colonel Betty which the plaintiff was entitled to attach. The plaintiff appealed. H

*Phipson* for the plaintiff.

*Muir Mackenzie* (*R. T. Reid, Q.C.*, with him) for the defendants.

**LORD ESHER, M.R.**—In this case an issue has been ordered to try whether the defendants were indebted to the estate of Colonel Betty, deceased, at the time of an application for a garnishee order. A. L. SMITH, J., held that they were not; and, though I always hesitate to differ from him, I cannot agree in the judgment he has given. I

The defendants are solicitors, and some money was entrusted to them for a particular purpose, so that it was accompanied by a trust, and they could not have kept it to satisfy their claims, whatever those claims might be. They were bound to employ it for the specific purpose for which it was entrusted to them, or else to return it. That purpose failed, and the consequence was that a resulting trust

A was immediately imposed on them, namely, to hand the money back. Being trustees they had no lien against their cestui que trust; that is admitted, and the decision in *Brandao v. Barnett* (1) compels the defendants to make that admission.

Nor would a plea of set-off have been available before the Judicature Acts; judgment for the full amount would have been given for the plaintiff in an action to recover the money. If there had been a right of set-off, and it had been pleaded, only one judgment would have been given, that is to say, judgment would have been given for the difference between the sums. Before the Judicature Acts, then, if the defendants' present claim had existed, yet the plaintiff would have recovered judgment for the whole amount of the money. The Judicature Acts have not altered the rights of the parties to an action in the matter of set-off, though they have given a defendant a right to make a counterclaim. A counterclaim may be treated as a set-off if it is in fact a set-off; and if a defendant who has a set-off calls it a counterclaim, he is not bound by his wrong use of a name. If a defendant has no set-off, then his counterclaim is in the nature of a cross-action. This court has often said that such a counterclaim is, for all purposes except execution, an independent action. If both parties are successful in their claims each gets a judgment for the full amount, whereas in the case of set-off there would be one judgment for the difference between the two claims. A counterclaim is in all respects, for instance in taxation of costs, an independent action, except in the matter of execution.

In *Westacott v. Bevan* (2), WILLS, J., has said that this court has held that it is only for the purpose of taxation of costs that two separate judgments are given; but that is a misinterpretation of what this court has said. Execution is issued as formerly in the case of cross-actions, not upon the goods of both plaintiff and defendant, but in favour of him who has obtained judgment for the larger amount, for the difference between the two judgments. The same remark applies to the costs of the claim and counterclaim; where they are taxed the allocatur is for the difference between them. Therefore, the view taken in that case by WILLS and VAUGHAN WILLIAMS, JJ., of what this court has said, is not correct.

F The consequence of what I have said is that, as the Judicature Acts have not altered the rights of the parties, the debt owing from the defendants to the executors still exists in spite of the counterclaim, and the judgment creditor is, therefore, entitled to a garnishee order attaching the debt. The appeal must, therefore, be allowed.

G **LOPES, L.J.**—The issue directed in this case was to inquire whether the defendants were indebted to the estate of Colonel Betty, deceased, in a sum which the plaintiff, a judgment creditor of Colonel Betty, might attach; and A. L. SMITH, J., has held, that the money placed by Colonel Betty in the defendants' hands cannot be attached. The money was placed in their hands for a specific purpose which failed upon the death of the depositor. His executors thereupon became entitled to have the money returned to them at once, and could have maintained an action for money had and received.

H But it is said that the defendants had a claim against Colonel Betty in respect of a bill of costs which exceeded the amount deposited with them, and which they might have set up as a counterclaim against the executors if an action had been brought by them for a return of the deposit. It was admitted by counsel for the defendants, as he was compelled to do by *Brandao v. Barnett* (1), that the defendants could not have relied on a lien, and that a set-off was not available, because the money was deposited for a special purpose. He also admitted that a cross-action before the Judicature Acts would have been no defence, but he said that a counterclaim, which can now be set up by a defendant, is on a different footing. The Judicature Acts were not intended, by allowing a counterclaim, to alter the rights of parties. A defendant is permitted to set up a counterclaim as a matter of practical convenience; but it is nothing more than a change in procedure, and does not give him any right that he had not before. Consequently,



the defendants' claim for costs does not affect the plaintiff's right to attach the debt which they owe to Colonel Betty's executors, and this appeal must be allowed. **A**

**KAY, L.J.**—With all respect I also dissent entirely from the judgment of A. L. SMITH, J. Money was deposited with the defendants for a specific purpose which failed, and the plaintiff is now attempting to attach it in execution for a judgment debt owing to him by the depositor. A. L. SMITH, J., held that the defendants were not indebted to the depositor, and for this reason: it was admitted that the defendants had no right of lien or set-off, but he held, that nevertheless they might have counterclaimed for the costs due to them from Colonel Betty if his executors had sued for a return of the deposit; and as the costs due to them exceeded the amount of the deposit, he held that the defendants were not indebted to Colonel Betty or his executors. Try that by the simplest possible test. Supposing the defendants' claim was for a liquidated amount which could not be used as a set-off, can it possibly be said that they could, nevertheless, by bringing a cross-action acquire that right? This clearly cannot be. **B**

Then it is said that the Judicature Acts have given a right which did not exist before by allowing a counterclaim. All that has been done by allowing a counterclaim is to enable a cross-action to be brought and tried at the same time as the original action. It is impossible to say that the rights of the parties have been altered by this, it is allowed only for convenience, and to save a separate action being brought, with all the attendant cost of doing so. The Judicature Acts have not assisted the defendants at all in this case. If a depositor is in possession of money which he is bound to restore to the depositor, and in respect of which, he cannot rely upon any lien nor by reason of the nature of the deposit claim a right of set-off for a greater sum which is owing to him, still less can he rely on a right to counterclaim which he may have. The judgment creditor can, therefore, attach this sum of money, and with all deference to the learned judge, I think this appeal must be allowed. **C**

*Appeal allowed.* **D**

Solicitors: *J. Granville Layard; Campbell, Reeves & Hooper.* **E**

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.] **F**

A

## Re SHINE. Ex Parte SHINE

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Fry, L.JJ.), January 30, 1892]

B

[Reported [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146;  
40 W.R. 386; 8 T.L.R. 279; 36 Sol. Jo. 295; 9 Morr. 40]

*Bankruptcy—Property available for distribution—Salary of bankrupt—Agreement with employer to deduct part of salary in return for payment of debts—Payment of alimony under order of Divorce Court—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 53 (2).*

C

The bankrupt, an actor, was earning a sum of £30 a week under an agreement in writing with a theatrical manager by which he agreed to act for a period of two years, and the manager agreed to pay him £22 10s. a week while acting in London and £30 a week while acting in the provinces, subject to a proportionate deduction for every night on which the theatre was not open, or the actor was unable or unwilling to act. A receiving order having been made against the actor, he entered into an arrangement with the manager under which the manager bought up his debts and deducted £20 a week from his earnings. The bankrupt was also paying £4 a week as alimony under an order of the Divorce Court. On an application by the trustee in bankruptcy, an order was made under s. 53 (2) of the Bankruptcy Act, 1883, that the bankrupt should pay £15 a week to the trustee.

D

E

**Held:** the payments to the bankrupt were either "salary" or "income" within the meaning of s. 53 (2) of the Act of 1883, but, the arrangement with the manager being valid, he was not "in the receipt of a salary or income" of £30 a week, but only of one of £6 a week, and no order ought to be made.

**Notes.** The Bankruptcy Act, 1883, has been repealed. For s. 53 (2), see now the Bankruptcy Act, 1914, s. 51 (2).

F

Considered: *Hollinshead v. Hazleton*, [1914–15] All E.R.Rep. 1117; *Re Garrett, Official Receiver and Trustee v. The Bankrupt*, [1930] All E.R.Rep. 139; *Re Landau, Ex parte The Trustee v. Bankrupt*, [1934] All E.R. 130; *Re Tennant's Application*, [1956] 2 All E.R. 753; *Re Cohen (a bankrupt)*, [1961] 1 All E.R. 646. Referred to: *Affleck v. Hammond*, [1912] 3 K.B. 162.

G

As to realisation of a bankrupt's property for distribution, see 2 HALSBURY'S LAWS (3rd Edn.) 453 et seq.; and for cases see 5 DIGEST (Repl.) 994 et seq. For the Bankruptcy Act, 1914, s. 51, see 2 HALSBURY'S STATUTES (2nd Edn.) 387.

Cases referred to:

H

- (1) *Re Hutton. Ex parte Benwell* (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 33 W.R. 242; sub nom. *Ex parte Hutton*, 1 T.L.R. 148, C.A.; 5 Digest (Repl.) 995, 8025.
- (2) *Re Brindle, Ex parte Brindle* (1887), 56 L.T. 498; 35 W.R. 596; 4 Morr. 104, D.C.; 5 Digest (Repl.) 994, 8021.

Also referred to in argument:

*Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest (Repl.) 995, 8023.

I

**Appeal** by the bankrupt against an order of Mr. Registrar LINKLATER, that the sum of £15 a week, part of the bankrupt's salary of £30 a week, should be paid by weekly instalments to the trustee in his bankruptcy, to be applied in payment of the bankrupt's debts.

The bankrupt was an actor, and, on June 4, 1891, he entered into an agreement in writing with Sir Augustus Harris, manager of a theatre, by which he was engaged to act at that theatre or elsewhere for two years, at a salary of £22 10s. a week when acting in London, and of £30 a week when acting in the provinces.

Payment was to be made weekly. By the agreement it was provided that, for any night on which the theatre should not be open, or if from illness or any other cause the bankrupt should not be able to perform on any night, a proportionate part of the week's salary should not be paid. On July 23, 1891, a receiving order was made against the bankrupt, and on Aug. 23 he was adjudicated a bankrupt. Some time subsequent to the date of the receiving order, the bankrupt made an arrangement with Sir Augustus Harris that the latter should buy up as many as possible of the bankrupt's debts, and should deduct £20 a week from the bankrupt's salary under the agreement in order to repay himself the amount expended in buying up the debts. At the time when the order now appealed against was made, that deduction of £20 a week was being made. The bankrupt was then acting in the provinces, and earning £30 a week under the agreement. He was also paying alimony of £4 a week to his wife, under an order of the Divorce Division of the High Court. On the application of the official receiver, as the trustee in bankruptcy, the registrar made the order now appealed against.

By the Bankruptcy Act, 1883, s. 53 (2):

"Where a bankrupt is in the receipt of a salary or income other than as aforesaid . . . the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary . . . or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

*Cooper Willis, Q.C.*, and *F. Cooper Willis* for the bankrupt.

*The Solicitor-General (Sir Edward Clarke, Q.C.)* and *Muir Mackenzie* for the trustee.

**LORD ESHER, M.R.**—Two points have been raised on this appeal, both of which involve questions as to the construction of provisions of the Bankruptcy Act, 1883. The first question is whether the money to be earned by the bankrupt, under his agreement with Sir Augustus Harris, assuming that he does earn it, is "salary or income" within the meaning of s. 53 (2) of the Act. It was money to be paid to the bankrupt under a contract made between himself, an actor, and a theatrical manager; it was a mutual contract for services to be rendered on the one side, and payment to be made on the other side, and was, therefore, a contract of service and payment for service. The money was to be paid weekly or monthly, and, under certain circumstances, there might be a forfeiture of, or deductions from, the stipulated sums, but otherwise they were to be paid at specified times.

These sums of money, being payable under a contract, do not come within the rule laid down in *Re Hutton, Ex parte Benwell* (1), for they are not "precarious" income, as in that case. Here, the bankrupt had a right to these payments, and the other party had a right to the services of the bankrupt. It was said that one could not make the bankrupt act, and so earn the payments under the contract, and, therefore, that the earnings were precarious and uncertain. But he was bound under a legal obligation to act, and the other party was under a legal obligation to pay him for acting. I think, therefore, that these earnings, even if they were not "salary," were yet "income" in the nature of salary, and within s. 53 (2) of the Act. It has been held that "income" in the ordinary general sense is not within that section, that is, income which is property, and which consequently passes to the trustee in bankruptcy; this, however, is not property which passes to the trustee, but is income in the nature of salary as explained in *Re Hutton, Ex parte Benwell* (1). This, then, is at least "income" if it is not "salary," and, on the construction of the Act, I agree with the case relating to a commercial traveller which has been cited, *Re Brindle, Ex parte Brindle* (2), and think that this case is similar to that one.

This order was made on the assumption that the bankrupt was "in receipt of a salary or income," which "salary or income" amounted to £30 a week, and the



- A** bankrupt was ordered to pay to the trustee £15 a week out of that £30. The question is whether he was "in receipt of" that £30 a week. I will assume that he was at first in receipt of that sum under the contract. As to that particular salary or income, which does not pass to the trustee in bankruptcy, the bankrupt is entitled to make any contract that he pleases without infringing on the bankruptcy laws, or on the right of his creditors, and he can deal with regard to that
- B** "salary or income" as he likes. The bankrupt and the theatrical manager did make an agreement with regard to that salary or income, to the effect that the manager should, under certain circumstances, deduct £20 a week therefrom. They had a right to make that agreement. If the sum of £20 is so deducted, can it be said that the bankrupt is "in receipt of" the whole £30 within the meaning of s. 53 (2)? I think not. Under the circumstances which have arisen, the
- C** theatrical manager does deduct, and the bankrupt does not receive, in law, truth, or fact, the sum of £20; the bankrupt only receives £10. Further than that, the law has taken away from him another £4 a week by an order of the Divorce Court to pay alimony, and, therefore, he only actually receives £6 a week for himself. Under these circumstances, ought the court to make an order deducting £15 a week from the bankrupt's earnings when he actually receives only £6 a week?
- D** It cannot, of course, do so. I think that the bankrupt's statement as to his financial position is true, and that we must act on that statement in this court, and not send the matter back to the registrar for further litigation.

I am of opinion that, under the circumstances of this case, no order ought to be made under s. 53 (2) of the Bankruptcy Act, 1883, and that this appeal must be allowed.

**E**

- BOWEN, L.J.**—I am of the same opinion. Two legal points have been raised. The first is whether the sums of money payable by the manager, under the written contract, to the bankrupt are "salary or income" within the meaning of s. 53 (2) of the Bankruptcy Act, 1883. I am of opinion, on looking at the contract, that it is either "salary," or, if not "salary," at any rate "income" within the meaning
- F** of that subsection. It seems to me that "salary" means a defined payment in money for services rendered under a contract to serve, which is to be computed with reference to time, and I think that this case falls within that definition. If, however, it is not "salary," it is certainly "income" as defined in *Re Hutton, Ex parte Benwell* (1), "income" which is ejusdem generis with "salary," that is to say, which possesses some of the specific qualities which "salary" possesses,
- G** though not necessarily the same in all respects. I am further of opinion that these payments, even if they were not to be computed by time, but were to be computed by recurrent events, as suggested, would yet be "income" if not "salary."

- The second point is that the bankrupt was not "in receipt of a salary or income" of £30 a week as the order which has been made assumes. It seems to me that
- H** a man is not "in receipt of a salary or income" when in fact he does not receive it and has no right to receive it, because, by his own contract, he has lost the right to receive it. The argument to the contrary is entirely fallacious, that it is in some way a fraud on the law of bankruptcy for a bankrupt to make such a contract. As LORD ESHER, M.R., has pointed out, the agreement between the manager and the bankrupt was a contract for personal services, to the benefit
- I** of which the creditors of a bankrupt are not entitled under the bankruptcy law; the creditors, in respect of such a contract, have only the right, under s. 53 (2), to obtain an order for payment to the trustee, for their benefit, of the earnings under such a contract. The bankrupt may make any contract he pleases with reference to his earnings under such an agreement, and the creditors cannot interfere. He has done so in this case, with the result that he actually receives only £10 a week under the agreement. Under those circumstances, how can it be said that the bankrupt was "in receipt of" the full salary or income when he had contracted with his employer that the salary should be reduced to £10 for

consideration? Section 53 cannot be made use of to displace any such contract as that, and cannot operate to set aside that contract in a roundabout way. As to the question of the discretion to make such an order, no judge would ever make an order on a man to pay away to one person money which he had already promised to pay to another. I agree that, in this case, no order at all ought to be made. A

**FRY, L.J.**—I regret that we have not before us all the written documents relating to the transactions between the bankrupt and his employer. With regard to the first question, whether these earnings of the bankrupt are “salary or income” within the meaning of s. 53 (2) of the Bankruptcy Act, 1883, I am of opinion that they are “salary,” and that, if not “salary,” they are clearly “income,” that is, income in the nature of salary. Whenever these four predicates as to a sum of money payable to a man are satisfied, that is, whenever it is for services rendered, payable under a contract, computed by time, and payable at a fixed time or times, I am inclined to think that it is a salary, even though the payment may be liable to be terminated, or to have deductions made from it. That definition does not include everything which is salary, but I think that everything which satisfies that definition is salary. B C

Then comes the second question. It is said that the bankrupt was “in receipt of” a salary or income of £30 a week. I read those words, “in receipt of,” in s. 53 (2), as meaning in the actual receipt of the money, and the question is whether the bankrupt was in actual receipt of the salary or income alleged. I think that he was not, but that he was “in receipt of” £10 a week only, out of which he has to pay £4 a week under the order to pay alimony. The argument on behalf of the trustee that a deduction made from the payment by the payer is not a deduction to be taken into account if the payee voluntarily permits it is entirely misconceived. In this case, however, there is nothing to show that there was not a valid agreement that the deduction should be made. In my opinion, s. 53 (2) only gives the court a discretion to make an order when the bankrupt is in actual receipt of a salary or income, and does not give the court any power to restrain the bankrupt in his dealings with his salary or income, or to order him to work. Under the circumstances of this case, I think that no order at all ought to have been made, and this order must be set aside. D E F

*Appeal allowed.*

Solicitors: *E. W. Garnett; Solicitor to the Board of Trade.*

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*] G

# CHURCHWARD v. CHURCHWARD AND HOLLIDAY (QUEEN'S PROCTOR INTERVENING)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), November 8, 9, 21, 1894]

[Reported [1895] P. 7; 64 L.J.P. 18; 71 L.T. 782; 43 W.R. 380; 11 T.L.R. 69; 11 R. 626]

*Divorce—Collusion—Initiation of suit procured, and its conduct provided for by agreement.*

If the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although a finger cannot be placed on any fact as having been falsely dealt with or withheld. When the parties to a suit are acting in complete concert, the court is deprived of that security for eliciting the whole truth which is afforded by the contest of opposing interests and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the court declines to be satisfied that it has before it all the material facts.

In a case where the court found that the initiation of the suit was procured, and its results as to costs and damages were settled, by agreement,

**Held:** there was collusion, and the petition must be dismissed.

*Divorce—Collusion—Petition dismissed as tainted with collusion—Competency of fresh suit free from collusion.*

The fact that a petition for divorce has been dismissed on the ground of collusion between the parties does not preclude the petitioner bringing a fresh suit free from the taint of collusion.

*Divorce—Collusion—Pecuniary consideration for suit.*

Per SIR FRANCIS JEUNE, P.: A divorce suit ought not to be made the stipulated price of any pecuniary consideration.

**Notes.** The Matrimonial Causes Acts, 1857 and 1860, mentioned in the judgment, *infra*, have been repealed: see now the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388), s. 4.

Distinguished: *Malley v. Malley* (1909), 25 T.L.R. 662; *Scott v. Scott*, [1913] P. 52. Considered: *Laidler v. Laidler*, [1920] All E.R.Rep. 174; *Beattie v. Beattie*, [1938] 2 All E.R. 74; *T. v. B. (formerly T.) and B.*, [1951] 2 All E.R. 183. Referred to: *Hyman v. Hyman*, *Hughes v. Hughes*, [1929] P. 1; *Sandler v. Sandler*, *Davies and Johnstone*, [1934] All E.R.Rep. 213; *Emanuel v. Emanuel*, [1945] 2 All E. R. 494; *Lowndes v. Lowndes*, [1950] 1 All E.R. 999.

As to collusion, see 12 HALSBURY'S LAWS (3rd Edn.) 300–302; and for cases see 27 DIGEST (Repl.) 388–395.

Cases referred to:

- (1) *Chisim's Case*, Macqueen's Appellate Jurisdiction of House of Lords, 582.
- (2) *Crewe v. Crewe* (1800), 3 Hag. Ecc. 123; 162 E.R. 1102; 27 Digest (Repl.) 389, 3220.
- (3) *Shaw v. Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, 1081.
- (4) *Hunt v. Hunt and Wright (Queen's Proctor intervening)* (1877), 47 L.J.P. 22; 39 L.T. 45; 27 Digest (Repl.) 393, 3240.
- (5) *Bacon v. Bacon and Ashby (Queen's Proctor intervening)* (1877), 25 W.R. 560; 27 Digest (Repl.) 392, 3233.



- (6) *Butler v. Butler, Butler v. Butler and Burnham* (1890), 15 P.D. 66; 59 A  
L.J.P. 25; 62 L.T. 344; 38 W.R. 390; 6 T.L.R. 148, C.A.; 27 Digest (Repl.)  
393, 3241.
- (7) *Rogers v. Rogers (Queen's Proctor showing cause)*, [1894] P. 161; 63 L.J.P.  
97; 70 L.T. 699; 6 R. 650; 27 Digest (Repl.) 590, 5508.
- (8) *Edwards' Case*, Macqueen's Appellate Jurisdiction of House of Lords, 583.
- (9) *George's Case*, Macqueen's Jurisdiction of House of Lords, 661. B
- (10) *Midgley (falsely called Wood) v. Wood* (1860), 30 L.J.P.M. & A. 57; 27  
Digest (Repl.) 394, 3246.
- (11) *Lloyd v. Lloyd and Chichester* (1859), Sea. & Sm. 39; 1 Sw. & Tr. 567; 30  
L.J.P.M. & A. 97; 1 L.T. 335; 164 E.R. 862; 27 Digest (Repl.) 389, 3221.
- (12) *Jessop v. Jessop* (1861), 2 Sw. & Tr. 301; 30 L.J.P.M. & A. 193; 4 L.T. 308;  
7 Jur.N.S. 609; 9 W.R. 640; 164 E.R. 1011; 27 Digest (Repl.) 393, 3237. C
- (13) *Gethin v. Gethin (Queen's Proctor intervening)* (1861), 31 L.J.P.M. & A. 43;  
27 Digest (Repl.) 393, 3235.
- (14) *Harris v. Harris and Lambert* (1862), 4 Sw. & Tr. 232; 31 L.J.P.M. & A.  
160; 164 E.R. 1505; 27 Digest (Repl.) 395, 3252.
- (15) *Barnes v. Barnes and Grimwade (Queen's Proctor intervening)* (1867),  
L.R. 1 P. & D. 505; 37 L.J.P. & M. 4; 17 L.T. 268; 16 W.R. 281; 27 D  
Digest (Repl.) 394, 3243.

**Intervention** by the Queen's Proctor, on the ground of collusion, in a suit for divorce brought by the husband on the ground of his wife's adultery with the co-respondent.

The husband and wife entered into an agreement by which, the wife having committed adultery with the co-respondent, the husband undertook that he would take proceedings for divorce, but would not claim damages from the co-respondent, while the wife undertook not to defend the suit, to pay the costs thereof, and to settle a sum of money on the child of the marriage. The agreement having been disclosed to the court, the Queen's Proctor intervened and submitted that it was collusive and that the petition should be dismissed. E

*Inderwick, Q.C.*, and *Guy Stephenson* for the Queen's Proctor.

*Lawson Walton, Q.C.*, and *R. H. Pritchard* for the petitioner. F

*Cur. adv. vult.*

Nov. 21, 1894. **SIR FRANCIS JEUNE, P.**, read the following judgment. G  
From the evidence before me I draw the following conclusions: (i) that the respondent and co-respondent are guilty of adultery; (ii) that the petitioner did not connive at such adultery; (iii) that there was no collusion to present to the court false facts in proof of adultery; (iv) that the petition was presented in accordance with, and in consequence of, the agreement come to between the parties. By this, I mean that the petitioner would have been content with a separation, could he so have obtained the pecuniary settlement he sought; and he would not have presented the petition, if he could not have secured himself against the risk of diverting his wife's property from his child. It was strongly urged on me that the petitioner would, in any case, have presented a petition for a divorce, and that the unwillingness exhibited to the respondent's solicitor was a justifiable stratagem to secure a favourable settlement. I cannot accept this view; (v) that it was, in fact, part of the agreement that the wife and co-respondent should not defend the suit; (vi) that it was not shown that there were any specific facts material to defence or recrimination which might have been brought forward by the wife. But it appears to me impossible to say that it was proved that there were no material facts which she could have brought forward by way of defence or recrimination. The petitioner, the petitioner's solicitors, and the respondent's solicitors denied that they knew of any such facts, but such statements do not appear to be conclusive on the point. H I

A The question is whether, under these circumstances, the petitioner should be held disentitled to a divorce by reason of collusion with the respondent. It was contended for the petitioner that the collusion necessary to be shown was that described in the latter part of s. 7 of the Matrimonial Causes Act, 1860, as "collusion for the purpose of obtaining a divorce contrary to the justice of the case," and his counsel drew a distinction between such collusion and that referred to in s. 30 of the Act of 1857. It is, however, to be observed that the intervention of the Queen's Proctor is not under the latter, but under the earlier, part of s. 7, where the phrase is simply "collusion." But the point is not very material, because, as an alternative, it was urged—and this is, indeed, the real gist of his argument—that all collusion meant "collusion for the purpose of obtaining a divorce contrary to the justice of the case," in a sense, presently to be mentioned, which counsel ascribed to the words. Whatever be the meaning of collusion, I cannot doubt that it bears the same meaning in s. 30 of the Act of 1857 and in both parts of s. 7 of the Act of 1860. It seems to be impossible to suppose that a totally different sense is to be assigned to the collusion which vitiates a claim for divorce if discovered by the judge at the trial before a decree nisi is pronounced, and that brought to his knowledge by the Queen's Proctor before or after such decree.

D The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it is urged that collusion is agreement, either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the court granting a divorce. It was insisted that, in a suit against a wife, unless it be shown that the petitioner's charge of adultery was, in fact, unfounded, or was supported by false evidence, in that material facts in support of defence or recrimination were concealed, there was no collusion. On the other hand, it was maintained that collusion has a wider scope; and that if there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and, a fortiori, if such agreement contain terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shown that adultery was not, in fact, committed or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shown to have been concealed.

F There would seem, therefore, to be four questions that may be asked. First, it is collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms of its conduct, by agreement, though there be no express stipulation that there shall be no defence and no specific ground for suspicion that a false case is put forward or material facts concealed? Secondly, does the addition of a term that there shall be no defence render the agreement collusive? Thirdly, is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed? Or, fourthly, is there collusion only when it is shown that, in consequence of such agreement, false matter has been introduced into the case or material facts suppressed? In support of the more limited view of the nature of collusion, reliance is placed on definitions which, at various times, and with more or less authority, have been given of collusion. MR. MACQUEEN in his book on MARRIAGE AND DIVORCE (2nd Edn.), p. 67, summarises the matter thus:

I "According to the authorities there appear to be two kinds of collusion—first, where the parties put forward false facts to form the basis of the judgment; secondly, where the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted to form the basis of the judgment."

This definition is, however, obviously incomplete in omitting the suppression of material facts of defence or recrimination as one kind of collusion, and it, there-

fore, shuts out the further consideration which arises—if it be admitted that such suppression does constitute collusion—namely, whether it must be shown that material facts were, in fact, concealed. It is remarkable that the learned author goes on to mention *Chisim's Case* (1) in the House of Lords, without apparently noticing, as I shall presently remark, what an extension of collusion that case appears to afford.

In *Crewe v. Crewe* (2) LORD STOWELL said (3 Hag. Ecc. at pp. 129, 130, 131):

"Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, an act of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorise parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law, therefore, requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who, alone, may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it. She may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncontrolled or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it. It has often been said, and with peculiar injustice, that, although the original adultery was not collusive, yet the proceedings in these courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law: the canon [i.e., the 105th canon] directs that a divorce shall not go upon the mere confession of the party; the wife, therefore, must give a negative issue (indeed, the court is almost bound to reject an affirmative issue, since it is necessary, by the canon, that evidence should be produced); she must deny her guilt, and her prayer must be according to her denial. But this is mere style and form. If the court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is whether the husband has received a real injury, and bona fide seeks relief."

I think that in this passage LORD STOWELL was considering, as indeed he says, only the view of the matter applicable to the case before him. It is, no doubt, collusion where there is an agreement between the parties for one to commit, or appear to commit, an act of adultery, in order that the other may obtain a remedy at law, as for a real injury. But, there again, is omitted, because in that case not relevant, the kind of collusion which results from suppression. It is to be observed, however, how carefully LORD STOWELL limits the case in which he excludes collusion to that of a mere desire of both parties to obtain a separation, and does not deal with the results of such a common desire leading to an agreement relative to the suit, still less those of the desire on the part of the husband being induced by extraneous considerations offered by the wife; and it is to be further observed, that LORD STOWELL insists that the husband must have received a real and bona fide injury.

This leaves open the question: In what cases is relief sought bona fide? Great reliance was placed by counsel for the petitioner on the definitions of collusion



A given by DR. LUSHINGTON and the Lord Advocate for Scotland before the Select Committee of the House of Lords in 1844, appended to the report of the Royal Commission appointed in 1850. I, therefore, refer to them, though they are extrajudicial opinions. DR. LUSHINGTON said:

B "190. A question was put to me as to collusion. I beg leave to observe that, in the sense in which it is used in Doctors' Commons, it does not mean even consent or facility, where there is just cause for the husband prosecuting the suit, or vice versa; but it is permitting a false case to be substantiated, or keeping back a just defence. It may be a question whether this rule of collusion extends to cases where recrimination, though practicable, is not resorted to. 191. Do you mean, by saying 'where recrimination is practicable and is not resorted to,' that the collusion consists in the abstaining from recrimination?—Yes; but I do not say that so doing has been deemed to be collusion in the legal sense of the term. . . . 194. Then, do you understand that wherever there is a case where the fact of adultery, cruelty, and so forth exists, provided that the fact is not got up for the purpose of the proceeding, it would not be a case of collusion, though the parties were in collusion as to the proceeding in court?—Certainly, we should not call it collusion; on the contrary, the expressions which have fallen from the learned judges have been these, and I think they are founded on truth: 'If the wife has already committed the greatest possible offence against the husband by violating his bed, why should she add to it by increasing the expense of the remedy?' 195. Are you not aware that, to a certain degree, the same principle holds with divorce Bills, for that, if the wife does not make any defence, which is the case with a great majority of those Bills, it is reckoned no proof of collusion?—Certainly. 196. And so, if the paramour makes no defence to the action, and lets judgment go by default, it is no proof of collusion?—Certainly."

F It is, I think, obvious that DR. LUSHINGTON chiefly desired to insist that the mere abstention from defence did not constitute collusion, and that the case was not presented to his mind of an agreement between the parties, providing for the bringing of a suit and for the terms on which it was to be conducted, including a stipulation that there should be no defence, and of the inference to be drawn from such an agreement.

The following questions were put to the Lord Advocate for Scotland, and answers given by him:

G "93. Would it be collusion if the party had actually committed adultery without any collusion, and if then the other party and the adulterous party were colluding together to get a divorce?—That is, I believe, an interpretation pretty generally put upon it. My own impression is that such is not the true meaning of collusion. I mean, that if a just cause for a divorce exists without collusion, and, that the party wronged seeks to have the remedy of divorce, and is entitled to it, I doubt whether the circumstance that the other party has no objection, or is well pleased, would be such collusion as to preclude the remedy. 94. So that, if adultery had really been committed, not for the purpose of getting a divorce, but independently of that, it would be no collusion such as to bar the remedy if the parties entered into a sort of plan for getting a divorce grounded upon that adultery?—I think that, according to the original meaning of collusion, it would not be so; but, if you were to examine them very strictly as to whether they had any collusion in bringing the suit, what would be the effect of the parties admitting that they knew of the suit being intended to be brought, and that they had no objection to it, but that, on the contrary, they had allowed the writ to be served, and dispensed with the time and afforded other facilities, I cannot say."

It is clear that the Lord Advocate expressly abstained from pronouncing an opinion on circumstances in some respects similar to those in the present case. It should,

however, be added that a little later he expressed the view that the mere circumstance of people going to Scotland to be divorced, as they might go to be married, would not constitute a divorce. It is not necessary to say more on that point than that the mere agreement to do what is necessary to give jurisdiction falls far short of the agreement in this case. A

Counsel for the petitioner further relied on the expressions used by LORD CHELMSFORD in *Shaw v. Gould* (3), which are, no doubt, of great weight, though they were not necessary for the decision of the case. They were as follows (L.R. 3 H.L. at pp. 77, 78): B

“But whatever may be ultimately entertained as to the extent of the power of the Scottish courts to dissolve English marriages, the validity of the divorce of the appellants’ mother from Buxton cannot be admitted, if it was obtained by concert or collusion. It was argued for the appellants that the only collusion which can affect the validity of a divorce is where there are concert and connivance in the acts upon which the decree proceeds, and that, if a just cause of divorce exists without collusion, any arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable. I quite agree that if the agreement in this case had been that Buxton should bring himself within the reach of the Scottish court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon attaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should ‘by himself, or by any one through him, give information which should be prejudicial to the divorce.’ Such an agreement as this appears to me to come within the very words of the oath de calumnia, which was required to be taken by Mrs. Buxton, by which she swore ‘that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him; nor did she know, believe, or suspect that there had been any concert or agreement between any other person on her behalf and the said defender or any other person on his behalf, with the view or for the purpose of obtaining such divorce.’ It is impossible to doubt that the disclosure to the court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to receive if he had given information about it.” C

It would appear, therefore, to have been LORD CHELMSFORD’s opinion—first, that the agreement by a respondent to come within Scottish jurisdiction for the purpose of a divorce being obtained against him, although accompanied by a stipulation that he should receive a certain sum when the divorce was obtained, did not constitute collusion; and, secondly, that the addition of a term that he should forfeit the money if he gave information prejudicial to the divorce did amount to collusion, because the disclosure to the court of the agreement might have been prejudicial to the divorce. LORD WESTBURY also (*ibid.* at p. 87) was of opinion that the decree was collusively obtained, but did not state on what grounds that opinion was based. An agreement to come within the jurisdiction in order that the suit might be brought would, no doubt, not constitute collusion. I venture, with all respect, to think that an agreement that the respondent should be paid if the suit succeeded was at least open to considerable doubt, and this must, it appears to me, have, in truth, been LORD CHELMSFORD’s view, because he thought D

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A it collusion to agree, in effect, to conceal those stipulations, as their disclosure might be prejudicial to the divorce. But is not the agreement in this case substantially of the same character as that which LORD CHELMSFORD and LORD WESTBURY condemned? Is not an agreement not to defend tantamount in effect to an agreement not to disclose anything prejudicial to the divorce? Although the present petitioner prudently and properly revealed his agreement with the respondent, it is clear that the respondent placed it, by agreement, out of her power to make such a disclosure, and, if so, that agreement became, like the agreement in *Shaw v. Gould* (3), collusion.

C It was pressed strongly on me that, in *Hunt v. Hunt and Wright* (*Queen's Proctor intervening*) (4), LORD HANNEN lent the weight of his authority to the narrower view of collusion. In that case it was alleged that the petitioner had been guilty of conduct conducing to his wife's adultery, and that he induced her to refrain from defending the suit by promising not to press for costs against the co-respondent. It would appear that the jury thought that these allegations were well founded. If so, there was, beyond question, a collusive agreement to conceal facts not only material but conclusive. No doubt, however, the President is reported to have said, in summing-up to the jury (47 L.J.P. at p. 22):

D "Now, collusion is this—if a party to a suit of this kind, by agreement with the others, procures the withdrawal from the notice of the court of facts which are relevant to the charge which is imputed to him or her, that is collusion. . . . Were these facts that were pertinent and material, and such as ought properly to have been submitted to a court or jury to enable them to determine one or other of the charges against the petitioner—of course that will depend on the answer you give to the first two questions I here put to you—namely, was his conduct such as conducing to his wife's adultery? Did he habitually use foul and indecent language to her?"

F It should, I think, be added that, in suggesting the cases in which there would, or would not, be collusion, LORD HANNEN appears to have put, as the test, whether the husband did, or did not, feel that the motives for the concealment which he stipulated for were relevant to the charge made against him. It would, no doubt, appear from portions of his summing-up that LORD HANNEN regarded proof that material, nay, even decisive, facts were concealed by agreement, as necessary to make out collusion. But it must be remembered that, being addressed to a jury, it was not necessary, or indeed desirable, for him to do more than state as much law as covered the case in hand; and I think that the view of LORD HANNEN, expressed in his summing-up, ought not to be put higher than this, that, where the main evidence of collusion is an agreement not to defend, in order to find collusion you must see that it was intended to conceal material facts. It would appear, from *Bacon v. Bacon and Ashby* (*Queen's Proctor intervening*) (5), decided shortly before *Hunt v. Hunt and Wright* (*Queen's Proctor intervening*) (4), that LORD HANNEN considered that agreement between the parties to withhold relevant evidence was one form only of collusion; and also that the evidence need be relevant only, and not decisive. The latter point is now established by the decision of the Court of Appeal in *Butler v. Butler* (6), which I recently followed in *Rogers v. Rogers* (*Queen's Proctor showing cause*) (7). Giving, therefore, full weight to *Hunt v. Hunt and Wright* (*Queen's Proctor intervening*) (4), it does not appear to me to conclude a case such as the present, where, apart from any agreement not to defend, there is so much more.

I It is now necessary to consider the authorities relied on by the Queen's Proctor. They begin with decisions of the House of Lords before the Act of 1857. It was contended before me that these decisions are not binding on this court. I am clear, however, that they are authorities of the greatest weight. In *Shaw v. Gould* (3) LORD WESTBURY said (L.R. 3 H.L. at p. 84):

"In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for



incestuous adultery and other crimes by the husband; but, until the recent Divorce Act, this law was administered by Parliament alone, and although the decision of Parliament was in the form of an Act or privilege, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative, act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament were well known, and, in fact, this House acted as a court of justice."

It may be added that those decisions of the House of Lords have been repeatedly recognised as authorities, and, notably so, by this court in a case I shall presently mention. By its Standing Order of Mar. 28, 1798, No. 142 (MACQUEEN ON THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS, 528, 791), the House of Lords imposed on itself the duty of inquiring

"whether there has or has not been any collusion, directly or indirectly, on his (the petitioner's) part, relative to any act of adultery that may have been committed by his wife; or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentence of divorce had in the ecclesiastical court at his suit; or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife. . . ."

There can, I think, be no doubt that the provisions as to collusion in the Matrimonial Causes Act, 1857, were intended to continue the practice of the House of Lords in divorce cases. It is, therefore, all important to see what the House of Lords considered collusion to be. In *Chisim's Case* (1) it appeared that the costs of the plaintiff in the action for crim. con. were paid by the respondent's father, and also that in the ecclesiastical court no witnesses were called for the wife. The report states:

"The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained."

It cannot possibly be said that in that case it was shown that any specific material facts were concealed; and it is expressly stated that the adultery was proved. It seems to me, therefore, that no collusion is possible, except that the House of Lords considered collusion to be made out from the fact that the parties in the conduct of the proceedings were acting in concert. No doubt the inference was that where such concert existed it was impossible to be sure that all the truth was presented; but the point is, that proof of concert in the conduct of the proceedings was held sufficient to engender such a doubt.

In *Edwards' Case* (8) the report states:

"The evidence of adultery in this case was clear; but a bond signed by Captain Edwards was produced, dated Dec. 10, 1778, securing payment of £45 a year to his wife; who, on the other hand, 'conditioned, on her part, that she and all those who were or might become concerned for her in her defence to the said Thomas Edwards obtaining a divorce would not give any unnecessary delay in the proceeding thereof, but in all things conform herself and themselves so as to bring the said suit and proceedings to as speedy an issue as possible; yet, nevertheless, not so as to weaken any real defence that the said Judith might be able to make to the said proceedings or the said Thomas Edwards obtaining his said divorce.'"

The Bill, after counsel had been heard as to the effect of this document, was rejected; and it was so treated, therefore, merely as proof that the parties had agreed there should be no defence, and this single fact was considered to establish

A collusion. In *George's Case* (9) there were circumstances connected with a prior separation between the parties as to which the House was clearly not satisfied; but, besides this, great stress was laid on the fact that there had been a contract between the parties with respect to the verdict in the common law court. Beyond doubt this fact was considered of great weight; but it would have been of no weight had it not, in the judgment of the House, by itself gone far, if not the whole way, to establish collusion.

I now turn to the decisions in this court. In *Midgley (falsely called Wood) v. Wood* (10), which was a case of nullity by reason of the undue publication of banns, SIR CRESSWELL CRESSWELL expressed his opinion that in a suit for dissolution by reason of adultery it would be collusion if the parties were to concur in getting up evidence of the case, though the case were a true one. The learned Judge Ordinary suggested that there might be a distinction in this respect in the case of a suit for nullity, where both parties might institute the suit on the same grounds; and this appears to me to show that the view of SIR CRESSWELL CRESSWELL was that collusion existed where one party, contrary to his or her apparent interest, was found acting in concert with the other, in matters material to the suit.

*Lloyd v. Lloyd and Chichester* (11), decided by the full court, consisting of CRESSWELL, J.O., WIGHTMAN, J., and BYLES, J., presents facts bearing very close resemblance to those in the present case. The adultery of the respondent, who had left her husband and was living with the co-respondent, was unquestionable. The court held that it did not find that the husband connived at, or was accessory to, the adultery; nor was any matrimonial misconduct imputed to him. But it was discovered by the court that the petitioner had received money from the wife's father to induce him to proceed with the suit (there being ground to think that he fancied that a dissolution of the marriage would cause him to lose a reversionary interest under a settlement); that his costs in the action for crim. con. were provided by the wife's father; that neither costs nor damages were to be demanded against the co-respondent; and that the wife's father and the co-respondent assisted in getting up the evidence. The court, referring to *Chisim's Case* (1), held that the appearance of collusion was too gross and palpable for any court to overlook it. The material elements in that case, namely, that the petitioner received consideration to prosecute the suit, and had his costs secured, are present here. It is true that, in that case, the parties acted together to get up the evidence, whereas, in this case, that was not done because it was unnecessary. But the material point is that, in that case, no more than in this, was it suggested that any false facts were put forward, or any material facts concealed. The utmost that can be said is that the court had before it parties, not independent, but acting throughout in concert; and the principle to be gathered from that case appears to be that, under such circumstances, the court is forced to believe that it is being misled, or, at any rate, that it can feel no assurance that it is not.

In the face of these two cases, I think it impossible to say that in *Jessop v. Jessop* (12), decided shortly after the two last-mentioned cases, in 1861, SIR CRESSWELL CRESSWELL intended to limit collusion to cases in which the agreement was to keep back evidence of a good answer, or to set up a false case; nor do I think that the words he used in his summing-up to the jury bear such a meaning. In *Gethin v. Gethin (Queen's Proctor intervening)* (13), decided later in 1861, I am inclined to think that SIR CRESSWELL CRESSWELL intended to express an opinion that, if it were shown that a husband who was respondent withdrew charges against his wife and made no defence, not acting independently but in pursuance of an agreement, that would constitute collusion. It is true, however, that in that case there was ground for suggesting that the wife had been guilty of adultery, though the jury found she had not; but it cannot be said that there was any concealment of the case of adultery, because the husband had, in fact, previously filed and abandoned a petition. But I am not sure that the case leads to any clear conclusion; neither do I attach much importance to *Harris v. Harris and Lambert* (14), in which it appeared that the respondent had assisted the petitioner's case by

facilitating proof of identification, and SIR CRESSWELL CRESSWELL said (31 A L.J.P.M. & A. at p. 160) :

"Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion."

I will only say that I do not think that that case in any way militates against the view more fully expressed by SIR CRESSWELL CRESSWELL in other cases I have mentioned. Probably the learned judge thought that the concert between the parties was not upon a matter sufficiently material to the suit to amount to collusion.

*Barnes v. Barnes and Grimwade (Queen's Proctor intervening)* (15), decided in 1867 by LORD PENZANCE, is not so strong an authority as *Lloyd v. Lloyd and Chichester* (11), because in *Barnes v. Barnes and Grimwade (Queen's Proctor intervening)* (15), the husband induced his wife, for a consideration, not to oppose; but there were, no doubt, some facts brought to light which, if disclosed to the court, might have induced it to refuse the decree. Still, the words of LORD PENZANCE appear to me to indicate that his view of collusion did not differ from that of SIR CRESSWELL CRESSWELL. His Lordship said (L.R. 1 P. & D. at pp. 507, 508) :

"I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation, to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery. With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance while a suit is pending, in order to save the expense of an application to the court for alimony. If that evidence stood alone I should hold that it is not sufficient to prove the charge of collusion; but the evidence goes much further. It amounted in substance to this—that the petitioner said to the respondent, 'If you do not oppose, I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.' If that is not collusion I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not, as far as her own adultery is concerned. But if she had brought to the knowledge of the court the facts which have now been proved, as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the court would have granted a decree. For these reasons, I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established. The petition must, therefore, be dismissed."

That judgment, taken as a whole, seems to me to show that from the agreement not to defend, if it had stood alone, he would have inferred collusion.

On the whole, it appears to me that the authority of the House of Lords (as shown by its practice) and of SIR CRESSWELL CRESSWELL, is decidedly in favour of the proposition that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with or withheld; and I do not think that the authority of LORD STOWELL, DR. LUSHINGTON, LORD PENZANCE, or SIR JAMES HANNEN can be invoked in favour of a contrary opinion. It must always be remembered that, in matrimonial proceedings, this court has imposed upon it, by its previous practice and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the



A petitioner's claim. I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decisions of the House of Lords and of the Matrimonial Causes Acts of 1857 and 1860 may not be that, when the parties to a suit are acting in complete concert, the court is deprived of that security for eliciting the whole truth which is afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in s. 7 of the Act of 1860, "collusion for obtaining a divorce contrary to the justice of the case," may be understood to indicate that, by such an agreement, justice is imperilled; but, not to require that it must be affirmatively shown that, having regard only to the matrimonial conduct of the parties, justice will not be, or has not been, done. No doubt the protection to the court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the court decline to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem et duellum miscuit*. He appears before the court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, I he raises more than a doubt whether, in the words of LORD STOWELL, he has received a real injury and *bona fide* seeks relief.

In the present case, being of opinion, as I have said, that the initiation of the suit was procured, and its results as to costs and damages were settled, by agreement, I must hold that there was collusion. If it be necessary, in order to constitute collusion, that there should be a compact not to defend, that also was present in this instance. Further, if it be needful that suspicion of the concealment of some facts be entertained, I entertain suspicion (I do not wish to say more) as to the facts in regard to the husband's conduct, from the expressions used by the wife in her letters. But I do not think it has been, nor, in my opinion, need it be shown, that any specific facts of a material character exist which might have been brought before the court. I was much pressed by counsel with the hardship on the petitioner of dismissing his petition and of rendering the agreement of no effect. But I cannot assent to that view. As regards freedom from an adulterous wife, if the petitioner desires that, for its own sake, I see nothing to prevent his filing a petition without agreement with her. As regards the obtaining of pecuniary advantage, for himself or his child, I must say that a divorce suit ought not, in my judgment, to be made the stipulated price of any pecuniary consideration.

H The intervention of the Queen's Proctor must, therefore, succeed, but there will be no order as to costs. I was pressed to say that the disclosure of the agreement at the trial negatived collusion. I cannot follow that suggestion. Confession is not a defence; nor is disclosure a proof of innocence. But I think that the conduct of the petitioner, in making this disclosure, entitles him to favourable consideration as to costs.

*Decree nisi rescinded.*

Solicitors: *King, Wigg & Co.; Queen's Proctor.*

[*Reported by H. DURLEY GRAZEBROOK, ESQ., Barrister-at-Law.*]

## ARROW SHIPPING CO., LTD. v. TYNE IMPROVEMENT COMMISSIONERS. THE CRYSTAL

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten and Lord Morris), March 19, 20, June 22, 1894]

[Reported [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258]

*Shipping—Wreck—Removal—Liability of shipowner—Abandonment of wreck before removal by harbour authority—"Removal"—Dispersal by explosives—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict., c. 27), s. 56.*

By s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847: "The harbour master may remove any wreck or other obstruction to the harbour . . . or the approaches to the same . . . and the expense of removing any such wreck [or] obstruction . . . shall be repaid by the owner of the same. . . ."

On Jan. 7, 1892, without any negligence on the part of the appellants or their servants, a ship owned by the appellants, as the result of a collision, was sunk within the approaches to the respondents' harbour in such a position as to form an obstruction within s. 56. On or about Jan. 9 they informed the respondents that they had abandoned the vessel as a wreck in the open sea. Subsequently, the respondents dispersed the wreck by explosives, and then brought an action against the appellants to recover the expense so incurred less a sum received for the sale of salvaged cargo and materials.

**Held:** the "owner" of a wreck within s. 56 was the person to whom the wreck belonged, not at the time the obstruction was created, but at the time when the harbour master exercised his statutory powers of removal and the expense was incurred; before the latter date the appellants had declared that they had abandoned all rights of property, and given up all interest, in the vessel, without any intention of resuming possession or ownership; and, therefore, the respondents' action failed.

Per LORD MACNAGHTEN: To entitle the harbour master to repayment under s. 56 it is incumbent on him to remove the obstruction in such a manner that at the conclusion of the operation it is substantially in the same condition as it was at the commencement, or, at any rate, with some regard to the interest of the owner. To disperse a wreck by explosives is not the sort of removal which is contemplated by the section. Under it the harbour master is not given power to destroy. In the present case there was, not removal, but total destruction.

*Eglinton v. Norman* (1) (1877), 46 L.J.Q.B. 557, overruled.

**Notes.** Distinguished: *Howard Smith & Sons, Ltd. v. Wilson*, [1896] A.C. 579. Considered: *Barracrough v. Brown*, [1895-9] All E.R.Rep. 239; *The Ella*, [1915] P. 111; *Boston Corpn. v. Fenwick & Co.*, [1923] All E.R.Rep. 583; *Great Western Rail. Co. v. Mostyn (Owners)*, *The Mostyn*, [1927] All E.R.Rep. 113; *Dee Conservancy Board v. McConnell*, [1928] All E.R.Rep. 554. Referred to: *The Wallsend*, [1907] P. 302; *Sheppy Glue and Chemical Works v. Medway River Conservators* (1926), 24 L.G.R. 457; *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K.B. 672; *Ruislip-Northwood U.D.C. v. Lee* (1931), 145 L.T. 208; *J. & J. Makin, Ltd. v. London and North Eastern Rail. Co.* (1943), 168 L.T. 394; *Stonedale No. 1 (Owners) v. Manchester Ship Canal Co.*, [1954] 2 All E.R. 170.

As to the removal of wrecks, see 35 HALSBURY'S LAWS (3rd Edn.) 728-731; and for cases see 41 DIGEST 821-823. For the Harbours, Docks, and Piers Clauses Act, 1847, see 23 HALSBURY'S STATUTES (2nd Edn.) 1117.

Cases referred to:

(1) *Eglinton v. Norman* (1877), 46 L.J.Q.B. 557; 36 L.T. 888; 25 W.R. 656; 3 Asp.M.L.C. 471, C.A.; 41 Digest 821, 6806.

- A (2) *River Wear Comrs. v. Adamson* (1876), 1 Q.B. 546; 46 L.J.Q.B. 83; 35 L.T. 118; 24 W.R. 872, C.A.; affirmed (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 41 Digest 974, 8643.
- (3) *The Edith* (1883), 11 L.R.Ir. 270; 41 Digest 822, l.
- (4) *Brown v. Mallett* (1848), 5 C.B. 599; 17 L.J.C.P. 227; 11 L.T.O.S. 64; 12 Jur. 204; 136 E.R. 1013; 41 Digest 790, 6501.
- B (5) *White v. Crisp* (1854), 10 Exch. 312; 2 C.L.R. 1215; 23 L.J.Ex. 317; 23 L.T.O.S. 300; 2 W.R. 624; 156 E.R. 463; 41 Digest 790, 6499.
- (6) *Utopia (Owners) v. Primula (Owners), The Utopia*, [1893] A.C. 492; 62 L.J.P.C. 118; 70 L.T. 47; 9 T.L.R. 542; 7 Asp.M.L.C. 408; 1 R. 394, P.C.; 41 Digest 820, 6794.
- C (7) *R. v. Watts* (1798), 2 Esp. 675; 170 E.R. 493; 44 Digest 124, 1001.
- (8) *Eastern Counties and London and Blackwall Rail. Cos. v. Marriage* (1860), 9 H.L.Cas. 32; 31 L.J.Ex. 73; 11 E.R. 639, H.L.; 42 Digest 606, 61.

Also referred to in argument:

- The Douglas* (1882), 7 P.D. 151; 51 L.J.P. 89; 47 L.T. 502; 5 Asp.M.L.C. 15, C.A.; 41 Digest 790, 6504.
- D *Underhill v. Ellicombe* (1825), McCle. & Yo. 450; 148 E.R. 489; 42 Digest 755, 1803.
- Stevens v. Evans* (1761), 2 Burr. 1152; 1 Wm. Bl. 284; 97 E.R. 761; 42 Digest 750, 1736.
- Shepherd v. Hills* (1855), 11 Exch. 55; 25 L.J.Ex. 6; 156 E.R. 743; 42 Digest 758, 1846.
- E *Randal v. Cockram* (1748), 1 Ves. Sen. 98; 27 E.R. 916, L.C.; 29 Digest (Repl.) 339, 2581.
- The North Britain*, [1894] P. 77; 10 T.L.R. 104; sub nom. *The North Britain, Roberts & Sons v. Ocean Marine Insurance Co.*, 63 L.J.P. 33; 70 L.T. 210; 42 W.R. 243; 7 Asp.M.L.C. 413; 6 R. 673, C.A.; 29 Digest (Repl.) 249, 1864.
- F *Prehn v. Bailey, The Ettrick* (1881), 6 P.D. 127; 45 L.T. 399; 4 Asp.M.L.C. 465, C.A.; 41 Digest 896, 7881.

**Appeal** by the defendants in the action from a decision of the Court of Appeal (LINDLEY, A. L. SMITH and DAVEY, L.JJ.), affirming a decision of GORELL BARNES, J., in favour of the plaintiffs.

- G *Finlay, Q.C.*, and *Scrutton* for the appellants.  
*Sir Walter Phillimore* and *Butler Aspinall* for the respondents.

Their Lordships took time for consideration.

June 22, 1894. The following opinions were read.

- H **LORD HERSCHELL, L.C.**—The question raised by this appeal is one of considerable importance. The facts are few and not in dispute. The vessel *Crystal*, of which the appellants were registered owners, was, on Jan. 7, 1892, sunk in the German Ocean below low-water mark, 400 yards east of the end of the South Pier at the mouth of the river Tyne. The disaster was the result of a collision, but there is no evidence how this was caused, or that any blame was to be attributed to the owners of the *Crystal* or their servants. On the morning of Jan. 8 Mr. Dent, the managing owner of the *Crystal*, gave notice to Mr. Scorfield, the representative of an association in which the vessel was largely insured, that he would have to take possession of her as the ship was past redemption; to which Mr. Scorfield seems to have made no objection. The vessel, in the position in which she lay, was both an obstruction to the approaches to the port and harbour of Newcastle-upon-Tyne and a danger to the navigation thereof. The Tyne Commissioners, accordingly, gave notice to the appellants that they would remove the obstruction, destroying it if necessary, and in the meantime would buoy and light it. The



commissioners acted upon this notice and destroyed and dispersed the obstruction A  
by means of explosives.

The present action was then brought to recover the expenses thus incurred beyond what was recouped by the sale of the materials. The respondent's claim, in so far as it relates to the expense of removing the wreck, is based on s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, which is in these terms :

"The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

The courts below have followed the decision of the Court of Appeal in *Eglinton v. Norman* (1), where it was held that the section I have just quoted casts upon the persons who were the owners of the vessel at the time she became a wreck and impeded the navigation a personal liability to pay the costs of removing the obstruction. I quite agree with them that there is no substantial distinction between that case and the present. It is contended, however, on behalf of the appellants, that a decision of this House in *River Wear Comrs. v. Adamson* (2), delivered after the date of the decision of the Court of Appeal in *Eglinton v. Norman* (1), has thrown doubt on that decision, and indicated that the section B  
ought not to be so construed as to cast upon the owners of a vessel under such circumstances a liability unknown to the common law.

*River Wear Comrs. v. Adamson* (2) turned upon another section of the same Act, namely, s. 74, which makes the owner of every vessel or float of timber answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier. F  
In that case damage was done by the respondent's vessel to the appellants' pier without any fault upon the part of the respondent. The Court of Appeal had held that the respondent was not liable, mainly on the ground that the damage was caused by the act of God. Although the judgment was affirmed in this House, the noble and learned Lords who heard the case did not rest their opinions on this ground. LORD CAIRNS, L.C., came to the conclusion that the section was not intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from someone, but that it was intended only to provide a ready and simple procedure for recovering damages where a right to damages existed at common law. He thought that the section relieved the undertakers from the investigation whether the fault had been the fault of the owner or of the charterers or of the persons in charge, and taking the owner as the person G  
who is always discoverable by means of the register, declared that he should be the person answerable, leaving him to recover over against the person liable. LORD HATHERLEY, after expressing the very great doubt and difficulty which he had felt as to the proper interpretation of the clause, said that, as it was the opinion of the majority of their Lordships that the case was not one that could be regarded as struck at by this clause, whether the ground to be assigned for it was the view I  
expressed by LORD CAIRNS, or whether any view might be adopted similar to that taken in the court below, he should not pause to inquire, but that he was unwilling to do anything further than to say that he could not concur in the opinion expressed by the Lord Chancellor otherwise than with extreme doubt and hesitation.

LORD O'HAGAN thought that the section pointed to something done by the act of man, or to the act of the person in charge. LORD BLACKBURN stated that he had very great doubt and hesitation in the case, and that he could not see anything

A in the language of the Act to justify the view adopted by LORD O'HAGAN that it was confined to cases in which someone was in charge of the ship, but that, after much hesitation and doubt, he was not prepared to say that the judgment should be reversed, and that the words "damage done by such ship" necessarily included all expenses occasioned by misfortunes in which the ship was involved in common with the piers. After referring to the fact that MELLISH, L.J., in the court below  
B seemed to have thought that the words might bear the more restricted sense of *injuria cum damno* he concluded thus (2 App. Cas. at pp. 772, 773):

"The declared object of the enactment is the protection of the piers, etc., 'from injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.'  
C If they can bear that sense, we ought to construe them so; and though I have had and have great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it, and consequently I agree that the appeal should be dismissed with costs."

LORD GORDON dissented from the judgment pronounced, and thought that the appellants were entitled to succeed.

D I think a review of the opinions thus pronounced is sufficient to show that no principle can be extracted from the speeches in that case which can be applied to the construction of other sections of the Act. Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction as for the expenses incurred  
E in removing it, yet I am unable to find any valid ground on which the operation of s. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law. I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been  
F to blame, it is hard that the loss of his vessel should entail on him the further burden of bearing expenses incurred, not for his benefit, but for that of the public. But a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there  
G are two alternative constructions. The harbour-master may remove "any wreck," and the expense of removing "any such wreck" is to be "repaid by the owner of the same." Where is there any ground for restricting this to cases where the owner of the wreck is himself, if not bound to remove it, at least subject to liability for damage caused by its presence, if he does not take that course? I can find none.

H The appellants further contended that if a new statutory liability was imposed by the section, the same enactment provided the remedy, and that those who desired to enforce the liability were limited to the remedy thus provided. It was urged that the section conferred the remedy of detaining and selling the wreck and satisfying the expenses out of the proceeds; that it did not provide any other mode of recovering the expenses; and that the harbour authority was, therefore,  
I restricted to this remedy. This argument found favour with the Irish Court of Appeal in *The Edith* (3), and they gave effect to it by their judgment in that case, when the construction of a similar provision came before them for determination. I confess I have approached the consideration of the terms of the statute with no indisposition to arrive at the same conclusion, but I am unable to do so. In the first place, the terms are express that the expense of removing the wreck "shall be repaid by the owner of the same." The construction contended for appears to me to give no effect to these precise words. If all that was intended was that the expenses were to be paid out of the proceeds of the wreck, why were these words

inserted, followed as they are by the words, "and the harbour master may detain and sell." Moreover, this power is expressed to be for "securing expenses," and the power to sell is on "non-payment on demand."

The truth is, that the contention of the appellants makes the latter words of the section alone operative, and gives no more effect to the words "shall be repaid by the owner" than if they had been omitted from the enactment. But this is not all; the latter part of the enactment, which it is said provides the only remedy, is not co-extensive with the earlier provisions. Authority is given to remove any wreck "or other obstruction," and also any floating timber which impedes the navigation. The expense of removing any such wreck, obstruction, or floating timber is to be repaid by the owner of the same; but power is only given to detain and sell such "wreck or floating timber." The word "obstruction" is omitted. Why the power was not extended to other obstructions than wrecks and floating timber is a matter of speculation. It may have been a mere slip, but it would scarcely be legitimate to construe the enactment on the assumption that it was so. There can be no doubt that it is just as explicitly enacted in the case of any other obstruction as in the case of a wreck that the expense shall be repaid by the owner, and yet, if the construction contended for by the appellants were to prevail the conclusion must either be that no means were provided for enforcing the liability in terms imposed, or that because no remedy was provided a personal debt was created in the case of an obstruction other than a wreck, but not in the case of a wreck, although the language as to repayment is identical in the two cases. I do not say that this is conclusive, but it adds to the difficulty of acceding to the interpretation insisted upon by the appellants. For the reasons I have given I do not see any way to differ from the courts below in holding that the terms of s. 56 do create a debt in respect of which an action may be maintained against the owner.

But then arises the question: Who is the owner within the meaning of the statute? The Court of Appeal, in *Eglinton v. Norman* (1), held that it was the person who was the owner at the time the obstruction occurred, and the right of the harbour master, therefore, to remove it accrued. They considered that, although the right of the harbour master to remove it was only inchoate, the rights of all parties were then irrevocably fixed, and that it mattered not what change afterwards took place in the ownership of a wreck. The words of the section do not expressly point out who is the owner referred to, and if the section had been held to apply only to cases where the obstruction came about by the default of the owner there would be much to be said for the view thus adopted. But, inasmuch as the section ex hypothesi applies even where there is no such default, I do not see any a priori reason for holding that the rights of the parties are then fixed. It is obvious that some time might elapse before the removal of the wreck which became an obstruction was determined on by the harbour master, and that a change of ownership might occur in the interval. When I examine the language of the section it appears to me to point, not to ownership at the time the obstruction is created, but to ownership at the time the expense of removing it is incurred. The expenses are to be repaid by the owner. The harbour master may sell the wreck on non-payment of such expenses on demand. And lastly, if the wreck is sold, and the proceeds exceeds the expenses, the overplus is to be returned to the owner on demand. This can scarcely mean the person who was the owner at the time the obstruction was caused, but must surely be intended to refer to the person whose wreck was disposed of and removed.

In the present case it seems clear that before the time when the expenses were incurred by the respondents, the appellants had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership. They had also given notice of abandonment to the underwriters. It is unnecessary to determine whether the underwriters are to be treated as the owners within the meaning of the statute; it is enough to say that I do not think the appellants can on its true construction be regarded as having, at the time the expenses were incurred, been owners and liable to repay them. I have, like some of the noble and learned



A Lords who took part in the decision of *River Wear Comrs. v. Adamson* (2), felt the greatest doubt and difficulty as to the proper mode of dealing with this case. The history of the statute (of which the section in question forms part) is pointed out by LORD BLACKBURN in that case. Many of the sections probably had their origin in the desire of the authorities who promoted Harbour Acts to secure adequate protection for their undertakings, and may have been adopted by the legislature

B without sufficiently careful consideration of the interests of other persons, and the liability which might with justice be imposed upon them. I cannot profess that the conclusion at which I have arrived is completely satisfactory to my own mind; but I think it is better to adhere in such a case as closely as one can to settled rules of construction, leaving any necessary changes in the law to be effected by the legislature rather than to attempt by a strained and violent construction to

C arrive at what, after all, may be very halting justice.

A subordinate point was raised in this case. The respondents incurred certain expenses in lighting and watching the wreck under the Removal of Wrecks Act, 1877 [repealed by Merchant Shipping Act, 1894 (23 HALSBURY'S STATUTES (2nd Edn.) 395), of which see ss. 530-534 relating to the removal of wrecks]. They applied the proceeds derived from the sale of the wreck towards the expenses

D incurred by them, both under the Act of 1847, and the later statute. They then sued for the balance of the expenses. It was contended that they were bound to apply the moneys received pro rata to the expenses incurred under the two statutes. This contention was repelled by the courts below, and I see no reason to differ from the views expressed on this point. For the reasons I have given, I think the judgment appealed from ought to be reversed, and judgment entered for

E the defendants, with costs. The respondents must pay the costs here and in the courts below.

**LORD WATSON.**—This appeal depends upon the construction of a single section in the Harbours, Docks, and Piers Clauses Act, 1847. The respondents, in exercise of the powers conferred upon them by the Act of 1847 and by the

F Removal of Wrecks Act, 1877, between Jan. 15 and June 4, 1892, spent £1,128 3s. 4d. in removing or dispersing the wreck of the steamship *Crystal*, which had been sunk by a collision on Jan. 7 within the approaches to the river and harbour of Tyne, and constituted a dangerous obstruction of vessels using the port. Their outlay was recouped to the extent of £331 16s. 11d. by sales of cargo taken from the wreck, the amount of their expenditure being thus reduced to £796 6s. 5d. The

G appellants were owners of the *Crystal* at the time when she was wrecked. On Jan. 8 they gave notice of her abandonment as a total constructive loss to their underwriters, who subsequently paid them the full amount of their insurances upon that footing. On Jan. 8 they received a notice that they would be held liable for the expenses which the respondents were about to incur, in reply to which they intimated that they had already abandoned the vessel as a wreck in the

H open sea. The respondents now claim payment of the balance of £796 6s. 5d. from the appellants as being the owners of the wreck of the *Crystal*, and they have obtained judgment in their favour both in the Admiralty Division and in the Court of Appeal.

The claim thus made and sustained has admittedly no warrant in the Act of 1877. It is based exclusively upon s. 56 of the Act of 1847, which provides that

I "The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

The argument of the appellants was directed to these two points only. They maintained, in the first place, that the section does not attach to the owner any personal liability for expenses, and in the second place that, if it does, they neither are, nor were at any time, the owners of the wreck of the *Crystal* within the meaning of the section. It does not admit of doubt that, if the appellants can establish either of these propositions, the judgments appealed from must be reversed. I do not find it necessary to enter upon the consideration of the first of these points, because I am satisfied that the argument of the appellants upon the second of them ought to prevail. Had it not been necessary to decide the first point, I could not, as at present advised, have differed from the opinion expressed by the Lord Chancellor. I cannot agree with the able judgment of the Irish court in *The Edith* (3), and I am unable to appreciate the bearing of *River Wear Comrs. v. Adamson* (2) upon the facts of the present case. I agree with the Lord Chancellor in thinking that their abandonment of the sunken ship in the open sea sine animo recuperandi had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal. That state of the facts necessarily gives rise to the question, whether the expression "the owner" of the wreck, as it occurs in s. 56, is meant to designate the owner of the ship at the time when she goes to the bottom of the sea or the owner of the wreck at and during the time of its removal.

GORELL BARNES, J., and the learned judges of the Appeal Court accepted as binding upon this point the decision of the Court of Appeal in *Eglinton v. Norman* (1). In that case it was laid down by the present Master of the Rolls (BRETT, L.J.), with the concurrence of LORD COLERIDGE, and a very hesitating assent by LORD BRAMWELL, that when a ship sinks in such a position as to cause obstruction to a harbour or its approaches, a right to remove it at the expense of the then owner at once accrues to the harbour authorities, and cannot be affected by any subsequent change or loss of ownership. I do not think it is reasonably possible to arrive at that conclusion except by holding that the legislature, in using the words "owner of the wreck," meant thereby to designate the owner of the ship at the time when she became a wreck. If that had been the intention of the legislature, nothing could have been easier than to give it expression. But the intention of the legislature can only be gathered from the language actually employed, and I am of opinion that the construction adopted by the learned judges of the Appeal Court, in *Eglinton v. Norman* (1), is inadmissible. The only thing which the harbour master under the section in question has authority to deal with is the wreck, and not the ship; and the only charges which, in any view, he can have a right to recover are those which may be duly incurred by him for the purpose and in the course of its removal.

It is clear, to my mind, that *prima facie* the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour master chooses to exercise his statutory powers. That appears to me to be the primary and natural meaning of the words. It may, of course, be displaced by force of the context. But I can find nothing in the context to suggest that the words were intended to have any other than their natural meaning. On the contrary, the direction in the end of the section to the effect that the harbour master, after selling the materials of the wreck in order to pay the expenses which he has incurred, shall account to the owner for any overplus, clearly indicates that the owner is the person to whom these materials belonged. Being of opinion that the respondents have failed to show that the appellants were owners of the wreck of the *Crystal* within the meaning of the section, I concur in the judgment which has been proposed by the Lord Chancellor.

**LORD ASHBOURNE.**—The decision of this appeal depends on the construction to be given to s. 56 of the Harbours, Docks, and Piers Act, 1847, the terms of which have been stated by my noble and learned friends who have preceded me. The contention of the appellants substantially raises two questions upon this

A section. They insist (i) that no personal liability is cast upon "the owner" for the expenses claimed; and (ii) that, no matter how that may be, they are not the "owners" who are chargeable. The statute does not apply to all harbours, docks, and piers, for the first section enacts that it shall

B "extend only to such harbours, docks, and piers as shall be authorised by any Act of Parliament hereafter to be passed, which shall declare that this Act be incorporated therewith."

C The statute was so incorporated by the Tyne Improvement Acts, and thus the questions are raised. Had the wreck occurred in or near any harbour where such incorporation had not taken place, it is not suggested that the appellants could have been made liable. It is admitted that they could not be responsible at common law, and, therefore, the whole case turns upon the construction of this section which creates this new responsibility. There should be clear words to create any such liability, and in construing the section the rule must be borne in mind that where the liability is a liability not existing at common law, but for the first time imposed by the statute, then, if the remedy is also prescribed by the statute, the party must pursue that remedy.

D Before taking the words of the section it is well to consider the nature and character of this personal liability sought under this section for the first time to be imputed to an "owner." It is asserted that, although he be not negligent, although his master and crew may have shown the most splendid seamanship and the most heroic courage, he is personally liable for the expense of the removal of the wreck of his ship, if it causes an obstruction to the harbour or navigation.

E The wreck may be caused by the act of God, by the default of the pilot he is compelled by law to employ, by the absence of the very buoys and lighthouses which the harbour authority is itself bound to provide, but no qualification of the owner's liability is suggested. Smugglers or mutineers may have wrecked the ship and make it an obstruction, but the possibility of an exception is not admitted. It is asserted that this personal liability is unlimited in amount, and that no

F matter how small the value of the vessel, or how worthless the cargo, the "owner" must answer to his last farthing for these expenses. The cost of removal might be twenty times the value of the ship, and the payment of that cost might drive the "owner" into bankruptcy; but that is not a consideration to be noted. It may be even asserted that the liability is not guarded by any limit of time or space, that the wreck might sink, causing no obstruction outside a harbour, yet

G years after it might by the action of storms, or wind, or tide be shifted to a position where it became an obstruction, when this liability would attach. In fact it is contended that under all circumstances, no matter what the conduct, or what the amount involved, "the owner" is personally liable, and that he is so made for the first time under this section.

H It is not too much to expect that a section imposing such a tremendous liability should be in clear terms. The section is not clear; its interpretation is difficult, its language is infelicitous, but it can be made to work smoothly and without difficulty if the contention of the respondents is rejected and that of the appellants adopted. In my opinion, no personal liability is created by the section. The first object of the section was to give power to the harbour master to remove the wreck or obstruction. Then if the owner repays the expenses he may take away

I his property. If he does not repay the expenses, the harbour master is given his remedy, the power of detaining the wreck with the further power of selling on non-payment of the expenses after demand. Then it is finally provided that, after payment of the expenses out of the proceeds, the surplus, if any, is to be rendered to the owner "on demand." The words "the expense . . . shall be repaid by the owner" cannot be taken alone. The whole section must be read together. The ship and its proceeds on sale were, as far as they went, to provide the fund for the expense; and accordingly, while the section provides for handing over the surplus to the owner, there are no words saying that he is to make good the



deficiency. It is not suggested that there is anything in the subsequent Removal of Wrecks Act, 1877, to support the respondents' construction of this s. 56. Yet if that construction is correct, we should expect to find the same liability in s. 4 of the later Act. These Acts deal with the same subject-matter, and it may well be that the Act of 1877 may supply some interpretation of this earlier provision. It is at all events worthy of note that the common law antecedent to the Act of 1847, and the statute law subsequent to that date, impose no personal liability of any kind for this expense. A  
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The learned judges in the courts below followed the decision of the Court of Appeal in *Eglinton v. Norman* (1). Only one of the judges of the Court of Appeal in the present case said that he would have decided the same way, and DAVEY, L.J., said that whenever the case was re-considered, the argument of counsel for the present appellants was worthy of the greatest consideration. On this point, therefore, one cannot decide in favour of the appellants without impeaching the authority of *Eglinton v. Norman* (1). I should infer from the report of that case that several of the arguments by which your Lordships have been aided had not been brought prominently before the court, and this is noted expressly in his judgment by A. L. SMITH, L.J. That case, however, decides on this section that a personal liability was attached to the "owner," and for the reasons I have already stated, I have arrived at an opposite conclusion, and with great deference to the learned judges who took part in that decision, and to the Lord Chancellor, I do not think it can be supported. *The Edith* (3), decided on similar words in another statute, is entirely opposed to the construction which would impose any personal responsibility on the owner, and PALLES, C.B., there strongly relied upon the argument that, when a new right is created by a section, and there is a remedy given in that section, that is the only remedy which is given at all. C  
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*River Wear Comrs. v. Adamson* (2) has also been relied upon by the appellants as shaking the authority of *Eglinton v. Norman* (1). It cannot be relied upon as a direct authority, being upon a different section of the statute; but I think it has a bearing upon the case, and can be usefully considered in connection with some of the arguments addressed to your Lordships. That case turns upon s. 74 of the Act of 1874, which says that F

"the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber to the harbour, dock or pier, or the quays or works connected therewith."

These words would appear to be clear and unqualified, and are certainly far more clear and unqualified than those of s. 56. But when an owner who had been in no default was sought to be made liable under its terms a large majority of this house declined to recognise his liability. I concur with the Lord Chancellor that no very clear principle can be extracted from the judgments, but I, at all events, gather that, although one noble and learned Lord was unable to see any way of escape from the apparently clear words of the section, the other noble and learned Lords decided that the section must be held to refer to something in which man was concerned, and not the casualties brought about by the act of God. The opinion of LORD BLACKBURN shows in every word the doubt and difficulty he felt in arriving at this conclusion. He points out (2 App. Cas. at p. 770) that G  
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"The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great, and however small may be the value of the ship"; I

and, again (*ibid.* at pp. 770, 772),

"before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more particularly when the hardship affects not only one individual but a whole class. After much hesitation and doubt I am not prepared to say that this judgment should be reversed."

**A** I am disposed to think that, if the noble and learned Lords who decided *River Wear Comrs. v. Adamson* (2) had also been called upon to decide the present case, they would have held that a shipowner was no more personally liable under s. 56 than under s. 74. It would have been difficult for them to hold an owner personally liable under the rather cumbrous words of s. 56, when they had just exonerated him from such liability under the much clearer and more absolute words of s. 74. In so holding, a consistent and workable construction is given to both sections, and none of the startling consequences, to which I have adverted at an earlier stage of my remarks, would have resulted.

On the second question, as to who is the owner under the statute, I might possibly have felt some difficulty if I had come to a different conclusion on the first point. If the owner was personally liable, an attempt might be made to argue against a construction under which he would be allowed to evade his liability, after the wreck and after the obstruction, by a mere assignment. The arguments and judgments in *Eglinton v. Norman* (1) are largely conversant with this question of the owner, and I think there may have been possibly some difference of opinion as to the time when he was to be ascertained with a view to the suggested liability. Sir H. James, for the plaintiff, argued that the owner at the time of the casualty was the owner under the statute, and this view was accepted by LORD COLERIDGE, C.J., and BRAMWELL, L.J., and BRETT, L.J., held that the owner was the owner at the time the wreck became an obstruction; but it is not easy to know whether there was any real difference of opinion between them and the Chief Justice. I agree with my noble and learned friends who have preceded me that the owner referred to in the section is the owner at the time the harbour master incurred the expense; and, concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them. In my opinion, also the judgment should be reversed.

**LORD MACNAGHTEN.**—Apart from the provisions of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, it seems to be clear that, according to English law the owner of a shipwrecked and sunken vessel which has become an obstruction to navigation through no fault on the owner's part, and of which he has lost or relinquished the possession, management, and control, is not under any obligation to remove it, or under any liability to pay or contribute to the payment of the expenses of its removal.

**G** The subject was much discussed in an elaborate judgment by MAULE, J., in the Common Pleas (*Brown v. Mallett* (4)). The principles laid down in that judgment were approved in the Exchequer in *White v. Crisp* (5), and those two authorities have been followed in a case in the Privy Council (*The Utopia* (6)). MAULE, J., says (5 C.B. at pp. 618, 619):

**H** “Where the navigation . . . has become obstructed by a vessel which has sunk and been lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of a public convenience, and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. In the case of *R. v. Watts* (7), LORD KENYON held that the owner of a ship sunk in the Thames by accident or misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended for the prosecution in that case, that, although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from

a sunken vessel; the expense of doing so might, and probably would, be greater than any private benefit which the owner might derive from it; and whether it were greater or not, the reason seems to be the same for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered."

Then he adds that, in the case of such impediments to navigation arising out of unavoidable accidents,

"the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure."

It seems to me that legislation contravening the principles and reversing the rule laid down by MAULE, J., would be legislation that might be described, not inaptly, as barbarous. At the same time there would be nothing unreasonable in making the owner, whose private misfortune has caused a public nuisance, pay or contribute to the expense of its removal, if and so far as he derives a benefit from the operation.

With these general remarks I approach the consideration of s. 56. The question seems to me to be this: Does that section throw upon the owner of a vessel which has become a wreck, and as such is an obstruction to navigation, the whole expense of its removal in every event and under all circumstances, or does it only throw the expense upon him if and so far as he is specially benefited by the removal? The result of the one construction, if it be admissible, would be fair and reasonable; the result of the other would be repugnant to justice, and in many cases, as LORD ASHBOURNE has pointed out, cruel and unreasonable in the extreme. The first observation that occurs to one is that this section is found in a collection or group of clauses which are headed with the words:

"And with respect to the appointment of harbour masters, dock masters, and pier masters, and their duties, be it enacted as follows":

LORD WENSLEYDALE, speaking of the Lands Clauses Consolidation Act, 1845, which is framed in a similar manner, said:

"An Act so penned cannot be read as a continuous enactment would be: various clauses relating to each separate subject are collected under various heads with an appropriate heading to each class, which must apply to the whole of that class of which it is the heading";

and he adds that the effect is the same as if the heading had been repeated at the head of each section: *Eastern Counties and London and Blackwall Rail. Cos. v. Marriage* (8), 9 H.L.Cas. at p. 69. The section, therefore, must be read in connection with the general heading. So read, it purports to be concerned primarily with the duties of harbour masters, dock masters, and pier masters. That is the scope of the section, and its proper province. The general heading supplies the key to the enactment. There is no indication that the enactment was intended to effect a serious alteration in the law to the prejudice and detriment of individuals. It rather seems to be indicated that nothing more was intended than to confer upon the harbour master, acting in the public interest, power to do on behalf of the owner that which might be done by the owner himself in his own interest, with less regard, perhaps, to the interest of the public.

Then the section says that the expense of removing the wreck "shall be repaid by the owner of the same." The word "repaid" again rather looks as if the framers of the enactment had in their minds repayment by one on whose behalf the operation was conducted. But that is a very slight indication of intention, because it may perhaps point to the circumstance that in the majority of cases the work would be done, not by the harbour master himself and his servants, but by persons whose trade and business it is to do such work, whom he would have



A to pay in the first instance. The words "shall be repaid by the owner" are the great difficulty in the case. I am unable to construe the section as confining the right of the harbour master in respect of repayment to payment out of the proceeds of the wreck (i) because that construction in reality gives no effect whatever to the words, "shall be repaid by the owner"; and (ii) because such a construction would give an unfair advantage to the owner. An owner with a keen eye to his  
 B own interest would never think of offering repayment unless the value of the wreck greatly exceeded the cost of removal. He would wait until the harbour master puts the wreck up for sale, and then he would probably have the opportunity of buying it for an old song; at the outside the only risk he would run would be the risk of having to bear the expenses of the sale. I do not question the rule that where a new right is created and a remedy given by one and the same enactment,  
 C that remedy is the only remedy to be pursued. But I do not see how that rule can be applied to s. 56 so as to limit the reimbursement of the harbour master to the proceeds of the sale of the wreck, because it seems to me that according to the true construction of the section, the harbour master has two remedies—a personal remedy against the owner as well as a remedy against the proceeds of the sale. I am, therefore, of opinion that the section does impose upon the owner  
 D of a wreck removed by the harbour master under the powers thereby conferred, the duty of paying the expenses of removal.

But this does not settle the question between the parties to this litigation. In order to make anyone liable the wreck must be "removed" within the meaning of that word as used in the section; and after all the only person who can be made liable is the owner of the wreck. In the present case I do not think that there  
 E has been a removal for which anybody can be made liable; and I am further of opinion that the owners of the *Crystal* before she was wrecked are not the owners of the wreck within the meaning of s. 56. It seems to me that the removal contemplated by s. 56 is removal in the interest and on behalf of the owner as well as in the interest and for the benefit of the public. To entitle the harbour master to repayment under s. 56, it is I think incumbent upon him to remove the obstruction  
 F in such a manner that at the conclusion of the operation it is substantially in the same plight and condition as it was at the commencement, or at any rate with some regard to the interest of the owner, whose interest I think the enactment meant to be regarded. What has the harbour master done here? He has "dispersed the wreck by explosives." That no doubt is a very complete and effectual sort of removal, but it is not, I think, the sort of removal which is contemplated  
 G by the section. It is to be observed that under this section the harbour master is not given power to destroy. Another statute was passed to give that power. Here there was not removal, but total destruction. Not one scrap or atom of the wreck was salvaged; not a single penny is brought into the account as the produce of the sale of any part of the wreck. It sounds to me like a grim joke to ask the owner, where there is an owner, to pay for the expense of annihilating his own  
 H property because he is chargeable by statute—and fairly chargeable, with the cost of its removal.

Then comes the question: Are the persons who were the owners of the *Crystal* at the time of the accident which caused the wreck the owners of the wreck within the meaning of the section? I lay out of consideration what took place between the owners and the underwriters. I will deal only with what took place between the  
 I harbour authority and the owners. On Jan. 8, 1892, the Tyne Improvement Commissioners gave notice to the owners of the *Crystal* that the vessel, which was then lying sunk at the harbour entrance, was an obstruction to navigation, and that if the obstruction was allowed to continue, they would on the expiration of seven days proceed to take possession of, remove, and, if necessary, destroy the whole of the vessel. On Jan. 12, before the expiration of the seven days, the owners replied by letter that, the steamer being a wreck in the open sea, they had abandoned her as such, and the commissioners must look to the savings of the wreck for any outlay they might have.

It appears to me that by that letter the owners declared that they had abandoned all rights of property and given up all interest in the vessel. Thereupon I think they ceased to be owners within the meaning of s. 56. They had lost possession of the vessel already; all that remained to them was the property in the vessel, that is to say, the right to re-take or resume possession of her. This right they abandoned as plainly and equivocally as it was possible for them to do, and they abandoned it before the commissioners began their operations or even took possession. They disowned the wreck. For the purposes of s. 56 it is not, I think, necessary to inquire whether goods designedly abandoned by their owner under such circumstances that no wrong is done to anybody by the abandonment become thereupon bona vacantia and "derelict" in the proper sense of the word, or whether, as the author of DOCTOR AND STUDENT asserts, the property still remains in the owner notwithstanding the abandonment. The commissioners appear to be in a dilemma. They have destroyed the wreck. Section 56 does not authorise destruction. If they take their stand on the Removal of Wrecks Act, 1877, they cannot under it charge the owner with their expenses. If they do not rely on the powers of that Act their action must be attributed to the license or authority which the notice of abandonment conferred, and then their action would have the effect of divesting the owner of the *Crystal* of the property (if any) which still remained in them after their notice of abandonment.

If the view which I venture to present be correct, s. 56 is a reasonable enactment. Where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him liable for their expenditure. The defects, such as they were, in s. 56 are remedied by the Removal of Wrecks Act, 1877. Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest. I am unable to agree with the decision of the Court of Appeal in *Eglinton v. Norman* (1), and I am of opinion that the judgment of the Court of Appeal in the present case, which is founded on it, should be reversed, and the action dismissed with costs.

**LORD MORRIS.**—I concur in the judgment proposed. The facts of this case have been so fully stated by your Lordships who have preceded me, that it is quite unnecessary that I should repeat them. The defendants are under no common law liability of any kind. Their liability is the subject of express enactment—s. 56 of the Act of 1847. Does that enactment make the defendants liable for the expenses of removing the wreck under the circumstances of this case? I am of opinion that it does not. It appears to me that it is only in the case of an owner—that is, of a person remaining in the position of owner, and in possession of the wreck—that any personal liability would attach to him; that if he abandon the wreck, or if the harbour authority take possession of the wreck and sell, the person who had been owner remains so no longer, except for the purpose of getting any surplus over the expenses out of the proceeds of the sale by the harbour authority, and incurs no personal liability. If the harbour authority did not arrest and detain the offending obstruction (in this case the wreck), and supposing that the owner remains owner, it may be that he would be liable, as he chooses to keep the offending obstruction, and, consequently, should be held liable to pay the expense of the removal of what he keeps as his property; but when he has informed the harbour authority that he disclaimed any property in the wreck, the only remedy for the harbour authority is to sell the wreck. The ordinary relation of debtor and creditor, from which an obligation to pay on request would be implied,

A is not created. The owner is in no default by himself or his servants; he abandons the property in the wreck, whereupon it becomes the subject which is to pay for the expense of its removal. The final clause of the section, while providing for the return of overplus, if any, does not proceed to say that any deficiency is to be made up by the owner. Where an action is intended, or distress intended to be empowered, the action or distress is directly given, as in ss. 48, 44 and 45.

Appeal allowed.

Solicitors: T. Cooper & Co.; Maples, Teesdale & Co., for Lietch, Dodd, Bramwell & Bell, Newcastle-on-Tyne.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## ALABASTER AND OTHERS v. HARNESS AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), December 4, 5, 1894]

[Reported [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740;  
43 W.R. 196; 11 T.L.R. 96; 14 R. 54]

*Maintenance of Action—Defence—Common interest in subject-matter of action—Legal, not sentimental, interest.*

The defendant, H., advised T. to bring an action for libel against the plaintiffs, and provided all the funds for carrying it on. The libel complained of was contained in an article reflecting upon the character of T., and also upon the character and business of H., but the libels on H. did not form any part of the cause of T.'s action, nor was there any issue raised in that action as to H.'s character or conduct. In that action the present plaintiffs obtained a verdict, but were unable to recover any of their costs from T. The plaintiffs thereupon sued H. and other defendants in the present action to recover damages for maintenance.

**Held:** the defendant H. had no such common interest in T.'s action for libel as would justify his maintenance of that action, and he was, therefore, liable in damages.

Per LOPES, L.J.: To justify interference by one person in an action brought by another the one must have some interest which is recognised by law in the subject-matter of the action, and, in my opinion, it must be a legal, and not merely a sentimental, interest in the result of the action.

**Notes.** Applied: *Greig v. National Amalgamated Union of Shop Assistants* (1906), 22 T.L.R. 274; *Oram v. Hutt*, [1911–13] All E.R.Rep. 376; *Baker v. Jones*, [1954] 2 All E.R. 553. Distinguished: *Martell v. Consett Iron Co.*, [1955] 1 All E.R. 481. Referred to: *Holden v. Thompson*, [1907] 2 K.B. 489; *British Cash and Parcels Conveyors, Ltd. v. Lamson Store Service Co., Ltd.*, [1908–10] All E.R.Rep. 146; *Scott v. N.S.P.C.C. and Parr* (1909), 25 T.L.R. 789; *Neville v. London Express Newspaper, Ltd.* [1918–19] All E.R.Rep. 61.

As to maintenance, see 1 HALSBURY'S LAWS (3rd Edn.) 39; and for cases see 1 Digest (Repl.) 80.

Cases referred to:

(1) *Booth v. Briscoe* (1877), 2 Q.B.D. 496; 25 W.R. 838, C.A.; 32 Digest 13, 39.



- (2) *Wallis v. Duke of Portland* (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E.R. 508; 1 Digest (Repl.) 83, 629. A
- (3) *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, 618.
- (4) *Findon (Finden) v. Parker* (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 7 Jur. 903; 152 E.R. 976; 1 Digest (Repl.) 81, 610. B
- (5) *Prosser v. Edmonds* (1835), 1 Y. & C.Ex. 481; 160 E.R. 196; 1 Digest (Repl.) 89, 668.

**Appeal** by the defendant from a decision of HAWKINS, J., at the trial of the action without a jury, reported [1894] 2 Q.B. 897.

The plaintiffs, proprietors of a newspaper called the "Electrical Review," brought an action claiming damages for maintenance against the defendants Cornelius Bennett Harness and the Medical Battery Co., Ltd., of which company Mr. Harness was, at the times hereinafter mentioned, the managing director. The Medical Battery Co. was incorporated for the purpose of carrying out the treatment of diseases by means of electric and magnetic appliances. They manufactured and dealt in the apparatus suitable for such treatment, and as a part of their establishment they founded and maintained an institute called The Electric and Zander Institute, with Mr. Harness as its head. In January, 1892, the plaintiffs published in the "Electrical Review" an article by way of protest against certain apparatus, contrivances, and electric belts which had been publicly exhibited by the company at the Crystal Palace, as being constructed in direct opposition to the laws of electricity, and in July and September in the same year the plaintiffs published other articles highly disparaging to the institute and to Mr. Harness, its president. In respect of these publications the Medical Battery Co. brought an action for libel against the present plaintiffs on Sept. 23, 1892. The pleadings in that action were completed, but no notice of trial was ever given, and on April 28, 1893, it was discontinued. On September 23, 1892, another article had appeared in the "Electrical Review" commenting in very strong and adverse terms upon a report which had recently been written and published by Dr. Herbert Tibbits, testifying to the great value of the institute, the efficiency of its apparatus and appliances, and the Harness Electropathic Belt, and reflecting upon the character and conduct of Tibbits in connection with that report, and also upon the Zander Institute and its appliances, and on the conduct of Harness as its manager and the vendor of the belts bearing his name. In respect of that article, Tibbits on Oct. 1, 1892, commenced an action of libel in his own name against the present plaintiffs. That action came on for trial before MATHEW, J., on Feb. 15, 1893, and resulted in a verdict for the defendants in that action with costs. These costs Tibbits was unable to pay, and the present action was brought against the present defendants to recover them as damages sustained by the plaintiffs in defraying the expenses of their defence to Tibbits' action, upon the ground that the defendants unlawfully maintained Tibbits in bringing and prosecuting his action. The maintenance charged consisted in Harness's suggesting to Tibbits to commence his action, and in employing a solicitor nominated by him to issue the writ and conduct the case at his, Harness', sole expense. C D E F G H

In giving judgment HAWKINS, J., said: "I have to ask myself, what is the 'thing in the plea or suit,' or the 'thing in variance' in an action, a common interest in which, with a plaintiff or defendant, justifies maintenance of such action or defence? Surely it must be that which the plaintiff claims as the subject-matter and object of his action, that which he will attain as the result of success in it. Whether such action be in detinue for goods, for disturbance of a right or any other imaginable grievance, the common interest in such subject-matter must be in the attainment of such success. It must be something far beyond a mere wish for the success of the suit; it must be more than a mere hope or expectancy that maintainer may, by upholding one of the parties, do great service to a I

**A** friend, or that he may thereby acquire such control and influence over its conduct that he may turn it to his own advantage. All such hopes and expectancies would amount to nothing in the way of justification unless he had a real interest in the subject-matter of the suit, or 'the thing in variance' in it. If such hopes or expectancies, without real interest in the matter, would suffice, maintenance would soon become very common.

**B** "I have used the phrases 'common interest in the subject-matter of the suit' and 'common interest in the thing at variance' because there is a difference between the 'subject-matter of the suit,' which means the very thing to be recovered in the action, and 'the thing in variance.' For instance, the action may be brought by any person directly and ostensibly in respect of the interference by the defendant of a right of way or of common in which the maintainer has a like interest.

**C** Maintenance in such a case would be clearly justified because of common interest in the subject-matter. Or the action may be brought to recover damages for a grievance; for instance, an assault in which damages could only be recovered for the trespass on the person of the plaintiff, in which there could be no common interest, and yet in the course of the case an issue might be raised in the determination of which another might have clearly a common interest to support or otherwise.

**D** I illustrate it thus: A. sues B. for a common assault. B. pleads simply Not Guilty. C. would not be justified in maintaining A.'s action, because he could have no common interest in it. But if B. pleaded a justification that A. was trespassing upon his land, and refused to go off it, and so he laid hands on him and put him off, and to this plea A. replied he was on B.'s land exercising a right of way, common to himself and C., this would be a thing in variance, and

**E** C. would clearly be justified in maintaining A.'s right, as being one in which he and A. had a common interest.

"Let me now deal with the present case. No doubt the article containing the libel complained of by Dr. Tibbits contained also libellous imputations upon the defendant Harness and his institution; but the libels upon the defendant Harness did not form any part of the cause of action, nor was there any issue raised as

**F** to his character or conduct. Harness' character, and the worth of his appliances, it is true, might form a prominent topic for counsel to comment adversely upon; and he might naturally feel deeply interested, in the sense of being anxious to have them met and refuted, and the utility of his belts and appliances established before the world. This is the condition of many persons not parties to suits, whose character and actions are unavoidably made the subject of very free comment during the progress of a cause; but this does not constitute such a common

**G** interest in the suit as to justify maintenance. In Tibbits' character or success, so far as he was concerned, Harness had no legal interest, and his own character and conduct could neither be judicially condemned nor justified, and any issues raising questions touching them would have been immaterial. In no proper sense, therefore, could the libel on Mr. Harness be treated as the matter in variance

**H** in Tibbits' action. Tibbits' character alone was the subject-matter of the action, and his right to maintain his action was the sole matter in variance. Throughout the pleadings in that action the innuendoes were in the statement of claim limited to Dr. Tibbits, and there is no justification, except so far as regards Tibbits, and the substantial defence was that, so far as Tibbits was concerned, the article was fair and bona fide comment and criticism of a published book and pamphlet and of

**I** proceedings of public interest, and upon this defence alone the verdict was for the defendants, the now plaintiffs.

"I know it may be said that it is hard that when a man's character is attacked he should not be allowed to support by his money the cause of a man who in defending his own character must of necessity to some extent support that of the other who is attacked with him. It may be so. I can only say, in my opinion, to allow a person to assist another in litigation upon matters which do not immediately and directly concern him would lead to more strife and inconvenience than could possibly result from the present law that no man may intermeddle to

support or defend a suit which, in the result, and by the judgment in it, can finally determine nothing which he desires to have determined, or which is not practically in issue. In the present case, however, I am pressed by no such feelings of hardship. For in the action brought by the Medical Battery Co. against Alabaster and others, to which I referred at the commencement of this judgment, the defendant Harness had a full opportunity of completely vindicating not only the character of the company but also his own. He thought fit, however, to abandon that action, for he discontinued it on April 28, 1893, some months before Tibbits' action was tried, preferring to shelter himself under the wing of Dr. Tibbits. And even in Tibbits' action he did not do that which he might have done, namely, make himself co-plaintiff with Tibbits; had he done so he would have entitled himself to all the advantages and opportunities of clearing his own character, as he would have had had he brought a separate action: R.S.C., Ord. 16, r. 1, and *Booth v. Briscoe* (1). This would have given him a common interest in the action, which I think he had not under the circumstances.

"This was not a case in which a joint action by Tibbits and Harness could have been maintained. Had it been so perhaps each might have maintained the other. This was merely an action in which two persons being libelled in one article each might separately have recovered damages as though each had brought a separate action. But of course, if Harness had so joined as plaintiff, he would have been liable for costs in the event of failure. By acting as he did, although he made himself liable for Tibbits' costs, he took the chance of any advantage he might derive from the action, but saved himself from liability to the defendant for costs in the ordinary course. I know it is not necessary to establish conclusively that a joint interest in the action virtually existed, and that it is sufficient to justify the defendant in maintaining Tibbits' action if on reasonable grounds he bona fide believed he had such interest, that is, that he reasonably believed in the existence of that state of things which, if true would in law, would have justified him in maintaining the action. His erroneous belief as to what in law would justify him, and his bona fide belief in a state of things which would support his erroneous view of the law, would amount to nothing. I am of opinion he had no such bona fide belief; that if he had such belief, he had no reasonable grounds for it; that he merely availed himself of Tibbits' action to save himself from the evils of liability for the defendants' costs; and his conduct in all these respects was unlawful. For all these reasons I think the verdict ought to be entered for the plaintiffs for the amount of the taxed costs of their defence, to be taxed as between party and party."

From this decision the defendants appealed.

*Jelf, Q.C.*, and *F. Dodd* for the defendants.

*Lawson Walton, Q.C.*, and *Eldon Bankes* for the plaintiffs.

**LORD ESHER, M.R.**—This is a perfectly clear case. An action was brought against Harness to recover damages for the maintenance by him of an action brought by Tibbits against the present plaintiffs for a libel on himself. That is a personal action which concerns only the man who brings it; he cannot recover damages for injury to anyone else, only for injury to himself. It was proved clearly that the action was commenced through a meeting at the office of Harness's solicitor when it was arranged that the action should be brought by Tibbits for the libel upon Tibbits, that the solicitor should be Mr. Cridland, who was, however, to act under the directions of Harness's solicitors, and that Harness should pay all the expenses. It was clearly proved, therefore, that Harness maintained that action. He suggested to Tibbits that he should commence the action, and he employed a solicitor, nominated by himself, to issue the writ and conduct the case at his sole expense. That was an action which ought, according to *LORD LOUGHBOROUGH*, upon principles of public policy, to be brought by the plaintiff upon his own bottom: *Wallis v. Duke of Portland* (2). In this case Harness



**A** instigated the bringing of an action by Tibbits and maintained it, when it ought to have been brought by Tibbits upon his own bottom, and at his own expense. That action in point of law concerned Tibbits only, and Harness could not be a party to it. If the action of Tibbits were unsuccessful, that could not have a legal effect of any kind upon any right of Harness.

**B** Is, then, this case one in which Harness is liable for maintenance? This doctrine of maintenance has been discussed by LORD LOUGHBOROUGH; it appears in the YEAR BOOKS; it has got into all the textbooks; and in recent times it has been elaborately considered by LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (3), and has been considered in other cases. It is not a question of moral right or wrong, or of natural justice or injustice. I cannot see that, apart from the specific law upon the subject, there is any harm in assisting another man's action.

**C** I can see that it may be contrary to public policy, for the courts may be inundated with actions and be blocked, and there may be much litigation commenced by persons who cannot pay the costs if they fail. The foundation of this law is, as stated by LORD LOUGHBOROUGH, that, upon grounds of public policy, a man must litigate upon his own bottom. If a man interferes in the suit of another in such a way as to pay the expenses, he is breaking the law against maintenance.

**D** From the earliest times some relaxation of the strictness of this rule was allowed, and some particular cases were specifically excluded in which such interference was excused, though by the strict law a man would be liable for maintenance. One exception was the case of a landlord assisting the suit of his tenant. There was also the case where assistance was given from charity, which was specifically allowed as an exception; and there may be others. If, however, a case does not come within these specific exceptions, it must be governed by the strict letter of the law. I will adopt here the rule given by LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (3), where he says (11 Q.B.D. at p. 11):

**F** "But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them."

**G** The case of a person being "overborne" is that which was put by LORD ABINGER, in *Findon v. Parker* (4), as an illustration; but I think that it has never occurred, and probably never will occur. Admitting, therefore, that the only recognised exceptions are those which are stated by LORD COLERIDGE, C.J., and being determined not to increase those exceptions, we must hold that this case is not within the exceptions. This, then, is as bad a case of maintenance as can well be.

**H** Because of some fancied interest in the matter Harness instigated the action, and the action was really his action. Although I have adopted the words of LORD COLERIDGE, C.J., yet I think that the rule may be equally well expressed by saying that the person must have "an interest recognised by law" in the suit which he assists. This appeal must be dismissed.

**I** **LOPES, L.J.**—I entirely agree with the judgment of HAWKINS, J., in this case. The defendant was guilty of maintenance of the worst kind beyond all question. It is said that this maintenance was justifiable. I think that maintenance has been well defined by LORD ABINGER, in *Prosser v. Edmonds* (5), where he says (1 Y. & C.Ex. at p. 497):

"No encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

In this case it is sought to justify the maintenance upon the ground that Harness had a common interest with Tibbits in the action. In my opinion, he had no

such common interest as would justify his interference. To justify such interference, a man must have some interest which is recognised by law in "the thing which is in variance," by which I understand an interest in the subject-matter of the action then in issue between the parties; and, in my opinion, it must be a legal, and not merely a sentimental, interest in the result of the action. Can Harness make out that he had any such common interest in this action? In my opinion, he had not any such interest. There was no question between Harness and the defendants in that action, and no issue which affected him. If the law of maintenance is based upon grounds of public policy, it is impossible to say that it is not contrary to public policy for a man who cannot be liable for costs to be permitted to come in and assist another in an action like this. I can imagine nothing more contrary to public policy. There are exceptions recognised by law, such as cases of consanguinity, oppression, charity, and master and servant. These exceptions are well recognised, but I should be sorry to see other exceptions engrafted upon the rule. I agree that the appeal must be dismissed.

**RIGBY, L.J.**—An action was brought by Tibbits to recover damages for a libel, and that action was brought at the instigation of Harness. It has been argued that questions might arise in that action which would affect Harness, and that it would be hard if he could not protect himself in that action. I will not attempt to give any definition of maintenance, because the general rule has been stated over and over again in the authorities. This case is clearly within the general rule. The difficulty arises because of the various exceptions which have been allowed by judicial decisions as defences when the general rule has been violated. These exceptions cannot be reduced into any general rule. Harness, however, contends that there is a general rule that there must be a *mens rea* in every case, that is, that it must be shown that the defendant in each case did what he thought to be wrong; and that he has a good defence if he believed that he was not doing wrong. I adopt the passages which have been read from the judgment of LORD COLERIDGE, C.J., merely introducing what I think he meant, viz., that the defendant must bring the case within the general rule as to having a common interest, or within one of the decided exceptions. This is a clear and aggravated case of maintenance, and not within any of the exceptions. I doubt whether, in any case, the man who is himself the author of the litigation, can claim the benefit of any of the exceptions, when his only excuse is that a question may arise which will affect him.

*Appeal dismissed.*

Solicitors : *Richard Furber; Lewis & Lewis.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

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## RICHARDSON, SPENCE &amp; CO., AND OTHERS v. ROWNTREE

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne and Lord Morris), March 2, 1894]

B

[Reported [1894] A.C. 217; 63 L.J.Q.B. 283; 70 L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp.M.L.C. 482; 6 R. 95]

*Carriage of Passengers—Condition excluding liability for injury—Reasonable notice to passenger—Questions for the jury.*

C

The plaintiff took a ticket at Philadelphia for Liverpool, by the defendants' steamship *Lord Gough*, and went on board the next day. During the voyage she fell overboard, owing, as she alleged, to the defendants' servants not providing proper guard-rails to a gangway and not properly lighting it. Upon the upper part of the ticket, which was handed to her by the ticket clerk folded up so that no writing was visible unless she unfolded it, nothing being said to draw her attention to the conditions, were the words in large type: "Received in payment in full for steerage passage for one adult." Lower down, after some small print, were certain terms, printed in small type, one of which was as follows: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted under the following conditions: (d) The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." Across the conditions the name of the ship and other matters were printed in red ink, which partially obscured the printed conditions. The plaintiff having brought an action to recover damages for the personal injuries suffered by her, the defendants pleaded that they were relieved from liability by condition (d). The jury, in answer to questions, found that, while the plaintiff knew that there was printing on the ticket, she did not know it contained conditions relating to the contract of carriage, or that the defendants had not done what was reasonably sufficient to give her notice of the conditions.

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**Held:** the correct questions had been put to the jury, and there was sufficient evidence to justify them in finding as they did.

*Parker v. South Eastern Rail. Co.* (1) (1877), 2 C.P.D. 416, approved.

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**Notes.** Followed: *Stirling v. London and South Western Rail. Co.* (1895), 12 T.L.R. 69. Considered: *Stephen v. International Sleeping Car Co.* (1903), 19 T.L.R. 621; *Marriott v. Yeoward*, [1909] 2 K.B. 987. Applied: *Cooke v. Wilson* (1915), 85 L.J.K.B. 888. Followed: *Hood v. Anchor Line (Henderson Bros.), Ltd.*, [1918-19] All E.R.Rep. 98. Distinguished: *L'Estrange v. F. Grancob, Ltd.*, [1934] All E.R.Rep. 16. Referred to: *Great Northern Rail. Co. v. Palmer* (1895), 72 L.T. 287; *Ryan v. Ocean Steam Navigation Co.*, *O'Connell v. Same*, *Scanlon v. Same*, *O'Brien v. Same*, [1914] 3 K.B. 731; *Liebig's Extract of Meat Co. v. Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381; *The Luna* (1919), 124 L.T. 382; *Armour v. Walford*, [1921] 3 K.B. 473; *Gibaud v. Great Eastern Rail. Co.*, [1921] All E.R.Rep. 35; *Nunan v. Southern Rail. Co.*, [1923] 2 K.B. 703; *Hearn v. Southern Rail. Co.* (1925), 41 T.L.R. 305; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] 1 All E.R. 316.

As to special terms of a contract for the carriage of passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 185-190; and for cases see 8 DIGEST (Repl.) 106 et seq.

Cases referred to:

(1) *Parker v. South Eastern Rail. Co.*, *Gabell v. South Eastern Rail. Co.* (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 25 W.R. 564, C.A.; 8 Digest (Repl.) 141, 909.

(2) *Henderson v. Stevenson* (1875), L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596, H.L.; 8 Digest (Repl.) 139, 898.



Also referred to in argument:

*Burke v. South Eastern Rail. Co.* (1879), 5 C.P.D. 1; 49 L.J.Q.B. 107; 41 L.T. 554; 44 J.P. 283; 28 W.R. 306; 8 Digest (Repl.) 114, 736.

*Watkins v. Rymill* (1883), 10 Q.B.D. 178; 52 L.J.Q.B. 121; 48 L.T. 426; 47 J.P. 357; 31 W.R. 337, D.C.; 3 Digest (Repl.) 93, 224.

**Appeal** by the defendants from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), affirming a decision of BRUCE, J., at the trial of the action at the Liverpool Assizes.

*Pickford, Q.C.* (*Bigham, Q.C.*, with him), for the appellants.

*J. Walton, Q.C.*, and *Collingwood Hope*, for the respondent, were not called on to address their Lordships.

**LORD HERSCHELL, L.C.**—The only question that arose on the trial of this action was whether the plaintiff was bound by certain conditions limiting the liability of the defendants who had engaged to carry her on the steamer from Philadelphia to Liverpool. The plaintiff paid her passage money and received her ticket from the defendants. On that ticket undoubtedly there were a great number of conditions detailed. The ticket began by stating that each passenger would be required to provide bedding and eating utensils, and then it continued: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." There are a number of conditions, beginning at the letter (a) and going down to the letter (i). The condition in question was one under letter (d):

"The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage."

These questions were left to the jury: (i) "Did the plaintiff know that there was writing or printing on the ticket?" That question they answered in the affirmative. (ii) "Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?" That they answered in the negative. (iii) "Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?" That they answered in the negative also.

These are questions which the majority of the Court of Appeal in *Parker v. South Eastern Rail. Co.* (1) pointed out by their judgment ought to be left to the jury. That was a case in its broad features very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of the railway company and received in return for the deposit of the luggage a ticket on which there was printed: "See back," and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions; that those were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants.

The only question which now comes before this House is whether there was any evidence to go to the jury upon which they could properly find the answer which they gave to the last two questions. What are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is and must be that where there are no facts beyond those which I have stated, the defendants are entitled, as matter of law, to say that the plaintiff is bound by those conditions. That seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in *Parker v.*

**A** *South Eastern Rail. Co.* (1), with which I entirely agree, and it does not seem either to be consistent, when the case is carefully considered, with *Henderson v. Stevenson* (2) in your Lordships' house. I, therefore, move your Lordships that this appeal be dismissed with costs.

**B** **LORD WATSON.**—I concur. It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all.

**C** **LORD ASHBOURNE.**—I also quite concur. The ticket in question in this case was for a steerage passenger, a class of people of the humblest description, many of whom have little education, and some of them none. I think, having regard to the facts here, the smallness of the type in which the alleged conditions were printed, the absence of any calling of attention to the alleged conditions, and the stamping in red ink across them, there was quite sufficient evidence to justify the learned judge in letting this case go to the jury.

**D** **LORD MORRIS.**—I concur.

*Appeal dismissed.*

Solicitors: *Rowcliffes, Rawle & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Field, Roscoe & Co.*, for *Bellringer & Cunliffe*, Liverpool.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

**E**

**F**

## BARNARDO v. McHUGH

HOUSE OF LORDS (Lord Halsbury, L.C., Lord Herschell, Lord Field and Lord Hannen), April 24, 27, 28, July 30, 1891]

[Reported [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423;  
55 J.P. 628; 40 W.R. 97; 7 T.L.R. 726]

**G**

*Infant—Custody—Rights of mother—Illegitimate child.*

A court, in determining who is to have custody of an illegitimate child, will primarily consider the wishes of the mother, unless it would be detrimental to the interests of the child.

*R. v. Nash, Re Carey* (1) (1883), 10 Q.B.D. 454, approved.

**H**

**Notes.** Followed: *R. v. Lewis* (1893), 9 T.L.R. 226. Applied: *R. v. New* (1904), 20 T.L.R. 515. Distinguished: *Secretary of State for Home Affairs v. O'Brien*, [1923] All E.R. 442. Considered: *Green v. Green*, [1929] P. 101; *Re Carroll* (No. 2), [1930] All E.R.Rep. 192. Distinguished: *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government*, [1942] 2 All E.R. 381. Considered: *Re A. (an infant)*, [1955] 2 All E.R. 202. Referred to: *Re McGrath* [1892] 2 Ch. 496; *Humphrys v. Polak*, [1901], 2 K.B. 385; *G. v. G.* (1928), 45 T.L.R. 7; *Re M.*, [1955] 2 All E.R. 911; *Re C. T. (an infant)*, *Re J. T. (an infant)*, [1956] 3 All E.R. 500.

As to the rights and liabilities of the mother of an illegitimate child, see 3 HALSBURY'S LAWS (3rd Edn.) 106 et seq.; and for cases see 3 DIGEST (Repl.) 432 et seq.

Cases referred to:

(1) *R. v. Nash, Re Carey* (1883), 10 Q.B.D. 454; 52 L.J.Q.B. 442; 48 L.T. 447; 31 W.R. 420, C.A.; 3 Digest (Repl.) 433, 276.

- (2) *R. v. Felton and Wenman* (1758), 1 Bott's Poor Law, 5th Edn., p. 478; 3 A Digest (Repl.) 433, 272.
- (3) *Re Spence* (1847), 2 Ph. 247; 16 L.J.Ch. 309; 9 L.T.O.S. 241, 329; 11 Jur. 399; 41 E.R. 937, L.C.; 28 Digest (Repl.) 630, 1314.
- (4) *Ex parte Knee* (1804), 1 Bos. & P.N.R. 148; 127 E.R. 416; 3 Digest (Repl.) 432, 270.
- (5) *R. v. Moseley* (1798), 5 East, 224, n.; 102 E.R. 1055, n.; 3 Digest (Repl.) B 433, 274.
- (6) *R. v. Soper* (1793), 5 Term Rep. 278; 101 E.R. 156; 3 Digest (Repl.) 433, 273.
- (7) *R. v. Hopkins* (1806), 7 East, 579; 103 E.R. 224, L.C.; 3 Digest (Repl.) 433, 275.
- (8) *Re Lloyd* (1841), 3 Man. & G. 547; 4 Scott, N.R. 200; 133 E.R. 1259; sub nom. *Re A. B.*, 11 L.J.C.P. 43; sub nom. *Anon.*, 5 Jur. 1198; 3 Digest C (Repl.) 434, 282.

**Appeal** from two orders of the Court of Appeal (LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.), reported [1891] 1 Q.B. 194, affirming two orders of the Queen's Bench Division (LORD COLERIDGE, C.J., and MATHEW, J.), the first making absolute a rule nisi for a writ of habeas corpus requiring the appellant, Dr. Barnardo, to bring up the body of an infant named John James Roddy, the illegitimate child of the respondent, Mrs. Mary McHugh, and the second appointing Mr. Walter Hussey Walsh guardian of the infant.

The facts are set out in the opinion of LORD HERSCHELL.

*Finlay, Q.C.*, and *W. Baker* for the appellant.

*Murphy, Q.C.*, *J. Walton* and *Lankester* for the respondent.

The House took time for consideration.

July 30, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—I desire to adopt the view of the facts of this case that has been stated by LORD ESHER, M.R. The question which this House has to determine is whether or not, under the circumstances the appellant is entitled against the will of the mother to retain the child in his home. That question, as I have already intimated, does not raise the question of unlawful detention at all. It is the question of whose is the rightful guardianship, or at all events what order the court ought to make in respect of guardianship on the facts of this case. It is clear that the written agreement with the appellant cannot determine that question. It is equally clear that, but for the circumstance of the child being illegitimate, there would be no doubt what order should be made. The question is whether that circumstance is conclusive against the mother on her present application.

I doubt very much whether any absolute rule can be laid down; but in *R. v. Nash, Re Carey* (1), this very question came for decision before the Court of Appeal, and SIR GEORGE JESSEL, M.R., appears to me to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a court of equity does, and always did, exercise in regard to such orders as are now in question. SIR GEORGE JESSEL, M.R., pointed out that that court is now governed by equitable rules, and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. He says (10 Q.B.D. at p. 456): "There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child." His Lordship, I think, did not mean an absolute right, but such a right as he had already described to be considered by a court of equity in making such orders. LORD MANSFIELD says much the same thing. In *R. v. Felton and Wenman* (2) on motion for an information against the defendants for taking away a bastard child from its mother, and delivering it to the father, a man of fortune,



A his Lordship said :

“Neither the putative father nor mother had the legal right of guardianship; and if the putative father, having an order of bastardy made on him to contribute to the maintenance of the child, has a mind to take the child and provide for it, the parish cannot insist on his paying towards the maintenance while in his custody; and that he thought in this case, where the justice had ordered the child to be delivered to the mother, he (the justice) had done wrong, the father being in good circumstances, and the mother poor; and that the circumstances of the parents should direct these cases.”

C LORD COTTENHAM, in his answer to the suggestion that a court of equity only interfered on behalf of infants where there was property in question, said he had no doubt about the jurisdiction to interfere, quite independently of property, and he drew this distinction :

D “Courts of law interfere by habeas for the protection of the person of anybody who is suggested to be improperly detained. This court [that is to say, a court of equity] interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriæ*, and the exercise of which is delegated to the Great Seal : ”

see *Re Spence* (3), 2 Ph. 252.

E It is clear further that the law has placed on the mother of an illegitimate child obligations which ought, and in my opinion do, bring them corresponding rights. Whether the right is, as LINDLEY, L.J., expresses it, a *prima facie* right to the custody of the child, or whether it be the settled view of the court of equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of opinion that no misconduct is established against this mother which disentitles her to exercise her right to be considered in respect of the custody of this child. I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed, and this appeal dismissed with costs, and I move your Lordships accordingly.

G LORD HERSCHELL.—In this case the Queen's Bench Division, on Aug. 5, 1890, made absolute an order that a writ of habeas corpus should issue commanding the appellant to have the body of an infant called Roddy before the judge at chambers immediately after the receipt of the writ. It was ordered that the writ should lie in the office until further order, and that the respondent, Margaret McHugh, should be at liberty to apply to the judge in chambers for the appointment of a guardian. On Nov. 4, the court appointed Mr. Walsh to be the guardian of the child. Both these orders were affirmed by the Court of Appeal on Nov. 25.

H The circumstances which have given rise to the controversy appear to be these : In the year 1888 a lady, who was a district visitor connected with Emmanuel Church, applied to the appellant for the admission to his homes of a boy named John James Roddy, who attended the schools belonging to that church. The boy was the illegitimate son of the respondent by a man named Jones, with whom she cohabited for twenty years. A few years ago she married her present husband.

I On June 19, the boy was admitted into the home, the respondent signing an agreement to leave the child under the care of the managers for twelve years. Early in the year 1890, the appellant was required, in accordance with an authority signed by the respondent, to hand the child over to a person named by her, and, on his refusal to do so, the present proceedings were instituted.

The question principally discussed at your Lordships' bar was whether the mother of an illegitimate child has a legal right to its custody. It was contended on behalf of the appellant that she has no such right; while on the other side it was argued that her rights are the same as those which a father possesses with

regard to his legitimate children. In the courts below, the latter proposition appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition. It is true that, in *Ex parte Knee* (4), where application was made for a writ of habeas corpus with a view to delivering to its mother the custody of an illegitimate child who had been placed with a third person by the putative father, MANSFIELD, C.J., said that the mother was entitled to the child if she insisted on it, unless some ground was shown by the affidavits to prevent her having the custody; but, in *R. v. Moseley* (5), which came before the court about the same time, LORD KENYON, C.J., said (5 East, at p. 224, n.):

"Where the father [he was speaking of the putative father of an illegitimate child] has the custody of a child fairly, I do not think that this court will take it away from him; but where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same position as before."

The same learned judge had, in a previous case of *R. v. Soper* (6), restored a child to the custody of a mother at her instance, where the putative father had obtained possession of it by fraud.

I do not gather that in either of these cases LORD KENYON acted on the view that the mother of an illegitimate child has an absolute legal right to its custody, but only that the court would intervene where she had been deprived of that custody by force or fraud; and, in *R. v. Hopkins* (7), two years after the decision of SIR JAMES MANSFIELD in *Ex parte Knee* (4), where a writ of habeas corpus was moved for by the mother of an illegitimate child which had been taken from her custody by force, LORD ELLENBOROUGH, C.J., expressed some doubt, on the opening of the case, "whether the court could interfere on behalf of the mother of an illegitimate child, who had no legal right to the person of the child," and said that "the question of guardianship belonged to another forum, with which this court would not interfere." On the following day, in granting the writ, LORD ELLENBOROUGH said (7 East, at p. 580):

"We think that this is a proper occasion for the court by means of a remedial writ to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint, leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle."

In *R. v. Nash, Re Carey* (1), to which I shall have occasion to refer hereafter, it was not necessary, as was there pointed out, to determine whether the mother of an illegitimate child had, according to the common law, a right to its custody, the court exercising an equitable as well as legal jurisdiction, and being governed by the rules of equity.

It seems to me that there was in former times a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was *filius nullius*, and to hold that no one possessed in relation to it the full parental rights which the law recognises in the case of legitimate offspring. When MAULE, J., in *Re Lloyd* (8) asked, "How does the mother of an illegitimate child differ from a stranger?" it does not appear to me that he was speaking ironically, but rather stating bluntly this legal doctrine. But, whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Amendment Act, 1834, s. 71, renders it impossible in the present day to regard the mother of an illegitimate child as destitute of any rights in relation to its custody. The obligation cast on the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody.

It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now

**A** governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by SIR GEORGE JESSEL, M.R., in *R. v. Nash, Re Carey* (1) (10 Q.B.D. at p. 456): "in equity regard was always had to the mother, putative father, and relations on the mother's side." In that case, the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think that this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

**D** The principles on which the court ought to act on the application for the custody of an illegitimate child being thus, to my mind, free from doubt, I proceed to inquire how they ought to be applied to the present case. On a review of all the circumstances of this case, I feel it impossible to hold that to comply with the wishes of the mother would be so injurious to the child as to justify our disregarding them. For these reasons I think that the judgment ought to be affirmed.

**LORD FIELD** and **LORD HANNEN** concurred.

*Appeal dismissed.*

Solicitors: *H. C. Nisbet & Daw; Leathley & Willes.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## RADCLIFFE v. BARTHOLOMEW

[QUEEN'S BENCH DIVISION (Wills and Lawrance, JJ.), November 9, 1891]

[Reported [1892] 1 Q.B. 161; 61 L.J.M.C. 63; 65 L.T. 677; 56 J.P. 262; 8 T.L.R. 43; 40 W.R. 63; 36 Sol. Jo. 43]

**H** *Time—Computation—Magistrates—Time within which complaint must be made—Exclusion of day on which offence committed.*

The rules for computation of periods of time are the same whether the statute limiting the period deals with civil or criminal procedure. Accordingly, where a period is fixed by a criminal statute within which proceedings, e.g., a complaint before magistrates, must be taken, the day on which the offence was committed ought to be omitted in calculating that period.

**I** *Hardy v. Ryle* (1) (1829), 9 B. & C. 603, and *Williams v. Burgess* (2) (1840), 12 Ad. & El. 635, applied.

**Notes.** The Cruelty to Animals Act, 1849, has been repealed.

Followed: *Marren v. Dawson Bentley & Co., Ltd.*, [1961] 2 All E.R. 270.

As to computation of time, see 37 HALSBURY'S LAWS (3rd Edn.) 92 et seq.; and for cases see 42 DIGEST 946 et seq.



Cases referred to :

- (1) *Hardy v. Ryle* (1829), 9 B. & C. 603; 2 Man. & Ry.M.C. 301; 4 Man. & Ry.K.B. 295; 7 L.J.O.S.M.C. 118; 109 E.R. 224; 42 Digest 948, 210.
- (2) *Williams v. Burgess* (1840), 12 Ad. & El. 635; 9 Dowl. 544; Arn. & H. 65; 4 Per. & Dav. 443; 10 L.J.Q.B. 10; 5 Jur. 71; 113 E.R. 955; 42 Digest 950, 234.
- (3) *Young v. Higgon* (1840), 8 Dowl. 212; 6 M. & W. 49; 9 L.J.M.C. 29; 4 J.P. 88; 4 Jur. 125; 151 E.R. 317; 42 Digest 947, 206.

Also referred to in argument :

*R. v. Middlesex Justices* (1843), 2 Dowl.N.S. 719; 12 L.J.M.C. 59; 7 J.P. 240; 7 Jur. 396; 42 Digest 960, 334.

*Migotti v. Colvill* (1879), 4 C.P.D. 233; 48 L.J.M.C. 190; 40 L.T. 747; 43 J.P. 620; 27 W.R. 744; 14 Cox, C.C. 305, C.A.; 42 Digest 938, 67.

*Lester v. Garland* (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, 203.

*Ex parte Fallon* (1793), 5 Term Rep. 283; 101 E.R. 159; 42 Digest 951, 241.

**Special Case** stated by justices for the county of Southampton.

On June 30, 1891, the respondent, Abraham Bartholomew, preferred an information against the appellant, Charles James Radclyffe, under s. 2 of the Cruelty to Animals Act, 1849, charging that, on May 30, 1891, he ill-treated a certain sheep by neglecting to supply sufficient food. By s. 14 of the Act of 1849, every complaint under the provisions of that Act "shall be made within one calendar month after the cause of complaint shall arise."

At the hearing, the appellant raised the preliminary objection that, as the offence was alleged to have been committed on May 30, 1891, and the complaint was not made until June 30, 1891, it had not been made within one calendar month after the cause of complaint had arisen, and that, therefore, the justices had no jurisdiction to hear and determine the case. The justices were of opinion that, in computing the time, "one calendar month," within which the information had to be laid, the day on which the cause of complaint arose should be excluded, and that the information was, therefore, laid in sufficient time under the Act. Before proceedings with the hearing of the case, the justices stated this Case for the opinion of the court, the question for the opinion of the court being whether their construction of s. 14 of the Act of 1849 was correct.

*Footnote* for the appellant.

*Colam* for the respondent.

**WILLS, J.**—I am of opinion that the decision of the justices in this case was right, and that this appeal must, therefore, be dismissed. The law on this point has been quite clear since *Hardy v. Ryle* (1) and *Williams v. Burgess* (2). In the former case, the facts were very similar to those in this case, except that there the proceedings were civil, and here they are criminal. The plaintiff in that case was discharged from prison on Dec. 14, and commenced an action for false imprisonment on June 14 following. The court there held that the action was commenced within six months after the act was committed, as required by the Constables Protection Act, 1750, s. 8. It is true that, in *Young v. Higgon* (3), PARKE, B., criticised the reasoning by which *Hardy v. Ryle* (1) is supported, but he does not suggest any doubt as to the correctness of the conclusions arrived at, and his final observation is cogent authority in support of them.

It has, however, been argued that the law draws a distinction between statutes dealing with criminal and civil proceedings, and that, in the former case, whenever a period is fixed by statute within which proceedings must be taken, the day on which the offence was committed ought to be included in calculating that period. No authority has been given in support of this argument, and I do not think that there is any. I think that great mischief would result if the same words were to

**A** be construed in one way in a statute dealing with civil procedure, and in another way in a criminal statute.

**LAWRANCE, J.**, concurred.

*Appeal dismissed.*

**B** Solicitors: *Wainwright & Baillie*, for Sir R. N. Howard, Weymouth; *A. Leslie*, Weymouth.

[Reported by T. R. BRIDGWATER, ESQ., Barrister-at-Law.]

**C**

## Re PULBOROUGH SCHOOL BOARD ELECTION. **BOURKE AND OTHERS v. NUTT**

**D**

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), February 19, 20, March 8, 1894]

[Reported [1894] 1 Q.B. 725; 63 L.J.Q.B. 497; 70 L.T. 639;  
58 J.P. 572; 42 W.R. 388; 10 T.L.R. 349; 38 Sol. Jo. 327;  
1 Mans. 172; 9 R. 395]

**E**

*Bankruptcy—Disqualification of bankrupt—Adjudication of bankruptcy before passing of Act creating disqualification.*

*Statute—Retrospective operation—Disqualification of bankrupt—Adjudication of bankruptcy before passing of Act creating disqualification.*

**F**

By the Bankruptcy Act, 1869, s. 32 (1), “when a debtor is adjudged bankrupt” he is to be subject to certain disqualifications set out in that subsection.

**Held** (LORD ESHER, M.R., dissenting): the section was not retrospective, and, therefore, the disqualification did not attach to a person adjudicated bankrupt before the passing of the Act.

*R. v. Vine* (1) (1875), L.R. 10 Q.B. 195, and *Re Pratt, Ex parte Pratt* (2) (1884), 12 Q.B.D. 334, distinguished.

**G**

**Notes.** The Bankruptcy Act, 1883, s. 32 (1), has been amended by the Local Government Act, 1933, s. 307 and Sched. XI, and the London Government Act, 1939, s. 207 and Sched. XIII, but the amendments do not affect the holding in the present case.

Distinguished: *Lane v. Lane*, [1896] P. 133. Considered: *Re Welsh Anthracite Collieries, Ltd., Industrial and General Trust, Ltd. v. Welsh Anthracite Collieries, Ltd.*, [1949] 2 All E.R. 736. Referred to: *R. v. Customs and Excise Comrs.*, [1928] A.C. 402; *R. v. Oliver*, [1943] 2 All E.R. 800.

**H**

As to disqualification of a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 351 et seq.; and for cases see 4 DIGEST (Repl.) 197 et seq. For the Bankruptcy Act, 1883, s. 32, see 2 HALSBURY'S STATUTES (2nd Edn.) 303. As to retrospective effect of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 423 et seq.; and for cases see 42 DIGEST 698 et seq.

**I**

Cases referred to:

- (1) *R. v. Vine* (1875), L.R. 10 Q.B. 195; 44 L.J.M.C. 60; 31 L.T. 842; 23 W.R. 649; 13 Cox, C.C. 43, D.C.; 14 Digest (Repl.) 593, 5905.
- (2) *Re Pratt, Ex parte Pratt* (1884), 12 Q.B.D. 334; 53 L.J.Ch. 613; 50 L.T. 294; 32 W.R. 420; 1 Morr. 27, C.A.; 4 Digest (Repl.) 169, 1555.
- (3) *Midland Rail. Co. v. Pye* (1861), 10 C.B.N.S. 179; 30 L.J.C.P. 314; 4 L.T. 510; 9 W.R. 658; 142 E.R. 419; 42 Digest 695, 1106.

- (4) *R. v. Turmine* (1878), 4 Q.B.D. 79; 48 L.J.Q.B. 5; 39 L.T. 255; 27 W.R. 150. A

Also referred to in argument :

*Re Raison, Ex parte Raison* (1891), 60 L.J.Q.B. 206; 63 L.T. 709; 39 W.R. 271; 7 T.L.R. 185; 8 Morr. 11; 4 Digest (Repl.) 587, 5250.

*R. v. St. Mary, Whitechapel (Inhabitants)* (1848), 12 Q.B. 120; 3 New Sess. Cas. 262; 17 L.J.M.C. 172; 11 L.T.O.S. 473; 116 E.R. 811; sub nom. *R. v. St. Mary, Whitechapel (Inhabitants)*, *R. v. St. Pancras (Inhabitants)*, 12 Jur. 792; 42 Digest 694, 1095. B

**Appeal** by the respondent from a decision of the Queen's Bench Division (LAW-RANCE and WRIGHT, JJ.), on a Special Case stated under s. 93 (7) of the Municipal Corporations Act, 1882. C

The question for the opinion of the court was whether the respondent, who in 1893 was a bankrupt under the Bankruptcy Act, 1869, was thereby disqualified from being elected a member of a school board under s. 32 (1) of the Bankruptcy Act, 1883. The facts are set out in the judgment of LOPES, L.J.

*Dickens, Q.C.*, and *Day* for the bankrupt. D

*Channell, Q.C.*, and *G. J. Talbot* for the petitioners.

*Cur. adv. vult.*

Mar. 8, 1894. **LORD ESHER, M.R.**—In this case, the respondent was elected as a member of the Pulborough School Board, and the petitioners have presented a petition asking the court to say that he was disqualified from being elected. The Divisional Court held that he was disqualified. E

The circumstances are few and simple. The respondent was adjudged a bankrupt before the passing of the Bankruptcy Act, 1883; under what circumstances we do not know, but he is still an undischarged bankrupt. It is urged on his behalf that, under these circumstances, s. 32 of the Bankruptcy Act, 1883, does not apply to him. It is argued that there is nothing in the Act to show unmistakably that it is retrospective; that the disqualification imposed by s. 32 is penal, and that, therefore, according to the ordinary rules of construction, the section ought not to be construed to have a retrospective effect if such a construction can be avoided. In my opinion, s. 32 is not penal within the meaning of the proposition that penal enactments ought not, if possible, to be construed as retrospective. I also think that the section is not retrospective, and, in my opinion, the judgment of the Divisional Court was right. Section 32 (1) provides : F G

"Where a debtor is adjudged bankrupt, he shall be disqualified for . . . (e) being elected to or holding or exercising the office of member of a school board."

Whether or not that enactment is retrospective depends on the words at the beginning of the section. The section does not say where a debtor "has been" or "shall be" adjudged bankrupt, either of which forms would be clear; but it uses an expression between the two, i.e., where a debtor "is" adjudged bankrupt. What is the canon of construction to be applied to those words? H

In the first place, I think that the section is not "penal" within the meaning of that word as used in the rule against the construction of enactments as retrospective. I cannot think that the legislature intended these disqualifications to be punishments on a man for becoming bankrupt, because, by s. 32 (2), there are provisions for the removal of the disqualification if the bankrupt obtains from the court his discharge "with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part." To say that the legislature intended by this section to punish a man of whom that could be proved would be to attribute to it gross injustice. It seems impossible to say that these disqualifications are imposed by way of punishment, and, therefore, in my opinion, they are intended to be solely for the protection of the public. In *R. v. Vine* (1), we I



A have a strong authority that a disqualification created under these circumstances cannot be penal within the meaning of the rule to which I have referred. I think that that is the effect of the judgment of COCKBURN, C.J.; but it was more clearly put by MELLOR, J., who says (L.R. 10 Q.B. at p. 200):

B "It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character."

The question in that case was whether a person convicted of felony was disqualified from being licensed to keep a public-house. The case was a stronger one than the present, but it lays down a canon of construction that, if an enactment creates disqualifications, not by way of punishment, but only for the public good, it is not to be considered penal within the rule against construing an Act to be retrospective.

C A rule was also strongly and clearly laid down in *Re Pratt, Ex parte Pratt* (2), which is a decision on the Bankruptcy Act, 1883, though not on s. 32. The question turned on the meaning of s. 4 and s. 5. Section 4 provides that "a debtor commits an act of bankruptcy" in certain cases; and s. 5 provides, "if a debtor commits an act of bankruptcy." Both these sections of the statute are in the present tense, not the past or future, and the court held that s. 4 was not retrospective with regard to an act of bankruptcy committed before the passing of the statute, but that it applied to the state of things existing at the date of the passing of the statute, and therefore, that a petition could be presented after the passing of the Act, provided that, at some previous time, an act of bankruptcy had been committed, whether under the Act of 1883 or any previous Act. The present tense used in s. 4 and s. 5 referred to the date of the petition, not to the dates of things happening before the passing of the Act. BOWEN, L.J., says of the Act (12 Q.B.D. at p. 340):

E "I think it is framed on the idea that a bankruptcy code is being constructed, and when the present tense is used, it is used, not in relation to time, but as the present tense of logic."

F And FRY, L.J., says (*ibid.* at p. 341):

G "I entirely agree with BOWEN, L.J., as to the meaning of the present tense in this section; it is used, I think, to express a hypothesis, without regard to time, just as in stating the proposition 'if A. is B., then B. is C.' It is equivalent to saying, 'if at the time when the petition is presented the debtor shall have committed an act of bankruptcy.'"

The court there said that the present tense used in s. 4 and s. 5 refers to the time when the court has to act, and does not refer to the time when that on which the court acts came into existence.

H Applying those words to the present case, it seems to me that the words of s. 32, "Where a debtor is adjudged bankrupt," are to be construed as applying to the time when he is elected to, or is acting in any of, the positions mentioned in the section; that is to say, at the time when it is sought to show that he is disqualified. If he were elected before 1883, but acted after that year, the petition against him would be against his acting in his office, and the time when he was elected would be immaterial. If that is the true construction of the section, it is not retrospective. It is prospective, because it refers to a time after the passing of the Act. As I have already said, it seems to me impossible to say, after looking at the provision at the end of the section, that the legislature intended to impose disqualification as a punishment on a bankrupt; and, if that is so, the rule of construction against construing penal statutes as retrospective would not be applicable here. Therefore, both on the authority of this court and on the ordinary rules of construction, I am of opinion that this section is not retrospective.

To hold otherwise would, as it seems to me, cause a manifest injustice. There might be a case when a man, adjudicated bankrupt before 1883, under such circumstances that his discharge has been indefinitely postponed on the ground of misconduct, might, under the construction which has been put (though I myself am very doubtful about it) on the Elementary Education Act, 1870, be re-elected and then be no longer disqualified. It seems to me extraordinary, but at present we are not asked to overrule that so decided. Then there might be another man, an undischarged bankrupt under the Act of 1883, in this position that, when his bankruptcy is inquired into, he will be entitled to a certificate on the ground that it was caused by misfortune without any misconduct on his part. This man must retire from being a member of the school board, though the other man may remain. And further, the fraudulent undischarged bankrupt may be the petitioner to oust the innocent undischarged bankrupt. I cannot believe that we ought to construe the statute, if there is any doubt in the matter, in such a way as to cause such a result. Therefore, I agree with the judgment of the Divisional Court, and, in my opinion, this appeal ought to be dismissed.

**LOPES, L.J.**, read the following judgment.—The facts, so far as material, are as follows: On Mar. 19, 1893, the respondent had been adjudged a bankrupt under the Bankruptcy Act, 1869. At a school board election, which took place on April 19, 1893, the respondent was a candidate for election, and was declared to be duly elected. At the time of his election, he had not obtained his discharge, nor had his bankruptcy been annulled. He was an undischarged bankrupt. On May 9, 1893, a petition was presented to the High Court alleging that the respondent at the time of his election was disqualified on the ground that he was an undischarged bankrupt. The question is whether, in the circumstances, the respondent, under s. 32 of the Bankruptcy Act, 1883, is disqualified for being elected a member of the school board.

The answer to this question depends on whether s. 32 is retrospective in its operation, or prospective only, and s. 32 says that, where "a debtor is adjudged bankrupt," he shall, subject to the provisions of the Act, be disqualified for almost every kind of office and appointment, these being specified, and amongst them for "being elected a member of a school board." It has been contended that the words "is adjudged bankrupt" are to be read "has been adjudged bankrupt either before or after the passing of this Act." I cannot so read those words. Independently of other considerations, with which I will presently deal, and regarding them only from a grammatical standpoint, I should read them, "is adjudged bankrupt under this Act." The sentence would then be, where a debtor "is adjudged bankrupt under this Act he shall, subject to the provisions of this Act, be disqualified." This reading seems more consonant with sense than "Where a debtor has been adjudged bankrupt under this Act, or any previous Act, he shall, subject to the provisions of this Act, be disqualified." The former reading gives to "is" its ordinary and natural meaning; the latter distorts it. The Bankruptcy Court, 1883, was an Act to amend and consolidate the law of bankruptcy, and created disqualifications and disabilities which had not before attached to bankruptcy.

It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect. In *Midland Rail. Co. v. Pye* (3), **ERLE, C.J.**,

A says (10 C.B.N.S. at p. 191):

B “Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one’s sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and wherever it is possible to put upon an Act of Parliament a construction not retrospective, the courts will always adopt that construction.”

C The position of the respondent previously to the Bankruptcy Act, 1883, under the School Board Act (33 & 34 Vict. c. 75), was that, on his being adjudged a bankrupt under the Bankruptcy Act, 1869, his seat on the board would be vacated, but he would be re-eligible for election at any succeeding triennial election of members of the board: *R. v. Turmine* (4). This case was not sought to be impugned at the Bar. Under s. 32 of the Bankruptcy Act, 1883, the respondent on being adjudged a bankrupt is disqualified from being elected a member of the school board until the adjudication of bankruptcy against him is annulled or he obtains from the court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part. A new disability, therefore, is imposed on him, and disabilities are imposed on other persons which had no existence before the Bankruptcy Act, 1883. Having regard to the scope of the Act, and the rule of construction applicable to statutes, I am confirmed in my view D as to the true reading of the words in s. 32 “is adjudged bankrupt.”

E It was urged that the words “Where a debtor is adjudged bankrupt” are equivalent to the words “Where a debtor is an adjudged bankrupt”; but, if the legislature so meant, why did they not use that form? And this observation is the more cogent, because, in the preceding section—viz., s. 31—the expression “undischarged bankrupt” is used. Again, s. 169 is most material, and points in the same direction. It provides that any proceedings under the Bankruptcy Act, F 1869, are to continue, and all its provisions are to apply thereto as if the Act of 1883 had not passed. The respondent’s bankruptcy is a pending proceeding, for he has not obtained his discharge, and he would have to apply for his discharge under the Bankruptcy Act, 1869. The legislature, in my opinion, intended that bankruptcies under the Act of 1869 were to be subject to the incident of a bankruptcy under that Act, and were not to be affected by the Act of 1883. The repeal G of the Bankruptcy Act, 1869, is not to affect “anything done or suffered before the commencement of this Act under any enactment repealed by this Act” (Bankruptcy Act, 1883, s. 169 (2) (a)). This would appear to retain the old disqualification, which, as I have observed, was different and less severe than that imposed by s. 32. In s. 33 and s. 34, the same words “is adjudged bankrupt” are used, H and it cannot be contended that to those words, as used in those sections, a retrospective operation can be attached. It seems to me highly improbable that the legislature, when passing a new Bankruptcy Act creating great changes in the law and attaching wider and graver disabilities to bankruptcy, would impose new and penal consequences on bankruptcies already existing.

I WRIGHT, J., in his judgment, seems to have relied on the language of the Bankruptcy Disqualification Act, 1871, which is repealed by the Act of 1883, but re-enacted in this s. 32. The words are, “Every peer who becomes a bankrupt shall be disqualified”; and s. 9 says, that the Act shall apply to

“Any person who before or after the passing of this Act becomes bankrupt, and subsequently succeeds to a peerage, whose bankruptcy has not determined at the time of his so succeeding... or any person who has become bankrupt before the time of the passing of this Act, and whose bankruptcy has not determined.”



The learned judge thinks it inconceivable that the legislature could have intended A  
a different construction to be placed on s. 32 without expressly saying so. In my  
opinion, the omission in the Act of 1883 of any interpretation clause, or any words  
giving a retrospective effect to the disability, is most significant, and is strong  
evidence to prove that no retrospective effect was intended. The court below  
were also much influenced, in my judgment, by *R. v. Vine* (1). It is always B  
dangerous to interpret one Act of Parliament by another, and the more especially  
is this the case where the words used and the subject-matter dealt with are dif-  
ferent. The words under consideration in that case were, "Every person con-  
victed of felony." It is difficult to distinguish those words from the words in  
question; but there was nothing in the Act of Parliament which had then to be  
construed to qualify or interpret their effect as there is in this case. Nothing, I  
mean, like s. 169, indicating that the incidents of an old bankruptcy under the C  
Act of 1869 were to continue, or like s. 33 and s. 34, where similar words are used  
in circumstances where a retrospective effect cannot be attributed to them.  
Apart, however, from these points of difference, I do not hesitate to say I prefer  
the reasoning of LUSH, J., who differed from the other members of the court.

I cannot accept that case as governing the case now before us. *Re Pratt, ex*  
*parte Pratt* (2), which was cited, is also distinguishable. The construction adopted D  
did not impose any new liability or disability; it only gave effect to that which  
would have happened if the Act of 1883 had not been passed, viz., cases in which  
an act of bankruptcy had been committed under the Act of 1869, but no pro-  
ceedings had been taken under that Act. It was a convenient construction to  
adopt, and does not militate with the view I take of s. 32 of the Bankruptcy Act,  
1883, or the principles I apply to its construction. I think, therefore, that the E  
decision of the court below should be reversed.

DAYEY, L.J., read the following judgment.—I am of opinion that the appeal in  
this case ought to succeed. It was not contended on the part of the petitioners  
that any disability or disqualification was imposed on the respondent by the  
Elementary Education Act, 1870, or that *R. v. Turmine* (4) was wrongly decided. F  
The question, therefore, seems to me to turn on the proper construction to be put  
on the words "Where a man is adjudged bankrupt" at the commencement of  
s. 32 (1) of the Bankruptcy Act, 1883. Reading those words alone, and apart  
from considerations arising out of the subject-matter of the section in which they  
occur, I should certainly understand them (according to the ordinary use of the  
English language) to mean, if any man shall or may hereafter be adjudged bank- G  
rupt; and, unless there be some controlling context in the Act or in the section,  
I hold that to be the meaning of the words. It has been suggested that the words  
may be read as meaning "Where a man is an adjudged bankrupt." The answer  
seems to me to be that those are not the words before us, and that the words we  
have to construe are grammatically different. I think that the words "is adjudged"  
are the verb, whereas in the paraphrase suggested the word "adjudicated" would H  
be an adjective. The one form of sentence points to an event to happen, whereas  
the form suggested predicates a certain quality of the subject which may just as  
well attach to him by a previous adjudication as by a subsequent one.

Is there any context to be found in the Act itself which should control what I  
hold to be the *prima facie* meaning of the words? I think not. By s. 169, all  
existing disqualifications are preserved, and, although I do not think that the  
eligibility to a school board was a privilege or right preserved by that section, I  
think that the language of the section shows an intention to leave existing bank- I  
rupts as they were, and negatives any necessity for implying any new disqualifi-  
cation. If I turn to s. 33 and s. 34 in the same group of sections, where the same  
words are used, I find that they are necessarily prospective only, and they afford me  
no assistance in construing the words in s. 32 otherwise than in their ordinary gram-  
matical sense. Does the subject-matter of the section supply any reason for so  
doing? In my opinion, the argument is the other way. This Act is not a School

- A Board Act, but a Bankruptcy Act for the primary purpose of defining the liabilities and consequences of bankruptcy, and although the section in question is, no doubt, dictated by regard to the public interest, it does impose disabilities and consequences of a serious character on persons adjudged bankrupt, and is in that sense and to that extent a penal enactment. It is a well-known principle in the construction of statutes that, where the words admit of two constructions, you are not
- B to construe them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the Act. If I thought this language more ambiguous than I confess I do, I think that this principle should be applied, and the words, being at best ambiguous, ought not to be construed so as to impose on the existing bankrupts disabilities which they were not at that time under. If the legislature had meant such a result, it would have been exceedingly easy, instead of using
- C this ambiguous form of words, to say so—as was in fact done in the Bankruptcy Disqualification Act, 1871, referred to by WRIGHT, J.

With regard to the cases which have been referred to, in *R. v. Vine* (1), the words construed were grammatically and substantially different: "Every person convicted of felony." The observations I have made on the suggested paraphrase in the present case apply to the words in that case. In *Re Pratt, Ex parte Pratt*

D (2), the court had to construe other sections of the Bankruptcy Act expressed in different language and with a different context, and there were very strong reasons of policy and convenience for adopting the construction placed on the Act by the court. I do not think that it is any authority in the present case. For these reasons, I agree with the lord justice that the judgment of the court below should be reversed.

E

*Appeal allowed.*

Solicitors: *Parish & Hickson*, for *R. A. Blagden*, Littlehampton; *Palmer & Bull*, for *Mant & Mant*, Storrington.

[*Reported by E. MANLEY-SMITH, Esq., Barrister-at-Law.*]

**MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC  
LIGHTING CO.  
SHELFER v. SAME**

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), November 23, 26, December 18, 1894]

[Reported [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34;  
43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112]

*Injunction—Damages in lieu of—Prima facie right to injunction—Award of damages in exceptional circumstances—Nuisance caused by public service company.*

By s. 2 of the Chancery Amendment Act, 1858: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

In the exercise of the jurisdiction given by the section attention ought to be paid to the well-settled principles on which injunctions were granted before the passing of the Act. Ever since the Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn the court into a tribunal for legalising illegal acts, and has protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., an electric, gas, or water company, or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Where a plaintiff's legal right has been infringed and there is a threat of further infringement to a material extent *prima facie* he is entitled to an injunction. The jurisdiction to award damages instead of granting an injunction ought not to be exercised except in very exceptional circumstances, e.g., where the nuisance is trivial and occasional and the injury to the plaintiff's legal right is small, where the plaintiff has shown that he only wants money, where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief, where it would be otherwise oppressive to the defendant to grant an injunction, and where the injury to the plaintiff is capable of being assessed in money and an award of damages affords him an adequate remedy.

*Injunction—Reversioner—Grant to—Injury to property continuing beyond the term.*

An action by a reversioner for an injunction to restrain an injury to his reversion will lie if he can prove actual damage to the reversion, as where, by the acts of the defendant, the structure of a house of which the reversioner is the freeholder is damaged, and further acts of the defendant causing injury will continue beyond the term.

**Notes.** The Chancery Amendment Act, 1858, s. 2, was repealed by the Statute Law Revision & Civil Procedure Act, 1883, but by s. 5 of the last-mentioned Act the repeal did not affect the jurisdiction established by the repealed enactment.

Considered: *Wise v. Metropolitan Electric Supply Co.* (1894), 10 T.L.R. 446; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217. Applied: *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L.T. 716. Considered: *Cowper v. Laidler*, [1903] 2 Ch. 337; *Midwood v. Manchester Corpn.*, [1905] 2 K.B.



- A** 597. Distinguished: *Kine v. Jolly*, [1905] 1 Ch. 480. Applied: *Rileys v. Halifax Corp.* (1907), 97 L.T. 278. Considered: *Gilling v. Gray* (1910), 27 T.L.R. 39; *Petty v. Parsons* (1914), 84 L.J.Ch. 81; *Slack v. Leeds Industrial Co-operative Society*, [1923] 1 Ch. 431. Applied: *Slack v. Leeds Industrial Co-operative Society*, [1924] 2 Ch. 475. Considered: *Horton's Estate v. Beattie* (1926), 42 T.L.R. 701. Applied: *Price v. Hilditch*, [1930] 1 Ch. 500. Considered: *Fishenden v. Higgs and Hill, Ltd.* (1935), 153 L.T. 128; *Wiltshire Bacon Co. v. Associated Cinema Properties, Ltd.*, [1937] 4 All E.R. 80. Applied: *Maberley v. Peabody & Co. of London, Ltd.*, [1946] 2 All E.R. 192; *Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland)*, [1957] 2 All E.R. 343. Referred to: *Allport v. Securities Corp.* (1895), 64 L.J.Ch. 491; *Colls v. Home and Colonial Stores, Ltd.*, [1904-7] All E.R.Rep. 5; *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707; *Saunby v. London (Ontario) Water Comrs.*, [1906] A.C. 110; *Farnworth v. Manchester City Corp.*, [1929] 1 K.B. 533; *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Same*, [1932] All E.R.Rep. 861; *National Trust for Places of Historic Interest or Natural Beauty v. Midlands Electricity Board*, [1952] 1 All E.R. 298; *Halsey v. Esso Petroleum Co., Ltd.*, [1961] 2 All E.R. 145.
- B**
- C**

**D** As to damages as alternative relief to an injunction and the right of a reversioner to an injunction, see 21 HALSBURY'S LAWS (3rd Edn.) 349, 379; and for cases see 28 DIGEST (Repl.) 788 et seq. For the Chancery Amendment Act, 1858, see 18 HALSBURY'S STATUTES (2nd Edn.) 456.

Cases referred to:

- E** (1) *Imperial Gas Light and Coke Co. (Directors, etc.) v. Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 28 Digest (Repl.) 768, 211.
- (2) *Martin v. Price*, [1894] 1 Ch. 276; 63 L.J.Ch. 209; 70 L.T. 202; 42 W.R. 262; 10 T.L.R. 172; 38 Sol. Jo. 127; 7 R. 90, C.A.; 28 Digest (Repl.) 788, 377.
- F** (3) *Goldsmid v. Tunbridge Wells Improvement Comrs.* (1866), 1 Ch.App. 349; 35 L.J.Ch. 382; 14 L.T. 154; 30 J.P. 419; 12 Jur.N.S. 308; 14 W.R. 562, L.J.J.; 36 Digest (Repl.) 330, 749.
- (4) *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch.App. 125; 42 L.J.Ch. 107; 27 L.T. 521; 36 J.P. 760; 21 W.R. 32, L.J.J.; 36 Digest (Repl.) 328, 725.
- (5) *Krehl v. Burrell* (1879), 11 Ch.D. 146; 40 L.T. 637; 27 W.R. 805, C.A.; 28 Digest (Repl.) 778, 296.
- G** (6) *Baxter v. Taylor* (1832), B. & Ad. 72; 1 Nev. & M.K.B. 11; 2 L.J.K.B. 65; 110 E.R. 382; 19 Digest (Repl.) 133, 864.
- (7) *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; 63 L.J.Ch. 399; 70 L.T. 485; 38 Sol. Jo. 253; 8 R. 781; 7 Digest (Repl.) 308, 257.
- (8) *Jones v. Chappell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 31 Digest (Repl.) 307, 534.
- H** (9) *Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch.D. 316; 62 L.T. 518; 6 Asp.M.L.C. 492, C.A.; on appeal sub nom. *Peruvian Guano Co., Ltd. v. Dreyfus Bros. & Co.*, [1892] A.C. 166; 61 L.J.Ch. 749; 66 L.T. 536; 8 T.L.R. 327; 7 Asp.M.L.C. 225, H.L.; 28 Digest (Repl.) 791, 404.
- (10) *A.-G. v. Gas Light and Coke Co.* (1877), 7 Ch.D. 217; 47 L.J.Ch. 534; 37 L.T. 746; 42 J.P. 391; 26 W.R. 125; 25 Digest (Repl.) 543, 139.
- I** (11) *A.-G. v. Leeds Corp.* (1870), 5 Ch.App. 583; 39 L.J.Ch. 711; 34 J.P. 708; 19 W.R. 19, L.C. & L.J.; 28 Digest (Repl.) 801, 509.

Also referred to in argument:

- Isenberg v. East India House Estate Co., Ltd.* (1863), 3 De G.J. & Sm. 263; 3 New Rep. 345; 33 L.J.Ch. 392; 9 L.T. 625; 28 J.P. 228; 10 Jur.N.S. 221; 12 W.R. 450; 46 E.R. 637, L.C.; 28 Digest (Repl.) 778, 298.
- Viscountess Gort v. Clark* (1868), 18 L.T. 343; 16 W.R. 569, L.J.J.; 28 Digest (Repl.) 804, 527.

- Holland v. Worley* (1884), 26 Ch.D. 578; 54 L.J.Ch. 268; 50 L.T. 526; 49 J.P. 7; 32 W.R. 749; 28 Digest (Repl.) 792, 412. **A**
- Stokes v. City Offices Co.* (1865), 2 Hem. & M. 650; 12 L.T. 602; 29 J.P. 708; 11 Jur.N.S. 560; 71 E.R. 616; affirmed, 13 L.T. 81, L.C.; 19 Digest (Repl.) 212, 1548.
- Sayers v. Collyer* (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 28 Digest (Repl.) 789, 381. **B**
- London, Brighton and South Coast Rail Co. v. Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, 690.
- National Telephone Co. v. Baker*, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 288; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 36 Digest (Repl.) 296, 417.
- Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59. **C**
- Trail v. Jackson* (1876), 4 Ch.D. 7; 46 L.J.Ch. 16; 25 W.R. 36, C.A.; Digest (Practice) 804, 3671.
- International Financial Society v. City of Moscow Gas Co., City of Moscow Gas Co. v. International Financial Society* (1877), 7 Ch.D. 241; 47 L.J.Ch. 258; 37 L.T. 736; 26 W.R. 272, C.A.; Digest (Practice) 803, 3664. **D**
- Berdan v. Birmingham Small Arms and Metal Co.* (1877), 7 Ch.D. 24; 47 L.J.Ch. 96; 37 L.T. 588; 26 W.R. 89, C.A.; Digest (Practice) 803, 3663.
- Bell v. Midland Rail. Co.* (1861), 10 C.B.N.S. 287; 30 L.J.C.P. 273; 4 L.T. 293; 7 Jur.N.S. 1200; 9 W.R. 612; 142 E.R. 462; 36 Digest (Repl.) 308, 548.
- Whitham v. Kershaw* (1886), 16 Q.B.D. 613; 54 L.T. 124; 34 W.R. 340; sub nom. *Witham v. Kershaw*, 2 T.L.R. 281, C.A.; 31 Digest (Repl.) 399, 5285. **E**
- Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34; 25 L.J.Ex. 265; 27 L.T.O.S. 58; 157 E.R. 1107; sub nom. *Mountford v. Oxford, Worcester and Wolverhampton Rail. Co.*, 4 W.R. 457; 36 Digest (Repl.) 307, 532.
- Simpson v. Savage* (1856), 1 C.B.N.S. 347; 26 L.J.C.P. 50; 28 L.T.O.S. 204; 21 J.P. 279; 3 Jur.N.S. 161; 5 W.R. 147; 140 E.R. 143; 36 Digest (Repl.) 306, 531. **F**
- Mott v. Schoolbred* (1875), L.R. 20 Eq. 22; 44 L.J.Ch. 380; 23 W.R. 545; 36 Digest (Repl.) 307, 533.

**Appeals** by the plaintiffs, Meux's Brewery Co., the freeholders, and Shelfer, the leaseholder, of the Waterman's Arms, a public-house, situate at Bankside, on the river Thames, against the decision of KEKEWICH, J., in an action brought by the plaintiffs against the defendants, the City of London Electric Lighting Co., for an injunction to restrain them from the use of any dynamo or other engine or machinery so as by vibration or otherwise to injure the plaintiffs' premises, and as to the plaintiff Shelfer, the leaseholder, from causing a nuisance by vibration or noise, and for damages. **G**

In March, 1893, Shelfer took from Meux's Brewery Co. a lease of the Waterman's Arms for a term of twenty-one years, at the yearly rent of £70, and he also paid a premium. At the end of 1891 the defendants acquired land adjacent to the public-house, and erected thereon sheds, engine houses, a shaft, and all the buildings and machinery necessary for forming a large central station for the purpose of supplying electric light over a considerable area in the metropolis. Foundations for the works were sunk from 25 ft. to 30 ft. below the surface of the ground, and engines of 500 and 1,000 horsepower were fixed in position and commenced to work. At the trial it appeared from the evidence that until October, 1893, the noise and vibration arising from the working of the engines was not noticeable, but that in that month the working of the engines began to cause the rooms of the licensed premises and the furniture and bedsteads therein to vibrate, so as to interfere with the sleep, comfort, and health of the occupiers, two of the witnesses stating that the vibration caused actual sickness. A crack **H**

**A** also appeared in a wall, which, in March, 1894, extended through two storeys, and measured two inches wide in some places, while a hearthstone in one of the upper rooms became displaced. It was found, too, that the house, which before had a list to the east, now settled towards the west, the defendants' side of the premises. The defendants admitted that some noise arose from their exhausts, but undertook to abate it, but they denied that the crack was caused by their operations, and stated that the vibration was trivial. **B** **KEKEWICH, J.**, held (70 L.T. 762) that, though the defendants were guilty of a nuisance, it was a case in which, in the exercise of his discretion under the Chancery Amendment Act, 1858 (Lord Cairns' Act), he ought not to grant an injunction, but only damages in both actions. From this decision the plaintiffs in both actions appealed.

**C** *Warmington, Q.C., Borthwick, and Waggett* for the plaintiffs.  
*Fletcher-Moulton, Q.C., Renshaw, Q.C., and Braithwaite* for the defendants.

*Cur. adv. vult.*

Dec. 18, 1894. The following judgments were read.

**D** **LORD HALSBURY.**—The plaintiffs in these two actions complain of a nuisance created by the defendants by the vibration of their engines and the annoyance caused by the carrying on of their electric lighting works. Of the reality and gravity of the nuisance no serious denial has been made before us. The plaintiffs are respectively the lessee and reversioners of the house known as the Waterman's Arms. The considerations which arise are applicable to the plaintiffs in both **E** actions, except in so far as one is lessee and the others are reversioners. I will deal with that question separately. The nuisance being established, it is said, first, that the defendant company are authorised by law to carry on the business, and that they have done all that skill and care can effect to prevent any nuisance; that they are in the same position as a railway company, and they are entitled to do what they have done under the authority of the legislature. If the analogy were **F** a correct one, I should think the defendants had fallen very far short of proving that they had done all that was possible to prevent a nuisance. A railway company has a defined line of operation within which it may make its works, and, if it does all that can be done to prevent a nuisance, the undertaking having to be carried on in that place, and the traffic having to be carried on by means of locomotive engines over the line of railway, the legislature is taken to have sanctioned that proceeding with the necessary annoyance. No such considerations apply here. **G** It is not, however, necessary to deal with this part of the case, and I only mention it to disclaim the notion that I acquiesce in the allegation that it has been here proved that it is essential to the carrying on of the electric lighting business in the district in question that a nuisance should be created.

**H** The main question turns on the construction of the Electric Lighting Act, 1882, and a Provisional Order which has become an Act of Parliament. It was boldly contended for the defendants that the Provisional Order protected the undertaking, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorised and even imposed as a duty on the undertakers. I think it is only necessary to read the provisional order in connection with s. 10 of the Electric Lighting Act, 1882, to dispose of that argument. **I** Section 10 [repealed by the Electricity Act, 1947] is in these words :

“The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any licence, order, or special Act authorising or affecting their undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licences for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply.”



The Provisional Order, which, as I said, has the same effect as an Act of Parliament, and which is relied on as an authority to create the nuisance, is in these words :

“Nothing in this Order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them.”

The general Act only gives them power subject to the restrictions of their particular Order, and the particular Order makes them expressly and in terms liable for creating a nuisance. I have also come to the conclusion that the powers given by s. 17 of that Act, read together with s. 10, are applicable to the execution of the authorised works as distinguished from the carrying on of the business; and when one considers how frequently the distinction between the execution of the works and the use of them when executed has been the subject of comment and decision, I think it must be taken that the language used has been deliberately chosen by the legislature as pointing to the distinction, now well recognised, between the construction of works and the user of them when constructed.

Assuming that there is a nuisance, and that there is no authority justifying it, the question still remains : What is the relief to which the plaintiffs are entitled? But for the provision of Lord Cairns' Act I suppose no one would have doubted that, in the state of facts I have now assumed to exist, the plaintiff Shelfer would have been entitled to an injunction to restrain the continuance of the nuisance. LORD KINGSDOWN, in the House of Lords (*Imperial Gas Light and Coke Co. (Directors, etc.) v. Broadbent (1)*), said (7 H.L.Cas. at p. 612) :

“The rule I take to be clearly this : if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that, unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation.”

But it is said, and truly said, that the law has been altered by Lord Cairns' Act, and the question is : What construction is to be placed upon that enactment? Undoubtedly it conferred upon courts of equity the jurisdiction to award damages which did not exist before. But the question is not whether it has actually given an additional power, which is undoubted, but whether it was intended to interfere with the well-settled principles upon which courts of equity were in the habit of interfering in such cases as the present. It seems to me that the defects in the powers of the courts of equity which were sought to be supplied by that statute give ample grounds for the provisions of the statute without supposing that it was meant to revolutionise the principles upon which equitable jurisprudence had been administered up to that time. The language is general, and the discretion given is wide enough in terms to authorise a judge to award damages where formerly he would have granted an injunction. But there is nothing in this case which, to my mind, can justify the court in refusing to grant an injunction. The effect of such a refusal in a case like the present would operate to enable a company who could afford it to compel a neighbouring proprietor to sell, by continuing a nuisance, and simply paying damages for its continuance. I see no trace of any intention to alter the well-settled principles upon which injunctions were formerly granted. And further, I think the question is here covered by the authority of *Martin v. Price* (2) in this court. I think, therefore, the judgment of KEKEWICH, J., should be reversed as far as the refusal of an injunction is concerned, and that an injunction should be granted.

What I have said at present refers only to the case of Mr. Shelfer. It is said that the reversioners have no such right. It seems to me that that entirely ignores the state of the evidence in respect of the material and permanent injury to the structure itself. No doubt, where a nuisance will not necessarily continue

- A** beyond the term, and the consequences of that nuisance will not fall on the reversioner's property, it may well be that the reversioner is not entitled to such a remedy. But where, as in this case according to the evidence, the walls of the house are so shaken that cracks are perceptible in them, and, if the present condition of things as regards the machinery were to continue without any alteration, there would be an increased injury to the actual subject of the reversion, it seems to me
- B** absolutely impossible to contend that the reversioner is not equally entitled to the injunction asked for. There will, therefore, be damages in respect of the past injury, but inasmuch as the reversioners and the leaseholder between them represent the entirety of the interest, it will be desirable, and indeed necessary, for the purpose of justice that the defendants should not be called upon to pay twice over for the same damage because the plaintiffs are separate in point of interest.
- C** The appeals will, therefore, be allowed with costs.

- LINDLEY, L.J.**—The nuisance complained of in these actions is clearly proved as a fact. It is also proved that the nuisance is of a very serious character, and will continue, and will increase if the defendants are allowed to enlarge their machinery and to extend their operations as they propose to do. The persons who
- D** complain of this nuisance are first, Shelfer, who is a lessee for twenty-one years, and the occupier of a public-house near the defendants' works; and, secondly, Meux's Brewery Co., who are his lessors. Both ask for an injunction, and for damages for the injury already done. They have not joined in one action as they might have done, but they have brought separate actions, which, however, came on for trial together. The learned judge has refused an injunction in both actions,
- E** and has simply directed an inquiry as to damages. From this decision the plaintiffs, in both actions, have appealed, and they ask for an injunction. The defendants have not appealed; they do not, they say, object to pay damages or compensation, but they strongly object to an injunction, and, in opposing the granting of an injunction, their counsel have contended that the defendants have done no actionable wrong, and that the statute which applies to them authorises,
- F** and indeed requires, them to supply electricity, and that the nuisance complained of is authorised by statute, and must, therefore, be submitted to by those who unfortunately suffer from it. It was contended by the plaintiffs that it was not open to the defendants to take this course without themselves appealing against the judgment for damages, but this contention cannot be supported. The defendants are entitled, if they choose, to waive their own right, if any, to appeal, and
- G** yet to resist the further relief which the plaintiffs seeks to obtain against them.

- The defendants' contention that the nuisance is authorised by Act of Parliament cannot be supported. This question turns on the construction of the Electric Lighting Act, 1882, ss. 10 and 17, and on the Provisional Orders of 1890 and 1891, made under its authority. These Orders prescribe the conditions on which the defendants are entitled to exercise their statutory powers, and they expressly say
- H** that nothing in them shall justify a nuisance. The argument that the defendants can justify what they are doing under the Act of Parliament, although not under the Orders, is, in my opinion, displaced by the wording of the Act and Orders, which must be read together. When so read, they do not legalise any nuisance. Part of the price paid for the right to exercise the statutory powers is that those who exercise them do not create a nuisance. Another answer to the defendant's contention on this head is, that ss. 10 and 17 of the statute only relate to damage done on the execution of the company's works, and not to damage done afterwards by the use of engines, the erection of which is completely finished. I will add, further, that it is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence as it stands does not satisfy me that this is really true. The defendants have not proved that they cannot supply electricity if they multiply their stations and diminish the power of their engines at each station. It is not

shown that they cannot in this way avoid creating a nuisance at any of their stations. A

The nuisance not being legalised, the question arises whether the plaintiffs are not entitled to an injunction. I will first take the case of *Shelfer*, the tenant. Before Lord Cairns' Act, tenants certainly would have been entitled to an injunction to protect them during their tenancy. Nothing can be more explicit on the point than the decision of the House of Lords in *Imperial Gas Light and Coke Co. (Directors, etc.) v. Broadbent* (1), where a market gardener obtained an injunction against a gas company who injured his crops. LORD HALSBURY has read a passage from LORD KINGSDOWN's opinion; there is a similar passage in the opinion of LORD CAMPBELL, L.C. (7 H.L.Cas. at p. 610), and there is also the very valuable authority of LORD CRANWORTH's judgment in the same case in the Court of Appeal (7 De G.M. & G. at p. 462), which is exactly of the same nature. This case is an authority to show that an injunction would not be refused on the ground that the public would be inconvenienced if an injunction were granted. B C

But then it is urged that, although this was the law before Lord Cairns' Act, that Act had given the court a discretion to award damages even in the case of a clear continuing nuisance of a serious character. It is very true that Lord Cairns' Act conferred upon the Court of Chancery jurisdiction (which it had not before) to award damages in lieu of an injunction. Section 2 provides that, D

"in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the court shall direct." E

The jurisdiction to give damages instead of an injunction is in words given in all cases, but the use of the word "damages" has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But, in exercise of the jurisdiction thus given, attention ought to be paid to well-settled principles, and ever since Lord Cairns' Act was passed, the Court of Chancery has repudiated the notion that the legislature intended to turn the court into a tribunal for legalising illegal acts; or, in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrong-doer is in some sense a public benefactor (e.g., a gas or water company, or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable where Parliament has sanctioned it. Courts of justice are not like Parliament, who consider whether proposed works will be so beneficial to the public as to justify exceptional legislation and the deprivation of people of their rights with or without compensation. F G H

Lord Cairns' Act was not passed in order to supersede special legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act. This is the view which has always been taken of the Act, as is plain from *Goldsmid v. Tunbridge Wells Improvement Comrs.* (3); *Clowes v. Staffordshire Potteries Waterworks Co.* (4); *Krehl v. Burrell* (5); and *Martin v. Price* (2). In *Martin v. Price* (2) the principle on which the court ought to act was quite recently enunciated and enforced. The court there, in a carefully considered judgment, said [1894] 1 Ch. at p. 285): I

"The plaintiff's legal right and its infringement already, and threatened further infringement to a material extent, being thus established, the plaintiff is en-



A titled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might of course be circumstances depriving the plaintiff of his *prima facie* right; but we can discover none in this case."

B In that case, accordingly, the Court of Appeal granted an injunction which had been refused by the court below, being of opinion that the discretion given to the court by Lord Cairns' Act had been wrongfully exercised. So here, guided by the same principle, I come to the same conclusion. Without denying the jurisdiction to award damages instead of an injunction even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases, except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances—cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy, as where the acts complained of are finished already, an injunction can be properly refused. There are no circumstances here which, according to recognised principles, justify the refusal of an injunction, and in my opinion, therefore, an injunction ought to have been granted in the action brought by the tenant.

E I pass now to the action brought by Meux's Brewery Co., the landlords. They sue in respect of actual and prospective injury to their reversion. Actual injury is proved, for their house is structurally injured by the defendant's operations, and further prospective injury from continued and increased vibration is also proved. This is not the case of a temporary nuisance, which is likely to cease before the existing tenancy expires, and which nuisance, therefore, although it may affect the present value of the reversion, will not affect the value when it falls into possession. The nuisance in this case is of a totally different character, and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. The cases on this subject, from *Baxter v. Taylor* (6) downwards, will be found collected in the judgment of NORTH, J., in *Mayfair Property Co. v. Johnston* (7), and I do not, therefore, refer to them here. It is true that in *Jones v. Chappell* (8) an injunction sought by a reversioner to restrain noise and vibration was refused, but it was refused because they might cease before the reversioner came into possession. But in this case it is idle to suppose that the vibration, which is the real cause of continuing injury, will cease. It must be borne in mind that the defendants are a corporation, created for the express purpose of supplying electricity for a time to which no limit can be assigned; and they have gone to great expense in making foundations and erecting permanent works on a large scale.

H *Jones v. Chappell* (8) may be compared with *Clowes v. Staffordshire Potteries Waterworks Co.* (4). There a reversioner applied for an injunction to restrain the defendants from fouling a stream. MALINS, V.-C., refused the injunction on the ground that the reversion was not materially or permanently injured, and that, if it was, the plaintiff's remedy was compensation under the defendants' special Acts. I But on appeal this decision was reversed, and an injunction was granted, JAMES, L.J., saying that the injunction was really a matter of course. This case arose after Lord Cairns' Act had come into operation. The common law decisions show that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or, as some express it, any injury of such permanent nature as to be necessarily injurious to his reversion. Where this is proved, as it is here, a reversioner is, in my opinion, entitled to an injunction upon the principles which I have already explained. In the Meux's Brewery Co.'s action, therefore, I also think an injunction ought to have been granted. There

ought to be one order in both appeals, varying the judgments appealed from, by granting an injunction restraining the defendants from carrying on these works so as to occasion a nuisance to the plaintiffs in either action. The form ought to be that adopted when landlord and tenant join in one action to have their respective interests protected. The defendants must pay the costs of the action brought by Meux's Brewery Co., and also the costs of these appeals. The damages in Meux's Brewery Co.'s action ought to be referred to the same referee to whom the damages in Shelfer's action have been referred. This will protect the defendants from the risk of having to pay more than they ought in the aggregate.

**A. L. SMITH, L.J.**—I will first give judgment in the case of *Shelfer v. City of London Electric Lighting Co.* I cannot agree to the proposition put forward on behalf of the plaintiff that under Lord Cairns' Act which was passed in 1858, jurisdiction is only given to the Court of Chancery to award damages in lieu of an injunction in those cases in which application is made for a mandatory injunction, and that there is no jurisdiction to do so if the object of the injunction is to prevent a continuing nuisance. It may well be, as stated by him, that only fourteen cases are to be found in the books since the year 1858, in which damages in lieu of an injunction have been awarded by the Court of Chancery, and that all these are cases in which mandatory injunctions were sought; but this constitutes no canon of construction whereby to interpret s. 2 of Lord Cairns' Act. This section is in the widest possible terms, and I can find no limitation as to it applying only where the injunction sought is mandatory as distinguished from an injunction to prevent a continuing nuisance. As regards jurisdiction, construing the section according to its plain English, I cannot doubt that the Court of Chancery has the power in the one case as in the other to award damages in substitution for an injunction. The only binding authority which has placed a restricted construction upon the section is *Dreyfus v. Peruvian Guano Co.* (9) in this court, in which it was held that for an injury not yet committed, but only threatened, the Court of Chancery has no power to award damages. The present case is not for threatened injury, but for a continuing nuisance existing at the date of the writ, whereby damage has been and still is being sustained. That jurisdiction to award damages exists in the present case I cannot doubt; but whether it should be exercised in such a case is quite another question.

It was argued on behalf of the defendants, that, even if they were committing a nuisance to the plaintiff and his family as found by KEKEWICH, J., no injunction would be granted against them, for the combined effect of ss. 10 and 17 of the Electric Lighting Act, 1882, was to authorise their doing what they were doing upon making full compensation to the plaintiff for all damage sustained by him thereby. In my judgment, this is not the true reading of these sections. Section 10, read in conjunction with the interpretation section (s. 32), is confined to construction of the works required to supply electricity and does not apply to their subsequent user, and s. 17 is confined to payment for damage caused by the execution of such works, and does not apply to damage caused by their user. Further, whatever be the true construction of these sections, the defendants were only authorised by the Act of 1882 to set up works and supply electricity subject to and in accordance with the provisions and restrictions of the Order or special Act authorising or affecting their undertaking; and by the Provisional Order, confirmed by Act of Parliament, under which the defendants were authorised to erect works and supply electricity, it is expressly provided that nothing therein contained should exonerate the defendants from any indictment, action, or other proceedings for nuisance, in the event of any nuisance being caused by them. This point of the defendants appears to me to be wholly untenable, and I agree in the conclusion KEKEWICH, J., arrived at therein. If authorities were wanted, though I think they are not, I refer to *A.-G. v. Gas Light and Coke Co.* (10) and *A.-G. v. Leeds Corpn.* (11).

I now come to the question whether, in a case like the present, to award damages

A in substitution for an injunction is or is not an altogether erroneous exercise of the jurisdiction given by the section. KEKEWICH, J., has found—and there is no appeal against these findings—that the defendants were, at the date this action was brought, creating a continuing nuisance by means of vibration, noise, and steam, which were produced by the working of their plant and machinery, whereby not only annoyance, inconvenience, and personal discomfort were occasioned to the plaintiff, his wife and daughter, in the occupancy of their house, but that the two latter had, by the nuisance, been made actually ill. There was also evidence that the defendants, by the erection of their works, had let down the building of the plaintiff, which consequently cracked, and that the continuous vibration which subsequently arose from the user of the defendants' plant and machines was increasing and aggravating these cracks. It was proved that the defendants were producing electricity by means of engines of from 4,000 to 5,000 horse-power, and that, unless stopped by injunction, they were about to increase their engine power to at least 20,000 horse power. It appears to me, to use the words in the judgment in *Martin v. Price* (2), to which I was a party, that

D “the plaintiff's legal right, and its infringement already, and threatened further infringement to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles upon which the court is in the habit of acting in these cases.”

E What is there in this case to take it out of the ordinary rule? There is no suggestion of any conduct on the plaintiff's part depriving him of his *prima facie* right to an injunction. Then, why is it that KEKEWICH, J., awarded damages in place of an injunction? The learned judge appears to have thought that, because the defendants at the trial had consented to abate the nuisance caused by steam, though not that caused by vibration and noise, damages were the proper remedy and adequate to compensate the plaintiff; but I would point out that the learned judge himself stated in his judgment that he was unable to allot to the different matters complained of the part each took in creating the undoubted nuisance

F proved to exist, and the reasons he gives for awarding damages are as follows :

G “Having regard to the occupation not having been as a matter of money interfered with; having regard also to this, that the inconvenience is felt very much more at one part of the house than the other, almost exclusively as regards a great part of the complaint in the upper floors; and having regard at any rate to the possibility of some inconvenience and probably some loss of accommodation, of making sleeping arrangements elsewhere; having regard also to the large inconvenience, to say no more, of stopping a business such as carried on by the defendants, I think this is a case in which damages are a very fair compensation.”

H I cannot agree with the learned judge that, because the plaintiff does not suffer a money loss, and is only driven out of this upper floor, and has only to make arrangements for sleeping elsewhere, he, according to the judgment, is not entitled to stop the continuance of the nuisance, but damages are a very fair compensation. Many judges have stated, and I emphatically agree with them, that a person committing a wrongful act (whether it be a public company for public purposes or a private individual) is not entitled to ask the court, by assessing damages in that behalf, to sanction his so doing by purchasing his neighbour's rights, leaving his neighbour with a nuisance or his light diminished, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages, as authorised by the section, may be awarded. In any case in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction, the court may award damages in its place.



So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion, it may be stated as a good working rule that (i) if the injury to the plaintiff's legal right is small; (ii) and is one which is capable of being estimated in money; (iii) and is one which can be adequately compensated by a small money payment; (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded. If these four requirements are found in combination in a case, then damages in substitution for an injunction may be given. There may also be cases in which, though the four above-mentioned requirements exist, the defendant, by his conduct, as, for instance, hurrying up his buildings so as, if possible, to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction. It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitute either small injury, or what can be estimated in money, or what is a small money payment or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, in the case of an injury to the plaintiff's legal right to light a window in a cottage, a sum of £15 as compensation might well be held to be not small but considerable; whereas a sum ten times as large awarded as compensation for a similar injury to a warehouse or other large building, might be held to be inconsiderable. Each case must be decided upon its own facts, but to escape the rule it must be brought within the exception.

In the present case it appears to me that the injury to the plaintiff is certainly not small, nor is it, in my judgment, capable of being estimated in money and of being adequately compensated by a small money payment. For nineteen years the plaintiff is saddled with his lease, and for that period, upon the hypothesis of the nuisance continuing, he is to suffer whatever annoyance, inconvenience, and personal discomfort may be created by the user of the works of the defendants other than by steam; and cracks in the walls of the house already made by the defendant's works are to be increased; and it may be that his wife and daughter throughout that period are to continue to be made ill as heretofore. Can anyone truly say that this is a small injury to the plaintiff's legal rights? Moreover, how are these injuries to be put into money, and upon what principle are these damages to be assessed, so as to represent the continuing injury to the plaintiff? To guess at them is not assessing them at all. In order to constitute a real assessment, it appears to me that the principle of purchasing the plaintiff's interest in his lease for the unexpired term will have to be adopted as the basis upon which the assessment is to be made, and, as I have before stated, this is never sanctioned by the court at the instance of a tort-feasor. The assessment upon the facts found will manifestly not result in a small money payment. In my judgment, for the reasons above, this is clearly not a case in which damages should be granted to the plaintiff in substitution for the injunction which he asks for, which is an injunction to restrain the continuance of the existing nuisance. If the remedies the defendants are about to apply to the steam will abate the nuisance, well and good, and the injunction will not injure them; but if, on the other hand, a nuisance still continues, in my judgment, this case is by no means brought within the exception to the ordinary rule which I have endeavoured to express, and, therefore, the judgment of KEKEWICH, J., wherein he awarded damages in substitution for an injunction, must be reversed and an injunction as prayed for be granted.

As regards the case of the reversioners, Meux's Brewery Co., this appears to me to give rise to a discussion of a somewhat academic description so far as the defendants are concerned, when an injunction has been granted against them in the case of the tenant Shelfer. It may, however, be of moment to the plaintiffs,

**A** the reversioners, for the reasons pointed out by their counsel, and more especially as the works of the defendants as regards engine power are about to be enormously enlarged, which obviously will increase the present continual injury to the fabric of the house. There is evidence that the defendants are committing, and are proposing to continue to commit, acts which will cause injury to the fabric of the plaintiff's house of a permanent character, and for which a jury would be well warranted in finding an injury to the reversion. I agree with what LORD HALSBURY and LINDLEY, L.J., have said upon this matter, and that an injunction should be granted as in the case of the tenant. These appeals, for reasons above stated, must be allowed with costs.

*Appeals allowed.*

**C** Solicitors: *Hunter & Haynes; Ashurst, Morris, Crisp & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

**D**

## HAMLYN & CO. v. TALISKER DISTILLERY

**E** [HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten, Lord Morris and Lord Shand), April 10, 12, 13, May 10, 1894]

[Reported [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540;  
10 T.L.R. 479; 6 R. 188]

**F** *Conflict of Laws—Contract—Parties residing in different places where different systems of law prevail—Law governing rights under contract—Intention of parties—Matters to be taken into consideration.*

Where a contract is entered into between parties residing in different places where different systems of law prevail, it is a question in each case with reference to what law the parties contracted and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. Both these matters must be taken into consideration, but neither of them is of itself conclusive, and still less conclusive as to the particular law which was intended to govern a particular part of the contract.

**G** The whole of the contract must be looked at, and the contract regulated by the intention of the parties as expressed in the contract or derivable by fair implication from its terms. In the absence of any clear expression of their intention it is necessary and legitimate to take into account the circumstances attendant on the making of the contract and the course of performing its stipulations contemplated by the parties.

**H**

**I** An agreement in writing, by which a seller resident in Scotland and a buyer resident in England agreed for the sale and purchase of goods to be delivered in Scotland, contained a clause that any dispute should be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The seller brought an action against the buyer in the Scottish courts for breach of the contract by failure to accept goods delivered under it, and the buyer pleaded the arbitration clause. It was agreed that that clause was void and of no effect under Scottish law, but was valid and binding under English law.

**Held:** the language of the arbitration clause indicated clearly that the parties intended that the rights under that clause should be determined according to the law of England, and the case would be remitted to the Court of Session with an order that the matters in dispute be settled by arbitration in terms of the contract.

**Notes.** Considered: *Crosland v. Wrigley* (1895), 73 L.T. 60; *South African Breweries v. King*, [1899] 2 Ch. 173. Applied: *Spurrier v. La Cloche*, [1900-3] All E.R.Rep. 277; *Royal Exchange Assurance Corp'n. v. Sjöforsakrings Akt. Vega*, [1902] 2 K.B. 384; *Hansen v. Dixon* (1906), 96 L.T. 32; *British South African Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Pena Copper Mines v. Rio Tinto Co.*, [1911-13] All E.R.Rep. 209; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Cameron v. Cuddy*, [1914] A.C. 651. Considered: *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730. Applied: *N.V. Kwik Hoo Tong Handel Maatschappij v. Finlay*, [1927] A.C. 604; *Duke of Marlborough v. A.-G.*, [1945] 1 All E.R. 165. Considered: *Kremezi v. Ridgway*, [1949] 1 All E.R. 662. Referred to: *Hicks v. Marton* (1907), 1 B.W.C.C. 150; *Sanderson v. Armour* (1922), 91 L.J.P.C. 167; *The Njegos*, [1936] P. 90; *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1959] 1 All E.R. 214.

As to the law governing a contract where there is a conflict, see 7 HALSBURY'S LAWS (3rd Edn.) 72 et seq.; and for cases see 11 DIGEST (Repl.) 420 et seq. Cases referred to:

- (1) *Caledonian Rail. Co. v. Greenock and Wemyss Bay Rail. Co.*, 10 M. (Ct. of Sess.) 892.
- (2) *Don v. Lippman* (1837), 5 Cl. & Fin. 1; 7 E.R. 303, H.L.; 11 Digest (Repl.) 438, 809.

**Appeal** from a decision of the First Division of the Court of Session (LORD ADAM and LORD M'LAREN, LORD KINNEAR dissenting), reported in 21 R. (Ct. of Sess.) 204, affirming a decision of the Lord Ordinary (LORD KYLLACHY) in an action brought by the respondents against the appellants for non-acceptance of goods under an agreement.

The agreement, which was executed by both parties in England, was as follows:

"Memorandum of agreement between Messrs. Roderick Kemp & Co., of Talisker Distillery, Carbost, North Britain, distillers, of the one part, and Messrs. Hamlyn & Co., 153, Cheapside, in the city of London, merchants, of the other part.—Whereas the said R. Kemp & Co. agree to sell, and the said Hamlyn & Co. agree to purchase, all grains made by the said Roderick Kemp & Co., or their nominees or assigns, averaging about 800 to 1,000 bushels per week (with the exception of about two quarters required for the use of the said Kemp & Co.) at the price of 1s. 8d. per quarter (eight bushels), according to the number of quarters of corn or malt put into the mash tub. It is further agreed that the said Hamlyn & Co. supply and erect at the aforementioned distillery one of Messrs. Petry and Hecking's patent drying machines, such machines to remain the property of the said Hamlyn & Co., and that the said Roderick Kemp & Co. shall thereupon work and keep in proper repair the said drying machine, supplying all steam and labour, etc., necessary for properly drying the grains for the said Hamlyn & Co., and will bag up in the said Hamlyn & Co.'s sacks, and deliver the grains f.o.b., Carbost, to their order, or otherwise, as required. This contract be in force for 10 (ten) years from time of erection. At the expiration of the said ten years the said Hamlyn & Co. to be at liberty to take away the said drying machine without let or hindrance. Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way. As witness the hands of the said parties this 27th day of January, 1892.—Hamlyn & Co.; Roderick Kemp & Co.—Witnessed the above signatures: David Lyall, clerk, 80, Ockenden Road, Islington."



A The defender pleaded that the action was excluded by the clause of reference in the memorandum of agreement. The plaintiffs replied that the clause was a submission to unnamed arbitrators, and was, therefore, invalid by the law of Scotland, by which the case was to be governed, though admitted to be good by the law of England. The Lord Ordinary and the majority of the judges of the First Division upheld this contention.

B Sir H. James, Q.C., Graham Murray, Q.C. (of the Scottish Bar), and Ruegg for the appellants.

The Lord Advocate (Balfour, Q.C.) and Danckwerts for the respondents.

Their Lordships took time for consideration.

C May 10, 1894. The following opinions were read.

**LORD HERSCHELL. L.C.**—On Jan. 27, 1892, an agreement was entered into between Roderick Kemp & Co., of the Talisker Distillery, Carbost, Isle of Skye [predecessors of the respondents], and Hamlyn & Co., of London [the appellants], under which Hamlyn & Co. were to supply to the distillery a patent drying machine, which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order, or otherwise as required. The agreement concluded with a clause in the following terms:

“Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.”

E This agreement was made between the parties in England. Shortly after the contract was entered into, Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had “no jurisdiction,” and that “the action is excluded by the clause of reference in the memorandum of agreement.” These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by LORD ADAM and LORD M'LAREN in the Inner House, LORD KINNEAR dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

F It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between the parties, nor that, according to the law of Scotland, it is wholly invalid inasmuch as the arbiters are not named.

G The view taken by the majority of the court below is thus expressed by LORD ADAM:

H “So far as I see, nothing is required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*—that is, by the law of Scotland.”

I It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned judges in the court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places where different systems of law prevail, it is a question, as it appears to me, in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the Bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made or the place where it is to be performed. In my view, they are both matters which must be taken into consideration, but neither of them is of itself conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract.

In the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to the arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and for the reasons which I have given, I see no difficulty whatever in construing the contract between the parties as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scottish court is asked to enforce a law which is against the public policy of the law of Scotland, and that, although the parties may have so contracted, the courts in Scotland cannot be bound to enforce the contract which is against the policy of their law. I should be prepared to admit that an agreement which was against a fundamental principle of the law of Scotland, founded on consideration of public policy, could not be relied upon and insisted upon in the courts of Scotland; and if according to the law of Scotland the courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which is insisted upon by the respondents. But that is not the case. The courts in Scotland recognise the rights of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators have been named, the courts in Scotland would have recognised, and

A given effect to, and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy it can be said to rest as a foundation that where an arbitrator is not named, an agreement between the parties to refer a matter to arbitration ought not to be enforced. It is not necessary to inquire into the history of the distinction which has arisen in the courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the courts of Scotland do enforce and give effect to an arbitration clause and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that, if this arbitration clause is to be interpreted according to the law of England, and is, therefore, a valid arbitration clause, there is no reason why the courts of Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration, deals with the remedy, and not with the rights of the parties, and that consequently the forum being Scottish, the parties cannot by reason of the agreement into which they have entered, interfere with the ordinary course of proceedings in the courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where merits fall to be determined in the Scottish courts, insist by virtue of an agreement that those courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scottish courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty, but the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail. For these reasons I move your Lordships that the judgment appealed from be reversed.

The question then arises, what course should be taken in the present case—whether the action should be stayed until the arbitration is completed, or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. I am quite satisfied, upon that part of the case, with the suggestion which will be made by LORD WATSON, and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

**LORD WATSON.**—This action was brought in the Court of Session by a Scottish distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal it is sufficient to say that the contract, which was made in England, but fell to be mutually performed in Scotland, contains this provision :

“Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way.”

In defence the appellants pleaded (i) no jurisdiction; (ii) the action is excluded by the clause of reference. Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (KYLACHY), and, in the First Division, by LORD ADAM and LORD M'LAREN, LORD KINNEAR dissenting. The learned judges of the majority were of opinion, with the Lord Ordinary, that,



inasmuch as Scotland was admittedly the *locus solutionis*, the whole stipulations of the contract, including the clause of reference, must be governed by Scottish law. In that view the agreement to refer, being to arbiters unnamed, was plainly invalid, and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender, who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the court is not wholly ousted by such a contract. It deprives the court of jurisdiction to inquire into and decide the merits of the case, while it leaves the court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded in limine the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Rail. Co. v. Greenock and Wemyss Bay Rail. Co.* (1), where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating, the rule of procedure, which was in force long before its date.

The first question in this appeal is whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law; and in that event the further question arises whether the courts of Scotland ought to give the same effect to it as if it had been a binding Scottish covenant. Upon the first of these questions I have been unable to arrive at the same conclusion as the courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms. In the absence of any clear expression of their intention it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties, and among these considerations the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scottish decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum and the place of performance in another.

In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation, and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scottish law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration, they were contracting with reference to the law of England. Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that, according to a well-known principle of general law, all questions touching

A the remedy must be decided according to the rules of the forum in which the remedy is sought. They also contended that the Lords of Sessions were not bound to recognise any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scottish law.

Neither of these contentions is, in my opinion, well founded. It has never, so far as I am aware, been seriously disputed that, whatever may be the domicile of a contract, any court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don v. Lippman* (2), which is the leading Scottish authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules, noticed by LORD BROUGHAM in his elaborate judgment as belonging to that class, refer to the action of the court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there, containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scottish court if the other happened to be temporarily resident in Scotland or to have personal estate in that country capable of being arrested.

The second reason advanced by the respondents, for denying effect to the reference, would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scottish courts are bound to give effect to every stipulation in a foreign contract, unless it is shown to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her courts would be justified in declining to recognise them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced, does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities which establish the rule, the rule has been so largely entrenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure *in hoc statu*, in order that the matters in dispute may be settled by arbitration, in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to try and dispose of the merits of the case.

**LORD ASHBOURNE.**—I concur. The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause in question. One of the parties was a Scottish distiller, and the parties on the other side were merchants in London. The contract was made in England and was (apart from the arbitration clause) to be

performed in Scotland. That clause is of the highest importance. There is no absolute rule of law as to the way in which the intention of the parties to a contract with reference to the law of a particular place is to be ascertained. Were it not for the arbitration clause I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland. Having regard, however, to the terms of that clause, I am led to the conclusion that the parties intended that it should be interpreted by the rules of the law of England alone. A contract which provides that disputes should be settled by arbitration by two members of the London Corn Exchange, or their umpire, "in the usual way," distinctly introduces a reference to the well-known laws regulating such arbitrations, and these must be the laws of England. This interpretation gives due and full effect to every portion of the contract, whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the laws of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

**LORD MACNAGHTEN** and **LORD MORRIS** concurred.

**LORD SHAND.**—I also am of opinion that the appeal in this case should be sustained, and the decision complained of reversed for the reasons which have already been so fully stated that it would serve no good purpose to repeat them. From the terms in which the clause of reference is expressed, in a contract to which, it must be observed, a firm of merchants in London and carrying on business there, is one of the parties, I think it is to be inferred to be *pars contractus* that the agreement which it contained for the settlement of disputes which might arise out of the contract, was to be interpreted and governed by the law of England; and I am further of opinion that there are no such considerations of public policy at the basis of the rules of Scottish law in reference to the necessity of arbiters being named in order to create a binding obligation to refer, as can warrant the courts in Scotland, in an action brought there, in refusing to give effect to the law and practice as to arbitrations in England. In accordance with the ordinary practice in Scotland, I think that procedure in the present action should be stayed, to allow the arbitration to be proceeded with in England as provided by the contract.

*Appeal allowed.*

Solicitors: *Ranger, Burton & Co.*, for *Finlay & Wilson*, Edinburgh; *R. S. Taylor, Son & Humbert*, for *A. Mustard*, Edinburgh.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]



## TAYLOR v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAIL. CO.

[COURT OF APPEAL (Lindley and A. L. Smith, L.JJ.), November 3, 9, 1894]

[Reported [1895] 1 Q.B. 134; 64 L.J.Q.B. 6; 71 L.T. 596;  
59 J.P. 100; 43 W.R. 120; 11 T.L.R. 27; 39 Sol. Jo. 42;  
14 R. 34]

*Carriage of Passengers—Negligence—Injury to passenger—Contract by purchase  
of ticket—Action founded in tort.*

*Personal Injuries—Contract between parties for carriage of plaintiff—Action  
founded on tort.*

The plaintiff bought a ticket enabling him to travel on the defendants' railway, and while he was entering a compartment of a railway carriage his thumb was crushed owing to the negligence of the defendants' porter in shutting the door. The plaintiff was awarded £20 damages in an action which was brought in the High Court. On taxation of the plaintiff's costs the question arose whether the action was one "founded on tort" or "founded on contract" within s. 116 of the County Courts Act, 1888.

**Held:** even though the plaintiff had entered into a contract with the defendants by taking a ticket, his action for personal injury caused by the negligence or misfeasance of the defendants' servant was an action "founded on tort" and not one "founded on contract" within s. 116 of the County Courts Act, 1888.

**Notes.** The County Courts Act, 1888, was repealed by the County Courts Act, 1934, itself repealed (except as to a few provisions) by the County Courts Act, 1959. Section 47 of this last Act, which now provides for the costs of actions of contract or tort commenced in the High Court which could have been commenced in the county court, draws no distinction between actions founded on contract and those founded on tort: see 30 HALSBURY'S STATUTES (2nd Edn.) 134. This case was decided on the question whether the action brought in the High Court was one which was "founded on tort" or "founded on contract" for taxation of costs, and, although this distinction is now no longer of consequence, it is considered that a report of the case will be of use as showing that a carrier of passengers has a duty to take care irrespective of contract.

Explained: *Kelly v. Metropolitan Rail. Co.*, [1895] 1 Q.B. 944. Applied: *Meux v. Great Eastern Rail. Co.*, [1895-9] All E.R.Rep. 710; *Turner v. Stallibrass* (1897), 67 L.J.Q.B. 52. Distinguished: *Steljes v. Ingram* (1903), 19 T.L.R. 534. Applied: *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1. Referred to: *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K.B. 155; *Whiteman v. Steadman*, [1913] 3 K.B. 340; *Booth Steamship Co., Ltd. v. Cargo Fleet Iron Co., Ltd.*, [1916-17] All E.R.Rep. 938; *White v. Warrick & Co.*, [1953] 2 All E.R. 1021; *Romford Ice & Cold Storage Co. v. Lister*, [1955] 3 All E.R. 460.

As to the duty of care to be used by carriers of passengers not being dependent on contract, see 4 HALSBURY'S LAWS (3rd Edn.) 177; and for cases see 8 DIGEST (Repl.) 75 et seq. As to negligence and the duty to take care by carriers of passengers, see 28 HALSBURY'S LAWS (3rd Edn.) 45 et seq.; and for cases see 37 DIGEST (Repl.) 22 et seq. As to the distinction between action of contract and tort, see 1 HALSBURY'S LAWS (3rd Edn.) 36 et seq.; and for cases see 42 DIGEST 969 et seq.

Cases referred to:

- (1) *Bryant v. Herbert* (1878), 3 C.P.D. 389; 47 L.J.Q.B. 670; 39 L.T. 17; 43 J.P. 52; 26 W.R. 898, C.A.; 42 Digest 969, 12.
- (2) *Pontifex v. Midland Rail. Co.* (1877), 3 Q.B.D. 23; 47 L.J.Q.B. 28; 37 L.T. 403; 26 W.R. 209, D.C.; 42 Digest 969, 18.

- (3) *Fleming v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1878), 4 Q.B.D. 81; 39 L.T. 555; 27 W.R. 481, C.A.; 42 Digest 970, 19. A
- (4) *Alton v. Midland Rail. Co.* (1865), 19 C.B.N.S. 213; 34 L.J.C.P. 292; 12 L.T. 703; 11 Jur.N.S. 672; 13 W.R. 918; 144 E.R. 768; 12 Digest (Repl.) 51, 279.
- (5) *Marshall v. York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, 849. B
- (6) *Austin v. Great Western Rail. Co.* (1867), L.R. 2 Q.B. 442; 8 B. & S. 327; 36 L.J.Q.B. 201; 16 L.T. 320; 31 J.P. 533; 15 W.R. 863; 8 Digest (Repl.) 103, 676.
- (7) *Foulkes v. Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157; 49 L.J.Q.B. 361; 42 L.T. 345; 44 J.P. 568; 28 W.R. 526, C.A.; 8 Digest (Repl.) 118, 757. C

Also referred to in argument:

*Tattan v. Great Western Rail. Co.* (1860), 2 E. & F. 844; 29 L.J.Q.B. 184; 6 Jur.N.S. 800; 8 W.R. 606.

**Appeal** by the plaintiff from a decision of WRIGHT, J., holding that, an action brought in the High Court by the plaintiff, a passenger on the defendants' railway, for damages for personal injury caused by the negligence of the defendants' employee, was an action "founded on contract" and not one "founded on tort" within s. 116 of the County Courts Act, 1888, and consequently, having been awarded £20 damages in the High Court action, the plaintiff was only entitled to costs on the county court scale. D

The plaintiff, a commercial traveller, alleged in his statement of claim that on May 6, 1894, he was a passenger on the defendants' railway, and was entering a compartment of a train at the defendants' station at Levenshulme, when a porter of the defendants negligently shut the door of the compartment upon and crushed the plaintiff's thumb; and that by the defendants' negligence the plaintiff suffered great pain, and was prevented from following his employment. The plaintiff obtained a verdict for £20 damages and judgment was entered in his favour for that amount and the costs of the action. Upon the taxation of the plaintiff's costs the question arose whether this action was properly attributable to the defendants' breach of contract in not conveying the plaintiff safely to his destination, or to negligence apart from contract; viz., whether the action ought to be regarded as "founded on tort" or "founded on contract," within the meaning of s. 116 of the County Courts Act, 1888. The master considered himself bound, by a decision of WRIGHT, J., at chambers upon a similar point in 1891, to hold that the action was founded on contract, and he, therefore, only allowed the plaintiff costs on the county court scale. The matter then came before WRIGHT, J., at chambers, who adhered to his previous decision. E

The plaintiff now appealed. F

*Morton Smith* for the plaintiff.

*C. A. Russell* for the defendants. G

*Cur. adv. vult.* H

Nov. 9, 1894. The following judgments were read. I

**LINDLEY, L.J.**—This is an action brought in the High Court by the plaintiff, who was a passenger by the defendant company's railway. The action was brought to recover damages for an injury, that injury having been sustained by the negligence of the defendants' servant in slamming the door and jamming the plaintiff's hand. The plaintiff recovered a verdict for £20; and now comes the question about costs—whether he is entitled to his full costs or not. That depends upon

A s. 116 of the County Courts Act, 1888. That section runs thus :

“With respect to any action brought in the High Court which could have been commenced in a county court the following provisions shall apply : (1) If in an action founded on contract the plaintiff shall recover a sum less than £20 he shall not be entitled to any costs of the action, and if he shall recover a sum of £20 or upwards but less than £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. (2) If in an action founded on tort the plaintiff shall recover a sum less than £10 he shall not be entitled to any costs of the action; and if he shall recover a sum of £10 or upwards, but less than £20, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. . . .”

C If this action falls within the first clause, if it ought to be regarded as an action founded on contract, then the plaintiff can only get county court costs. If, on the other hand, the action falls within the second clause, that is to say, if it is an action founded on tort, then there would be nothing to qualify the plaintiff's right, he would get his full costs. We are driven, therefore, to consider whether, adopting the language of the Act, this action brought by the plaintiff is an action founded on contract or an action founded on tort.

D The language of the Act is a little peculiar. I need not go into the history of it; I merely observe that the classification which is made by the legislature is confined to actions brought in the High Court which might have been commenced in the county court, and those two subdivisions exhaust the whole of that class of actions, and each excludes the other. That gives rise to the difficulty here. We no longer have to consider forms of actions. We are, however, compelled by the legislature to put every action which can be brought in the county court, but is brought in the High Court, into one or the other of those two categories. Everyone who has studied the English law will know perfectly well that there is a debatable ground between torts and contracts. There are what are called quasi-contracts and quasi-torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often you put it either way. But here we are compelled to draw the line hard and fast and put every one of the actions in one class or the other. I have looked into the authorities, but it is only necessary, as I propose to do, to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think that anything would be gained now by going into the old learning about the forms of actions. We have to consider this Act of Parliament, and the only cases which are of any importance and assistance, as enabling us to construe the Act, are those cases which have been decided upon it or upon the similar Acts which this Act has replaced.

G First and foremost there is *Bryant v. Herbert* (1), decided in 1878; secondly, there is the case decided in 1877 of *Pontifex v. Midland Rail. Co.* (2); and then in the next year there was *Fleming v. Manchester, Sheffield & Lincolnshire Rail. Co.* (3). Having studied those cases with care (I do not think it necessary to go into them) it appears to me that this is an action founded on tort; and the conclusion to which I have arrived is based upon these reasons: That which caused the injury was not an act of omission; it was not a mere non-feasance. It was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take; but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible without running contrary to the reasoning of the Court of Appeal in *Bryant v. Herbert* (1), which reversed the decision of DENMAN, J., and myself in the same case, to hold that within the meaning of the County Courts Act, 1888, this is an action founded on contract as distinguished from tort.



The case to which counsel for the defendants referred of *Alton v. Midland Rail. Co.* (4) at first appears to present some difficulty; but, in the first place, that case was not like this, and in the next place, it has been criticised and commented upon somewhat adversely; I do not say it has been overruled—that is quite another matter. But it is not a case on the construction of this Act, and, therefore, I prefer to base my decision on what I consider to be the true construction of the Act in this case. Therefore, I come to the conclusion that this appeal ought to be allowed; and the plaintiff will have his costs here and below.

**A. L. SMITH L.J.**—The question is, whether, when a passenger contracts with a railway company (i.e., takes a ticket) entitling him to be carried upon a given journey, and he is injured therein by a misfeasance for which the company is liable, and he brings an action, therefore, in the High Court, such action is founded upon contract or founded upon tort within the meaning of s. 116 of the County Courts Act, 1888, for by that section different consequences arise as to costs if the action is founded upon contract or if founded upon tort. It has been held by this court that, in considering a matter of costs under sections similar to the present, the substance of the action and not its form is to be looked at, and it should be ascertained whether the real substantial complaint is for breach of contract or for tort: see *Bryant v. Herbert* (1). It is not disputed that, as a matter of pleading, a plaintiff for a cause of action such as the present may declare in either contract or tort, but this is not the governing consideration.

It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained while there by reason of the active negligence of the company's servants, whether he has a contract with the company or not: *Marshall v. York, Newcastle and Berwick Rail. Co.* (5); *Austin v. Great Western Rail. Co.* (6); and *Foulkes v. Metropolitan Rail. Co.* (7). And he need not allege or prove any contract at all; he need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants; for this is sufficient to show a breach of that duty on the part of the defendants which is implied by law. It is equally clear that in such an action, whether the plaintiff sets up a contract or not, to succeed he must prove active negligence, i.e., a misfeasance of the company's servants, and that in the proof of this negligence he will undoubtedly fail. The fact that the plaintiff happens to have a contract, i.e., a ticket, is of use in such an action it is true, for the purpose of showing that the plaintiff was lawfully where he was when he sustained the injury. But proof of this fact can be given aliunde, and proof of a contract is by no means vital to success.

**BRAMWELL, L.J.**, in *Bryant v. Herbert* (1) says—and in this I agree—that the foundation of an action are those facts which it is necessary to state and prove to maintain it, and no others. On the other hand, if the action be brought against a common carrier for non-delivery of goods, that is founded upon contract, as was held by this court in *Fleming v. Manchester, Sheffield and Lincolnshire Rail. Co.* (8), and negligence need not be averred and proved. So also if brought for a non-feasance, for then the plaintiff cannot succeed until proof of a contract and its breach. *Alton v. Midland Rail. Co.* (4), so much relied upon by the defendants, was decided upon demurrer to a declaration in which it was expressly averred that the rights of the servant for whose injuries the master was therein suing the company were founded upon contract, and this was taken as the premiss upon which the case had to be decided, and it was then held that the master could not sue for injury to his servant caused by breach of a contract entered into between the servant and the company. No question was or could be raised as to what would have been the result if the servant's remedy against the company had been founded upon tort, for the case as before stated was decided upon demurrer to a declaration which expressly averred that the servant's rights against the company were founded upon contract. This case, when looked into, is not the authority which it was supposed to be, and in no way decides that an action brought for personal injury

A against a company by a passenger who has taken a ticket is necessarily an action founded upon contract and not upon tort.

The judgments of BRAMWELL and BRETT, L.JJ., in the before-mentioned case of *Bryant v. Herbert* (1), are very pertinent to this case, and having considered them and the other cases cited therein, and especially *Pontifex v. Midland Rail. Co.* (2), and for the reasons above, I hold that an action against a railway company for personal injuries by reason of the active neglect of the company's servant, even though the plaintiff has taken a ticket, is an action founded upon tort and not upon contract within s. 116 of the County Courts Act, 1888. I may add that, having consulted the senior master of the Common Law Division, I find that this judgment is in accord with the mode of taxation hitherto adopted in the division. For the reasons above this appeal must be allowed and the plaintiff will have his costs here and at chambers.

*Appeal allowed.*

Solicitors: *Indermaur & Brown*, for *Gardner & Son*, Manchester; *Cunliffes & Davenport*, for *Lingards*, Manchester.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

## ATTORNEY-GENERAL v. WORRALL

[COURT OF APPEAL (Lord Esher, M.R., Lopes and A. L. Smith, L.JJ.), November 13, 15, 1894]

[Reported [1895] 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807; 59 J.P. 467; 43 W.R. 118; 11 T.L.R. 48; 39 Sol. Jo. 58; 14 R. 1]

*Estate Duty—Property passing on death—Property deemed to pass—Personal property—Gift of mortgage debt—Annuity reserved to donor—Customs and Inland Revenue Act, 1881 (44 & 45 Vict., c. 12), s. 38 (2) (a)—Customs and Inland Revenue Act, 1889 (52 & 53 Vict., c. 7), s. 11 (1).*

A sum of £23,925 was due to a father on a mortgage of land, and he had obtained a decree of foreclosure which had not become absolute. A deed was executed whereby the mortgagors conveyed the equity of redemption to the father's son in consideration of £525. The father conveyed the legal estate to his son and released the mortgage debt, and his son covenanted to pay his father an annuity of £735. The son paid this annuity until the death of his father.

**Held:** the transaction was a gift of personal property within s. 11 (1) of the Customs and Inland Revenue Act, 1889; the son had not obtained the enjoyment of what was given free from a contractual benefit to his father which encumbered the enjoyment of what was given; and accordingly, on the death of the father, the son was liable to pay duty under s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881, as extended by s. 11 (1) of the Act of 1889.

**Notes.** Considered: *A.-G. v. Holden*, [1903] 1 K.B. 832; *A.-G. v. Johnson*, [1903] 1 K.B. 617. Applied: *New South Wales Stamp Duties Comrs. v. Perpetual Trustee Co.*, [1948] 1 All E.R. 525. Considered: *L.M. St. Aubyn v. A.-G.* (No. 2), [1951] 2 All E.R. 473. Referred to: *United Realisation Co. v.*

*I.R.Comrs.* (1898), 79 L.T. 556; *A.-G. v. Seacombe*, [1911] 2 K.B. 688; *A.-G. v. Sandwich*, [1922] 2 K.B. 500; *A.-G. v. Parr*, [1924] 1 K.B. 916; *A.-G. for Ontario v. Perry*, [1934] All E.R.Rep. 422; *Re Hall, Holland v. A.-G.*, [1941] 2 All E.R. 358; *Re Earl Fitzwilliam's Agreement*, [1950] 1 All E.R. 191; *Oakes v. New South Wales Stamp Duties Comrs.*, [1953] 2 All E.R. 1563.

As to property deemed to pass on death where benefit is reserved with reference to a gift, see 15 HALSBURY'S LAWS (3rd Edn.) 21; and for cases see 21 DIGEST (Repl.) 22 et seq. As to obsolescent duties (including account duty), see 15 HALSBURY'S LAWS (3rd Edn.) 6 et seq. For s. 38 (2) of the Customs and Inland Revenue Act, 1881, and s. 11 (1) of the Customs and Inland Revenue Act, 1889, respectively, see 9 HALSBURY'S STATUTES (2nd Edn.) 332, 344.

Case referred to in argument:

*A.-G. v. Smith*, [1893] 1 Q.B. 239; 62 L.J.Q.B. 288; 68 L.T. 6; 57 J.P. 389; 41 W.R. 245; 9 T.L.R. 171; 37 Sol. Jo. 192, C.A.; 21 Digest (Repl.) 188, 1107.

**Appeal** by the defendant from a decision of the Divisional Court (MATHEW and CAVE, JJ.), made on an English information, giving judgment for the Crown and that the defendant was liable to pay account duty.

By a deed made in 1886, between James Worrall, the father of the defendant, of the first part, Mary Shield, of the second part, Robert Shield, of the third part, and the defendant, of the fourth part, reciting that the hereditaments mentioned in the deed had been mortgaged to James Worrall for £26,150, of which £23,925 remained due and owing, and that the defendant had agreed to purchase from Robert Shield the hereditaments for £24,500, and that James Worrall had agreed to join in the conveyance for the purpose of releasing the premises from the mortgage debt in consideration of the covenant on the part of the defendant thereafter contained, in consideration of £525 paid by the defendant to Mary Shield, and in further consideration of the covenant on the part of the defendant thereafter contained, such covenant being accepted by James Worrall in satisfaction of his mortgage debt of £23,925 from which he thereby released Mary and Robert Shield and the defendant, the hereditaments were conveyed to the defendant in fee simple discharged from the mortgage. The defendant covenanted with James Worrall to pay him during his life or to his assigns the yearly sum of £735 half-yearly. Before this transaction was carried out James Worrall had obtained a decree for foreclosure which had not yet become absolute. The Crown claimed that the transaction carried out by the deed, between James Worrall and the defendant, was one of gift and not of purchase, and James Worrall thereby gave the defendant the mortgage debt belonging to him, reserving a benefit by way of contract to the extent of the annuity of £735 during his life, and the defendant acquired and retained possession of the subject-matter of such gift accordingly.

James Worrall died in 1890, and a claim was made against the defendant for account stamp duty on the above sum of £23,925 under the provisions of the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as extended by the Customs and Inland Revenue Act, 1889, s. 11 (1). A claim was also made for estate duty under the provisions of s. 5, sub-ss. (2), (4) and (5) of the Act of 1889. The defendant admitted the deed and alleged that the transaction was one of purchase and not of gift. He had taken possession of the hereditaments, and had paid the annuity during his father's life.

*E. W. Byrne, Q.C.*, and *Willes Chitty* for the defendant.

*The Attorney-General (Sir R. T. Reid, Q.C.)* and *Vaughan Hawkins* for the Crown.

**LORD ESHER, M.R.**—The first question which we have to determine is, what was in truth and substance the real transaction in this case. In my opinion the best way to find that out is to consider the matter as if there were no deeds at all. Looking, then, at the facts of the case, the transaction appears to have been as



A follows. The father was owned £23,925 upon a mortgage of land. The mortgagors retained the equity of redemption, and the mortgagee had only the security of the land. The mortgagee had a right to claim foreclosure if he were not repaid, and so to get the land absolutely as his own. He had a son, and either wished to benefit him or to get rid of the burden of the land by transferring it to him. He, therefore, resolved to give to his son that mortgage debt of £23,925. He could not give the money because he had not got it. As to the land, he had only a right to a foreclosure absolute if he were not paid. His rights, therefore, were personal property. It was arranged that he should give the money to his son, and that his son should buy the equity of redemption. The father, however, wanted to have an annuity equal to about 3 per cent. on the money, and the son agreed to give him an annuity of £735. The whole of that arrangement was carried out by a deed. The equity of redemption was conveyed by the mortgagors to the son, and the father conveyed the legal estate to the son and released the mortgage debt; the son covenanted to pay his father an annuity of £735.

The law is that we are to look at the truth and substance of the transaction. That being so, does this case come within s. 11 of the Customs and Inland Revenue Act, 1881? Personal property only is within the earlier Act of 1881. Then s. 11 (1) of the later Act of 1889 provides that

“... property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise,”

E shall be liable to duty under the Act of 1881. There was then in this case a gift of personal property from the father to the son; and, in my opinion, there was not an exclusion of the father from all “benefit to him by contract or otherwise.” There was this contract by which the son was to pay the annuity of £735 to the father. This case, therefore, is within the statute, and this property is liable to probate duty. The appeal fails and must be dismissed.

F **LOPES, L.J.**—I am of the same opinion. It is perfectly clear that in questions of this kind the court must look at the substance and not at the form of the transaction. In this case I think that, whether we look at the substance or at the form of the transaction, the Crown must succeed. Three questions have been raised. The first question is whether this was a gift at all. It is said that it was not, because of the covenant to pay the annuity. It appears to me to be none the less a gift because there was this covenant to pay an annuity. It was still a gift. G The second question is whether this was a gift of personal property. The defendant contends that, if this was a gift at all, it was a gift of real property. It is essential to consider the facts as they existed at the date of the deed, in order to determine whether this was a gift of personal property or not. Under the circumstances of the case it is impossible to say that the father gave the land to his son. H The land was not his to give. He gave the mortgage debt to his son, and the gift was, therefore, one of personal property. If the father had not made this deed, and had died before the foreclosure was made absolute, his executors would have been entitled to this money, and that shows that this was personal property.

I The third question is whether this was a gift within the terms of s. 38 of the Customs and Inland Revenue Act, 1881, and s. 11 (1) of the Customs and Inland Revenue Act, 1889. Section 38 (2) (a) of the earlier Act of 1881 provides that duty shall be payable on personal property, which shall include

“Any property passing under any past or future voluntary settlement made ... and not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property.”

That was passed to prevent evasions of probate duty. Under that section the reservation to the donor must have been a reservation out of the property given. Then s. 11 (1) of the later Act of 1889 was passed to remedy that defect, and it provides that s. 38 of the Act of 1881 shall be amended so as to include

“property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor or of any benefit to him by contract or otherwise.”

Under s. 11 (1), therefore, it is no longer necessary that the reservation or benefit to the donor should be out of the property given. In the present case is it possible to say that no benefit has been reserved to the donor? It is clear to me that there is reserved such a benefit as is contemplated by s. 11 (1). The judgment of the Divisional Court was right and must be affirmed.

**A. L. SMITH, L.J.**—This appeal must be dismissed. The question raised is, whether the defendant is liable to pay probate duty upon certain property. The answer to that question depends, first, upon whether this property is personalty or realty. I am satisfied that the Divisional Court rightly decided that it was personalty. The transaction was as follows: The father was owed £23,925 upon the security of a mortgage of land, and had obtained a foreclosure decree which had not become absolute. Then the land was conveyed to the son by the deed which has been considered. I am of opinion, therefore, that that which passed from the father to the son was personal property. Then it was contended that this was not a gift at all within the meaning of the Act, because consideration was given, and there cannot be a gift if consideration is given. I think, however, that s. 11 (1) of the Act of 1889 contemplates gifts for which a consideration may have been given. Then it is said that, even if this were a gift of personal property, yet no benefit was reserved to the donor out of the property itself, and that, therefore, this gift was not within s. 11 (1). I do not so read s. 11 (1). The words of the subsection are,

“Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.”

These words were, I think, expressly intended to enlarge the effect of s. 38 of the Act of 1881, and to include the reservation of a benefit of this kind. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Byrne & Blakiston; Solicitor of Inland Revenue.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

# SMURTHWAITE AND OTHERS v. HANNAY AND OTHERS

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten and Lord Russell), June 21, 22, August 3, 1894]

[Reported [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299]

*Practice—Irregularity under rules—Application to set aside proceedings—Joinder of plaintiffs with causes of action separate and distinct causes of action—R.S.C., Ord. 70, r. 1.*

*Shipping—Cargo—Delivery—Several shippers—Part of cargo unidentifiable on delivery—Shippers owners in common in proportion to respective interests.*

Each of nine shippers shipped bales of cotton, in varying quantities under separate bills of lading, on board the same ship and bound for the same port. When the ship arrived at the port the total number of bales landed fell short by eighteen of the total in the bills of lading. Fifteen of the landed bales were unidentifiable, having had their distinctive marks and numbers obliterated. The fifteen landed bales were sold and the proceeds distributed proportionately among the several consignees. The several shippers and consignees joined as plaintiffs in one action against the defendants, the shipowners, on the bills of lading for damages for short delivery.

**Held:** (i) the plaintiffs, each of whom had a claim arising under a separate contract, had different causes of action and were not entitled to be joined under R.S.C., Ord. 16, r. 1 [as it then stood]; (ii) the joinder of plaintiffs in a way not authorised by R.S.C., Ord. 16, r. 1, was more than an irregularity under R.S.C., Ord. 70, r. 1, so that the defendants were not out of time under r. 2, and could take the objection after appearance; (iii) (per LORD RUSSELL OF KILLOWEN) when the bales of cotton became unidentifiable, the several owners became owners in common in proportion to their respective interests and the shipowners could only attribute such proportion in answer to any claim for non-delivery.

**Notes.** In this case the decision as to joinder of plaintiffs was made under R.S.C., Ord. 16, r. 1, as it then stood. As from Oct. 26, 1896, when this rule was amended, it can no longer be said that Ord. 16, r. 1, relates only to parties and not to joinder of action and the joinder disallowed in this case would now be allowed: see Ord. 16, r. 1, as amended, see the ANNUAL PRACTICE (1963) 301. This case, however, is reported as it is considered that it will be of use on the other two points.

Criticised: *Sandeman & Sons v. Tyzack and Branfoot Steamship Co., Ltd.*, [1911–13] All E.R.Rep. 1013. Referred to: *Craig v. Kanseen*, [1943] 1 All E.R. 108; *Marsh v. Marsh*, [1945] A.C. 271; *Sheldon v. Brown Bayley's Steel Works, Ltd.*, [1953] 2 All E.R. 382.

As to joinder of plaintiffs, see 30 HALSBURY'S LAWS (3rd Edn.) 317 et seq.; and for cases see DIGEST (Practice) 399 et seq. As to application to set aside proceedings for irregularity, see 30 HALSBURY'S LAWS (3rd Edn.) 400; and for cases see DIGEST (Practice) 969. As to the duty of the shipowner where cargo is composed of goods consigned to different consignees, see 35 HALSBURY'S LAWS (3rd Edn.) 456; and for cases see 41 DIGEST 537 et seq.

Cases referred to:

- (1) *Booth v. Briscoe* (1877), 2 Q.B.D. 496; 25 W.R. 838, C.A.; Digest (Practice) 659, 2796.
- (2) *Spence v. Union Marine Insurance Co., Ltd.* (1868), L.R. 3 C.P. 427; 37 L.J.C.P. 169; 18 L.T. 632; 16 W.R. 1010; 3 Mar.L.C. 82; 41 Digest 536, 3642.



- (3) *Viscount Gort v. Rowney* (1886), 17 Q.B.D. 625; 55 L.J.Q.B. 541; 54 L.T. 817; 34 W.R. 696; 2 T.L.R. 782, C.A.; Digest (Practice) 894, 4359. A

Also referred to in argument :

*Burstall v. Beyfus* (1884), 26 Ch.D. 35; 53 L.J.Ch. 565; 50 L.T. 542; 32 W.R. 418, C.A.; Digest (Practice) 408, 1085.

*Sanders v. Windsmith*, [1893] 1 Q.B. 771; 62 L.J.Q.B. 404; 69 L.T. 387; Digest (Practice) 402, 1033. B

**Appeal** from an order of the Court of Appeal (LORD ESHER, M.R., and KAY, L.J., BOWEN, L.J., dissenting), reported [1893] 2 Q.B. 412, reversing an order of the Divisional Court (DAY and HENN COLLINS, JJ.), reversing an order of MATHEW, J., made at chambers, refusing to direct a stay of proceedings in an action brought by the respondents, the shippers or consignees, against the appellants, shipowners, for damages for short delivery. C

*Bigham, Q.C., J. Walton, Q.C., and Pickford, Q.C.*, for the appellants.  
*Finlay, Q.C., and T. G. Carver* for the respondents.

The House took time for consideration.

The following opinions were read. D

Aug. 3, 1894. The following opinions were read.

**LORD HERSCHELL, L.C.**—The appellants are the owners of a vessel called the *Castleton*. The respondents shipped certain cotton on board that vessel for carriage from a foreign port to Liverpool. On arrival at that port it was found that the marks of fifteen bales had been obliterated, and that the total number which arrived was less by eighteen than the number which, according to the bills of lading, had been shipped. Thereupon the present action was brought, the plaintiffs being the several holders of the bills of lading, either as shippers or as indorsees from shippers, who had not received delivery of the number of bales specified in their bills of lading respectively. E

On the question whether such an action can be maintained there has been a great difference of judicial opinion. MATHEW, J., refused to stay the action. DAY and HENN COLLINS, JJ., in the Queen's Bench Division, took a different view, but their judgment was reversed by LORD ESHER, M.R., and KAY, L.J., BOWEN, L.J., dissenting. It is admitted that the claims of the plaintiffs are several, that they have no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action as the present; but it is contended that R.S.C., Ord. 16, r. 1, justifies the course which has been pursued in making them co-plaintiffs. The argument of the learned counsel for the respondents went this length, that the rule sanctions the joinder of any number of plaintiffs, however distinct the causes of action in respect of which they are suing, subject only to this, that any defendant alleging that several causes of action have been united which cannot conveniently be disposed of together may, under R.S.C., Ord. 18, r. 8, apply for an order confining the action to such of the causes of action as can be conveniently disposed of together. If the argument be a sound one it cannot, in my opinion, stop short of the point to which the learned counsel pressed it. LORD ESHER, M.R., thought a more limited construction might be put upon the rule, that, large as the words of the rule were, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions, then the plaintiffs could not join in one action in respect of them. F  
G  
H  
I

I am unable, with all deference, to find anything in the language of the rule to justify drawing such a line, nor can I see how it could in practice be drawn. Take the facts of the present case as an illustration. In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped. Whether the goods, the non-delivery of which is complained

A of, were in fact shipped depends in each case upon a different set of circumstances. The several consignments may have been and probably were delivered to the shipowner by different persons, at different times, and under different circumstances. They were, it is true, delivered for carriage in the same ship and were goods of the same description. But I cannot see that this makes the transaction one any more than if goods consigned by different persons had been intended for carriage by different ships and had been of a different description. Precisely the same controversy, requiring just the same proof, might have arisen in the one case as in the other. And if the one case be within the rule I see nothing in its terms to exclude the other.

C Order 16, r. 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in Ord. 18. Yet, if I correctly understand the argument of the respondents, the construction they put upon Ord. 16 necessarily deals with the joinder of several causes of action, and confers, without reference to any other order or rule, the right "to unite in the same action several causes of action." For, if it sanctions the joining of plaintiffs having separate and distinct causes of action, this involves of necessity the union in one action of several causes of action.

D Order 16, r. 1, provides that

"all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."

E This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief, especially when I consider that the rule only relates to the parties to an action, and that the right to join more than one cause of action is regulated by another rule. But for the use of the word "severally," I do not think any doubt would have been entertained that this was the true construction. There was naturally much discussion as to the meaning and effect of that word. In construing these rules it must always be borne in mind that before the passing of the Judicature Act the practice and procedure of the Court of Chancery and

F the courts of common law differed in many respects. It was a leading object of the rules framed under that Act to formulate a code of procedure which should in general be applicable to the Common Law and Chancery Divisions of the High Court alike. There can be no doubt that in the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief, and might, before the Judicature Act, have been properly joined, although their

G claim was neither joint nor alternative. There is, therefore, no difficulty in satisfying every word of the rule by the construction which I have suggested, and it, I confess, appears to me the natural one.

H It cannot be doubted that, whatever construction is put upon the rule I have been considering, it must be applied equally to r. 4 of Ord. 16. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants. There are other rules of Ord. 16 which seem to me to militate against this contention. It is difficult to understand how there could ever be a "misjoinder" if such a procedure were authorised. And what is the use of r. 6, which enables a plaintiff,

I "at his option, to join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract..."

if the previous rules have the effect contended for? I do not pause to discuss the question whether the construction contended for by the appellants or by the respondents would be found to provide the more convenient procedure. I have endeavoured to construe the rule apart from such considerations, but this much I may say, that I am far from satisfied that the balance of convenience is, as the respondents contend, on their side. I cannot accede to the arguments urged for the respondents that, even if the joinder of the plaintiffs in one action was not

warranted by the rule relied on, this was a mere irregularity of which the appellants, **A** by virtue of Ord. 70, r. 1, r. 2, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

Before concluding I ought to refer to *Booth v. Briscoe* (1) which was much relied on by the respondents. The plaintiffs who were joined in that action sued in respect of a libel impugning the management of an institution of which they were the trustees. No objection was taken to the constitution of the action. They **B** recovered joint damages. In the Court of Appeal BRAMWELL, L.J., intimated an opinion that their causes of action were several, and that the damages should have been several also. But he thought that they might, nevertheless, under the circumstances, properly be joined. It is not necessary to determine whether that case was rightly decided. It is enough to say that it was a very different one from the present. I think that the judgment of the Court of Appeal should be **C** reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs here and below.

**LORD ASHBOURNE.**—I concur.

**LORD RUSSELL OF KILLOWEN.**—In this case the respondents, the plaintiffs **D** below, sue the appellants, the defendants below, for non-delivery of certain bales of cotton shipped in the defendant's steamship *Castleton* at Galveston for carriage to Liverpool. The plaintiffs consist of sixteen firms or persons, nine of whom are alleged to have been shippers and seven consignees of the cotton in question. The defendants have pleaded several defences, the principal defence apparently being **E** that the bales of cotton claimed were never shipped, or received for shipment, on board the defendants' ship. The facts alleged in the pleadings, so far as they are material, are as follows: Each of the nine shippers shipped bales of cotton, in varying quantities, on board the *Castleton*, receiving separate bills of lading therefor. The facts common to all the shipments were: that the shipments consisted of bales of cotton; that they were laden on board the same ship (which was a general ship); that they were consigned to the same port; and that the bills of **F** lading were similar in all respects material in this case. When the ship arrived at Liverpool it was found that the total number of bales landed fell short of the total number in the bills of lading by eighteen. Further, it was found in the case of fifteen of the landed bales that their distinctive marks and numbers had been obliterated, and that they were unidentifiable. Those fifteen bales had been sold, and it is stated that their proceeds have been distributed proportionately among **G** the several consignees.

In this state of things the plaintiffs joined in bringing the present action. The defendants objected to the joinder of the plaintiffs in one action, and contended that each plaintiff was bound to bring a separate action in respect of his shipment or consignment, as being a separate and distinct cause of action. On June 1, 1893, **H** MATHEW, J., made an order refusing an application to stay the action; but on appeal from that refusal DAY and HENN COLLINS, JJ., on June 30, 1893, made an order that all further proceedings should be stayed, or the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to the claim to be proceeded with. Upon appeal had from the last-mentioned order, LORD ESHER, M.R., and KAY, L.J. (BOWEN, L.J., dissenting) gave judgment **I** reversing the order of the Divisional Court, and thereby allowed the action to proceed. From that judgment the present appeal is brought.

The question thus raised before your Lordships turns upon the proper construction of R.S.C., Ord. 16, r. 1. That rule provides that:

"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to,



A without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the court or a judge in disposing of the costs shall otherwise direct."

B The Master of the Rolls thought that, grammatically construed, the order was wide enough in its terms to permit of the joining of any number of plaintiffs, although their causes of action related to entirely distinct and different transactions; but he thought that, in order to prevent the absurdity which he considered might arise from that wide construction, the rule ought to be construed with this limitation: namely, that although several plaintiffs with different and distinct causes of action might be joined together in one action, their causes of action must arise out of the same transaction. Further, he arrived at the conclusion that, although the plaintiffs in this case have different causes of action, they are causes of action which did arise out of the same transaction, and that, therefore, the plaintiffs were here properly joined.

C It seems to me that a serious ambiguity lies in the use of the words "same transaction" as here applied. I think that the causes of action here did not arise out of the same transaction. They arose out of similar but entirely distinct transactions, creating similar but entirely distinct legal liabilities. The goods of the several plaintiffs were, no doubt, sent in the same ship from the same port of shipment to the same port of discharge, and in that sense the plaintiffs may be said to have been parties to the same transaction, but in that sense only. The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another.

D KAY, L.J., was of opinion that if Ord. 16, r. 1, stood alone, the joining under one writ here attempted of several plaintiffs with distinct and separate causes of action was not authorised by the rule; but he thought that Ord. 18, r. 1, did authorise such joining, subject to the power of the court or of a judge to intervene where considerations of convenience justified it. I cannot assent to this view. Order 16 is conversant with a subject-matter different from that dealt with by Ord. 18. Order 16 (principally in r. 1 and r. 4) deals with the parties to an action; but, in my judgment, Ord. 18 deals and deals only with the causes of action which may be joined together in an action properly constituted, as to parties, under Ord. 16.

E BOWEN, L.J., dissented from the view taken by the other members of the court, and I concur both in the reasons of that learned judge and in the conclusions at which he arrived. I cannot agree with the Master of the Rolls in the limitation which, to avoid an absurdity, he introduces in the construction of r. 1 of Ord. 16—namely, the limitation that the plaintiffs shall have been concerned in the same transaction. I find no such words of limitation either in r. 1 of Ord. 16, dealing with plaintiffs, or in r. 4, of the same order, dealing with defendants; and, therefore, it seems to me that the only two possible constructions are those which were, in fact, the contentions of counsel at the Bar for the appellants and for the respondents respectively.

H For the respondents it was broadly contended that any number of plaintiffs, with any number of distinct causes of action, might join in one action within the meaning of the rule, subject only to the control of the court or of a judge. I must dissent from this view. Indeed, if r. 1 is to have this wide construction, r. 4 must receive an equally wide construction. R.S.C., Ord. 16, r. 4, provides as follows:

I "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities, without any amendment."

According to this broad contention, therefore, it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability. On the other hand, it was contended for the appellants that the plaintiffs, who alone can be joined in one action under Ord. 16, r. 1, are plaintiffs in whom, or in some of whom, not any, but the right to any relief claimed is alleged to exist. In my judgment, this is the true construction. In other words, the rule applies to cases where it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists, and also to cases (more frequent in the Chancery than in the common law courts) in which several plaintiffs having separate rights claim the same relief. This view is strengthened by the fact that several of the rules, following r. 1 and r. 4 of Ord. 16 and r. 1 of Ord. 18, would have been unnecessary were the true construction the wide one contended for by the respondents. It is not unimportant to observe that r. 11 of Ord. 16, which deals with misjoinder, only enables the court or a judge to deal with the names of parties "improperly joined"; but it is difficult to see, if the construction of r. 1 contended for by the respondents be right, how there could be a misjoinder of plaintiffs. On the other hand, Ord. 18, r. 11, dealing with joinder of causes of action, gives the court or a judge power to limit the joinder of causes upon considerations of convenience alone.

It was suggested at the Bar that, if this action were not allowed to proceed as now constituted, each plaintiff suing separately would be placed in a position of difficulty, because, it was urged, the defendants might attribute the unmarked bales, or a sufficient number of them, to the particular plaintiff suing, and so meet his claim. But this is not so. When the bales became unidentifiable, the several owners of cotton became, in point of law, owners in common of them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: *Spence v. Union Marine Insurance Co., Ltd.* (2). The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has, in the facts of this case, much weight; but whether it has or has not, it cannot be regarded if, as I think, the Orders and rules do not authorise that joinder of plaintiffs which has been here attempted.

A brief reference to the authorities is sufficient. As to *Booth v. Briscoe* (1), it is only necessary to say that, assuming that case to have been rightly decided, which it is not necessary to determine here, it differs widely from the present one, and it is no authority for the respondents' contention. That was a case in which the plaintiffs, managers of an asylum, brought an action in respect of a libel which did not reflect upon them individually or by name, but upon the management. They brought a joint action, and recovered joint damages. No objection was taken to the constitution of the action until the matter came before the Supreme Court after trial, and LORD BRAMWELL came to the conclusion, in the circumstances I have mentioned, that, as the complaint was of one and the same wrong, they might be joined as co-plaintiffs. In *Gort v. Rowney* (3) two plaintiffs suing together claimed relief in respect of separate and distinct causes of action. No objection was taken to the constitution of the action, which was referred to arbitration upon the terms that the costs were to abide the event; and the sole point to be determined was the question what was the event upon which the costs depended. Certain dicta of the Master of the Rolls in that case were relied upon by the respondents before your Lordships. But those dicta were not assented to by BOWEN, L.J., and were, in fact, not necessary for the decision of the question at issue.

A further point was taken at the Bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorised by Ord. 16 was a mere irregularity, and that the appellants came too late to take advantage of it (Ord. 70, r. 2). This objection is not, in my judgment, well founded. In my judgment such joinder of plaintiffs is more than an irregularity; it is the constitution of a

**A** suit as to parties in a way not authorised by the law and the rules applicable to procedure; and, apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process. On the whole, therefore, I come to the conclusion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellants with costs.

**B**

**LORD HERSCHELL, L.C.**—I am requested to state that **LORD WATSON** and **LORD MACNAGHTEN**, who were present during the argument of the case, but are not able to be here today, concur in the judgment which has been proposed.

*Appeal allowed.*

**C** Solicitors: *Rowcliffes, Rawle & Co.*, for *Hill, Dickinson & Hill*, Liverpool; *Wynne, Holme & Wynne*, for *H. Forshaw & Hawkins*, Liverpool.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

**D**

## **EDINBURGH STREET TRAMWAYS CO. v. EDINBURGH CORPORATION AND OTHERS**

**E**

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne and Lord Shand), June 8, 12, 14, 15, July 30, 1894]

[*Reported* [1894] A.C. 456; 63 L.J.Q.B. 769; 71 L.T. 301; 10 T.L.R. 625; 6 R. 317]

**F**

*Tramway—Purchase by local authority—"Then value"—Matters to be considered—Cost of construction at date of sale—Condition at date of sale—Depreciation—Tramways Act, 1870 (33 & 34 Vict., c. 78), s. 43.*

**G**

By s. 43 of the Tramways Act, 1870, which was incorporated in the private Act of the appellant company, it was provided that a local authority might, after the expiration of twenty-one years from the construction of a tramway, by notice in writing require the promoters of the tramway to sell to them their undertaking "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever), of the tramway, and all lands, buildings, works, materials, and plant of the promoters... such value to be in case of difference determined by" a referee nominated by the Board of Trade.

**H**

**Held** (LORD ASHBOURNE dissenting): in valuing a tramway under that section the arbitrator was not entitled to take into account the profits or the rental value of the undertaking at the date of the sale, but the proper value of the tramway was such sum as it would cost to construct and establish the tramway at that date, subject to a proper deduction for depreciation, the fact that the tramway was then successfully constructed and in complete working condition being taken into account.

**I**

Per LORD HERSCHELL, L.C.: The word "tramway" in the Tramways Act, 1870, s. 43, means the structure laid down on the highway and nothing more. The word may, no doubt, without impropriety be held to include all proprietary rights attached to it, but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute on the promoters.



**Notes.** Followed: *London Tramways Co. v. L.C.C.* (1898), 78 L.T. 361. Considered: *London, Deptford and Greenwich Tramways Co. v. L.C.C.*, [1905] 1 K.B. 316. Applied: *Dudley Corpn. v. Dudley, Stourbridge and District Electric Traction Co.* (1907), 97 L.T. 556. Considered: *Hamilton Gas Co. v. Hamilton Corpn.*, [1910] A.C. 300. Applied: *Melbourne Tramway and Omnibus Co. v. Tramway Board* (1919), 88 L.J.P.C. 102; *Oldham, Ashton and Hyde Electric Tramways, Ltd. v. Ashton Corpn.*, [1921] All E.R.Rep. 664. Referred to; *Re Southampton Tramways Co. and Southampton Corpn.* (1899), 81 L.T. 652; *Eccles Corpn. v. South Lancashire Tramways Co.*, [1910] 2 Ch. 263; *Perth Gas Co. v. Perth Corpn.*, [1911] A.C. 506; *Hickman v. Peacey*, [1945] 2 All E.R. 214; *Surrey County Valuation Committee v. Chessington Zoo, Ltd.*, [1950] 1 All E.R. 154.

As to the power of a local authority compulsorily to purchase a tramway, see 38 HALSBURY'S LAWS (3rd Edn.) 719, 720; and for cases see 43 DIGEST 353-356. As to compensation on compulsory acquisition generally, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 11 DIGEST (Repl.) 124 et seq. For the Tramways Act, 1870, see 25 HALSBURY'S STATUTES (2nd Edn.) 1289.

Cases referred to:

- (1) *Re London County Council and London Street Tramways Co.*, [1894] 2 Q.B. 189; 70 L.T. 97; 10 T.L.R. 211, D.C.; reversed, [1894] 2 Q.B., p. 202; 70 L.T. 572; 10 T.L.R. 405, C.A.; affirmed sub nom *London Street Tramways Co. v. London County Council*, [1894] A.C. 489; 10 T.L.R. 630, H.L.; 43 Digest 355, 115.
- (2) *Pimlico Tramway Co. v. Greenwich Union* (1873), L.R. 9 Q.B. 9; 43 L.J.M.C. 29; 29 L.T. 605; 38 J.P. 117; 22 W.R. 87; *Ryde Rat. App.* (1871-85), 97; 38 Digest (Repl.) 495, 140.
- (3) *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444; 63 L.J.Q.B. 56; 69 L.T. 661; 57 J.P. 772; 1 R. 288, H.L.; 43 Digest 1060, 26.

Also referred to in argument:

- R. v. London and North Western Rail. Co.* (1874), L.R. 9 Q.B. 134; 29 L.T. 910; 38 J.P. 245; sub nom. *R. v. Bedford Union Assessment Committee and Goldington Parish Overseers*, 43 L.J.M.C. 81; 38 Digest (Repl.) 646, 1058.
- Dobbs v. Grand Junction Waterworks Co.* (1883), 9 App. Cas. 49; 53 L.J.Q.B. 50; 49 L.T. 541; 48 J.P. 5; 32 W.R. 433, H.L.; 43 Digest 1090, 219.
- Elston v. Rose* (1868), L.R. 4 Q.B. 4; 9 B. & S. 509; 38 L.J.Q.B. 6; 19 L.T. 280; 17 W.R. 52; 13 Digest (Repl.) 388, 163.
- R. v. Duke of Bridgewater Trustees* (1829), 9 B. & C. 68; 4 Man. & Ry.K.B. 143; 2 Man. & Ry.M.C. 139; 7 L.J.O.S.M.C. 81; 109 E.R. 26; 38 Digest (Repl.) 663, 1148.
- R. v. Tomlinson* (1829), 9 B. & C. 163; 4 Man. & Ry.K.B. 169; 2 Man. & Ry.M.C. 164; 7 L.J.O.S.M.C. 64; 109 E.R. 61; 38 Digest (Repl.) 675, 1251.
- R. v. Lower Mitton (Inhabitants)* (1829), 9 B. & C. 810; 4 Man. & Ry.K.B. 711; 2 Man. & Ry.M.C. 424; 8 L.J.O.S.M.C. 57; 109 E.R. 301; 38 Digest (Repl.) 663, 1147.
- Craig v. Edinburgh Street Tramways Co.* (1874), 1 R. (Ct. of Sess.) 947; 11 Sc.L.R. 541.

**Appeal** from a decision of the First Division of the Court of Session (LORD ADAM, LORD McLAREN, and LORD KINNEAR, the Lord President, LORD ROBERTSON), dissenting), affirming a decision of the Lord Ordinary (LORD LOW).

*Asher, Q.C.*, *Graham Murray, Q.C.*, and *Vary Campbell* (all of the Scottish Bar) for the appellants.

*The Lord Advocate (Balfour, Q.C.)* and *Fletcher Moulton, Q.C.*, for Edinburgh Corporation.

Their Lordships took time for consideration.

July 30, 1894. The following opinions were read.

**A LORD HERSCHELL, L.C.**—The appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated Part 2 and Part 3 of the Tramways Act, 1870. Section 43 of that Act entitled the respondents within six months after the expiration of a period of twenty-one years from the time when the appellants were empowered to construct the tramway, by notice in writing, to require the appellants to sell their undertaking. They

**B** accordingly, on Aug. 12, 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the city of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr. Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree arbitral, which he made, Mr. Tennant stated that, in his opinion, after careful

**C** consideration of the terms of s. 43 of the Tramways Act, 1870, in valuing the tramways, he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him, according to his construction of the statute, was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he

**D** was entitled to take into account the fact that the tramways were then successfully constructed, and in complete working condition. The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr. Tennant's award or decree arbitral, upon the ground that his view of s. 43 of the Tramways Act, 1870, was erroneous, and for declarator that he ought, under that section, to have fixed the value to be paid by the respondents

**E** for the tramways upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value. Both the Lord Ordinary and the First Division of the Inner House have held Mr. Tennant's award to be good, and have assoilzied the respondents.

The question on this appeal, is whether these decisions were correct. The question turns on the construction to be put upon the language employed in s. 43 of the Tramways Act, 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the local authority. The words are as follows :

**G** "...upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking..."

It is contended, on behalf of the appellants, that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section.

**I** Before discussing the language used by the legislature, it is, I think, necessary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them. The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in s. 34 of the Tramways Act, 1870, which authorised them to use upon the tramways so laid down carriages with flanged wheels, or wheels suitable only to run on the rails prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flanged wheels

or other wheels suitable only to run on the prescribed rail. It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the persons or company authorised to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the right to the statutory monopoly conferred upon the promoters by the section to which I have referred. A

I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that, although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway, and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are, to my mind, conclusive upon this point. What, then, does "tramway" mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters. I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the provision in s. 43 which immediately follows that under consideration. It is provided that, when a sale has been made, all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a provisional order under the Act, and in reference to the same they shall be deemed to be the promoters. B C D E F

It is by virtue of this enactment, and of this alone, that the local authority becomes entitled to the exclusive use of the tramway, which was previously vested in the promoters. It is the statute, and not the company which originally constructed the tramways, which confers upon the local authority this right. It is also worthy of note that some, if not all of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking," inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect to the undertaking sold." G

I have so far dealt with the language of the section, without taking into consideration the words within the parenthesis upon which so much of the argument turned. What was to be paid by the purchasers was the then value of the tramway "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever." It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the legislature the term "value of the tramway" would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must, therefore, include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning attributed to them is to be modi- H I



A filed by reason of the words which precede. Each part of the provision throws light on the other. It is by reading it as a whole that the intention of the legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants.

B It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in respect of such profit. I find it difficult to understand how it could ever be supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to  
C guard against his allowing for, or, in other words, taking into account, past profits in arriving at the value of the tramway. But if the word "allowance" is used in this sense in relation to past profits, its meaning must be the same in relation to future profits. I, therefore, construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value.

D It was argued that, if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend  
E upon the profits to be anticipated. It was further argued that the legislature had only excluded an allowance for past or future and not for present profits. Why, it was asked, if all profits were to be excluded, were the words "past or future" inserted? To my mind, the words cover all profits whether made or to be made. And the reason for their insertion appears to me plain. If the word "profits" alone had been used it would have been open to contention that only profits  
F actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future. Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator, in determining the then value of the tramway, was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute, and would be thereafter by the same statute conferred upon the local  
G authority.

Reliance was placed by the appellants upon the provisions of ss. 41 and 42 of the Tramways Act, 1870, enabling the Board of Trade, if the promoters discontinued the working of their tramway, or were insolvent, to declare that their powers in respect of the tramway should be at an end. In the first of these cases, the Board of Trade were empowered to declare the powers of the promoters at an  
H end from the date of the order; in the latter, at the expiration of six months from the making of the order, but in both cases it is provided that the powers of the promoters shall thereupon cease and determine, "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as s. 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended  
I that this showed that the purchase of the undertaking was regarded by the legislature as a purchase of the powers of the promoters. I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of s. 43 which regulates the terms of payment in a different manner from that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not, the powers of the promoters equally cease and determine; the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local

authority by virtue of the statute, in precisely the same manner as they were acquired by the promoters. For these reasons I think the interlocutors appealed from should be affirmed, and the appeal dismissed with costs. A

**LORD WATSON** concurred.

**LORD ASHBOURNE.**—The facts of the case have been so fully stated by the Lord Chancellor that I need only refer to them at such length as may make my meaning plain. The direct question raised before your Lordships is whether the arbitrator was right in valuing the tramway at what it would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalised its annual value. B

The question depends upon the construction of s. 43 of the Tramways Act, 1870. The decision is of deep moment to all the tramway companies in Great Britain and involves interests of considerable magnitude. The section is not clear. In any view of the case it is a cumbrous and unfortunate piece of drafting, not plain or direct, and each side is confronted with difficulties in its interpretation. It is not surprising to find that among the judges before whom the case has come there have been wide differences of opinion, and, therefore, I have applied myself to the consideration of the case, with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinions of judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect. The clause requires the closest and most critical examination and analysis in order to see what is the method of the transfer, what is sold, and what is to be paid. Nothing would have been easier than to have said that at the end of the twenty-one years there could be a transfer of the undertaking, and in such an event the undertakers should be paid for the cost of materials in situ capable of being worked, less depreciation. But the legislature in its wisdom has used a long, complicated, and involved sentence, from which we have to spell out and infer such meaning as we can. C

The transaction is to take place by a sale. A sale involves a selling and a buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section. But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking, of course, is sold, but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway in situ, or the tramway with the power to use it? This is really a governing point in the case. Does the sale of the tramway include, or involve, or carry with it the right to use it? The words of the section are: D

"... when any such sale has been made, all the rights, powers, and authorities of [the company] in respect of the undertaking sold... shall"

vest in the purchaser. The words here, again, are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. E

Section 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may, by order, declare that from the date of the order the powers of the promoters shall be at an end, F

"and thereupon the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," G

i.e., by s. 43. Thus s. 41 expressly states that the powers, including the right to use, are purchased under s. 43. Section 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless H

A the same are purchased by the local authority in manner by this Act provided, i.e., again by s. 43. In this connection it is important to note s. 44, which enacts:

B “Where any tramway in any district has been opened for traffic for a period of six months the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, persons, corporation, or company, or to the local authority of such district; and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters.”

C In my opinion, a sale under s. 44 would carry with it the right to use the tramway. Similar words are used in s. 43. The machinery of sale is resorted to, “the rights, powers, and authorities” are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it. It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to “the promoters,” and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of Appeal in *London Street Tramways Co. v. London County Council* (1). LINDLEY, L.J., says ([1894] 2 Q.B. at p. 205):

F “The vendors have only a right of user, that is by s. 20; they have no land to sell, they have only an easement so far as the land is concerned, but they have an exclusive right to use the tramway by s. 29, and to grant licences to other persons to use it by s. 37. These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale.”

G The words of A. L. SMITH, L.J., on this point are very strong and clear (*ibid.* at pp. 214, 215):

H “I cannot doubt that what is to be sold and bought is not merely the tramway in situ as a structure, but the undertaking of the company as a going toll-earning concern—that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others, to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt. The words of the section are clear—‘and thereupon the company shall sell,’ not their rails and sleepers, but ‘their undertaking,’ and when such sale has been made, ‘all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the county council.’”

I A. L. SMITH, L.J., in the clearest words gave his opinion (*ibid.* at p. 215) that the company had to sell

“the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned,”

and he adds emphatically, “that this is what is to be sold by the company to the London County Council I do not doubt.” I concur in this view of A. L. SMITH,



L.J., which I regard as of the highest importance as stating and explaining the great value of the subject-matter to be sold. It may be that the language of the section is involved and roundabout, that the conveyancing is defective, but, to my mind, it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated than to spell out a narrower one in contradiction of what I believe to be the meaning of s. 43 itself, as well as to the clear words of ss. 41 and 42, and the construction required to give effect to s. 44.

If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is: What is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present), "the then value of the tramway, and all lands, buildings, works, materials, and plant." The actual tramway, in a very literal sense, consists of little else except its iron rails. "The then value of the tramway" from the old-iron point of view would be a ludicrous mockery, and accordingly everyone—judges and arbitrators alike—repudiate any such construction and admit that a wider interpretation must be sought. A. L. SMITH, L.J., says (*ibid.* at p. 219):

"There can be no doubt that in any ordinary case, where an undertaking, such as the present, is to be sold and paid for, its present, that is, its then value, is in practice arrived at by capitalising its rental value."

MATHEW, J., more in detail, says (*ibid.* at p. 194):

"'Value' is to be ascertained as it would have to be ascertained for rating purposes, and that the word must be construed in that sense. These tramways are hereditaments, capable of earning profits, and assessable under the Poor Law Acts. That is clear from *Pimlico Tramway Co. v. Greenwich Union* (2), which has been called to our attention, and the meaning of which I have indicated of the word 'value' is recognised in many statutes in *pari materia*, as for instance, in the Valuation (Metropolis) Act, 1869, s. 4, and also in the Union Assessment Acts. To get at the value you take the profits, deduct the tenants' charges and reasonable profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit. By capitalising that rental you get at the value of the hereditament."

I, therefore, take it that apart from the parenthesis "the then value" would be held to have its ordinary meaning, as stated by A. L. SMITH, L.J. The onus of proving that the ordinary meaning should not be given to the words "the then value" is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says,

"exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever."

Prima facie, these words imply that, but for their use, the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances, would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used not to abate but to destroy and contradict the ordinary meaning of the words "the then value." If the argument is correct that the value of the tramway is only the value of the materials in situ, profits would not need to be excluded, because not comprised in the original subject-matter. It is admitted that "the then value" is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? A. L. SMITH, L.J., well puts the question: "Are the words of exclusion in this section so strong, when applied to the things to be paid for—namely, a tramway in situ—as to exclude the ordinary way of ascertaining present value?" It must be borne in mind that the county council can only acquire ownership rights under the sale. They can let, but

A cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers' profits, and, therefore, it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority "the then value" should not be run up by the history of "past" or the anticipation of "future" profits. These words "past" or "future" are suggested by the word "then." The provision is that no "allowance" is to be made, and that is very far from an enactment that "the then value" may not be ascertained according to the ordinary rule and practice in like cases.

The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The Lord President in his judgment well says (21 R. (Ct. of Sess.) at p. 703):

C "The contention of the corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than prima facie they bear. I cannot conceive why the legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, and then incidentally and by way of exclusion put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value."

It must be remembered that "the then value" of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost large sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No "allowance" is here to be made for "past or future profits," but "the then value" is to be arrived at by the ordinary methods. It is also not to be forgotten that under this section a tramway company might be compelled to sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale, or for severance.

The company concede that they, under its terms, are debarred from "any allowance" for their profits in "the past" or their hope of greater profit in "the future"; but could it have been intended that in providing that they were to get "the then value" they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator? *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (3) is important as showing, to quote HENN COLLINS, J., when the London case was in the Divisional Court,

H "the words which the legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials."

The section in the present case is framed in an entirely different manner, because, in my opinion, the legislature contemplated a different operation with different results. No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the county council is unreasonable, and that it would be natural to expect that if the legislature contemplated such a meaning they would have said so in plain language. The weighty words of MATHEW, J., in the Divisional Court, are worthy of attention ([1894] 2 Q.B. at pp. 196, 197):

I "The Act was intended to inform such of the public as were disposed to become shareholders in this kind of undertaking, and one would expect plain language addressed to such persons and their advisers as to what the legislature meant. If it meant to inform the public, 'You shall not have, at the

end of twenty-one years, compensation for the value of the undertaking, but your undertaking shall be sold for the cost of the materials in situ, less depreciation,' I cannot help thinking that very few tramways would have been constructed, because a shareholder proposing to take shares has to satisfy himself that the profits of the undertaking would not only pay him interest upon his investment, but would restore to him wholly or partially, at the end of twenty-one years, his capital."

I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high authority of those who have reached a different conclusion, but, with all deference and submission, in my opinion the judgment appealed from should be reversed.

**LORD SHAND** concurred with the opinion of the Lord Chancellor.

*Appeal dismissed.*

Solicitors: *Rees & Frere*, for *Drummond & Reid*, Edinburgh; *A. Beveridge*, for *W. White Millar*, Edinburgh.

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

## ATTORNEY-GENERAL v. MOORE

[CHANCERY DIVISION (Stirling, J.), December 16, 1892]

[Reported [1893] 1 Ch. 676; 62 L.J.Ch. 607; 68 L.T. 574;  
41 W.R. 294; 9 T.L.R. 144; 37 Sol. Jo. 132; 3 R. 213]

*Coroner—Treasure trove—Jurisdiction of coroner to determine question of title—Coroners Act, 1887 (50 & 51 Vict., c. 71), s. 36.*

The jurisdiction of a coroner upon an inquest held by him relative to treasure trove is limited to inquiring who were the finders "and who is suspected thereof," and does not extend to determining questions of title to the treasure.

**Notes.** As to inquests on treasure trove, see 8 HALSBURY'S LAWS (3rd Edn.) 543, 544; and for cases see 13 DIGEST (Repl.) 174. For s. 36 of the Coroners Act, 1887, see 4 HALSBURY'S STATUTES (2nd Edn.) 839.

Case referred to:

- (1) *R. v. Toole* (1867), 11 Cox, C.C. 75; 16 W.R. 439; 15 Digest (Repl.) 869, \*5370.

Also referred to in argument:

*Britton v. Cole* (1695), Comb. 434; 5 Mod. Rep. 109; 1 Salk. 395; on appeal (1697), Comb. 469; 1 Ld. Raym. 305; 12 Mod. Rep. 175; 1 Salk. 408; Carth. 441; 90 E.R. 596; 16 Digest (Repl.) 129, 128.

*R. v. Mason* (1702), 7 Mod. Rep. 32; 2 Salk. 447; 87 E.R. 1077; 16 Digest (Repl.) 278, 475.

*Lambert v. Taylor* (1825), 4 B. & C. 138; 6 Dow. & Ry.K.B. 188; 3 L.J.O.S.K.B. 160; 107 E.R. 1010; 13 Digest (Repl.) 159, 201.

*Garnett v. Ferrand* (1827), 6 B. & C. 611; 9 Dow. & Ry.K.B. 657; 4 Dow. & Ry.M.C. 441; 5 L.J.O.S.K.B. 221; 108 E.R. 576; 13 Digest (Repl.) 142, 1.

*R. v. Aldenham (Alderman of Rowel)* (1676), 2 Lev. 152; 83 E.R. 494; sub nom. *R. and Alderman*, 3 Keb. 604; 13 Digest (Repl.) 155, 161.

*Prince of Wales, etc., Association Co. v. Palmer* (1858), 25 Beav. 605; 53 E.R. 768; 13 Digest (Repl.) 173, 415.



A **Motion** on behalf of the Crown asking that the defendant, a coroner, be ordered to deposit in court certain articles claimed to be treasure trove belonging to the Crown, or that he might be restrained by injunction from parting with the articles otherwise than to the Treasury Commissioners.

On Dec. 16, 1891, certain articles of ancient church plate, comprising three silver cups, a silver chalice, a silver pateen, and two silver pyxes, were found B hidden in the ground at Stoke Prior in Herefordshire. Shortly after their discovery they were taken possession of by the defendant, who was the coroner of the Leominster district of the county, who, on Oct. 12, 1892, proceeded to hold an inquest upon them. The jury before whom the question came found that the articles were treasure trove. Upon the coroner asking whether there were any claimants, it was urged on behalf of the Crown that a question of title as against C the Crown could not be decided upon an inquest, and that the coroner had no further duties to discharge, and the coroner was requested to discharge the jury and hand over the treasure to the Crown. The objection was overruled by the coroner, who thereupon proceeded to hear evidence in support of the claim of the lord of the manor to the articles, and to consider questions arising on the construction of several ancient deeds and documents. The jury were unable to agree upon D the question of ownership, and counsel for the Crown then asked that the jury should sign the inquest and verdict, and that the coroner should enter upon the inquest such verdict of the jury, and hand over the treasure to the Crown. These applications were all rejected by the coroner, who decided that the inquest was not complete until the jury had given a verdict on all the points put to them. He then bound the jury over to attend the Hereford Assizes for the direction of the E judge.

On the matter coming before DAY, J., it was found that one of the jury was absent owing to illness, and his Lordship thereupon discharged the jury. On behalf of the Crown, an application was made to DAY, J., that the coroner might record the verdict of "treasure trove" upon the inquisition. DAY, J., held that the inquiry was not yet complete, and that, whether or not he had jurisdiction to F compel the coroner to do one thing or another, in his opinion the coroner's proceedings had been throughout quite justified. The finding of treasure trove did not conclude the inquiry. The coroner was a very ancient and most responsible officer of the Crown, and he had to inquire amongst other things into the dues of the Crown, and as to the falling in of the rights of the Crown. The Crown was not absolutely entitled to treasure trove. The Crown was prima facie entitled to G it, but had in many instances parted with those rights to the subject. In those cases it could not seize the treasure trove, and the coroner was bound to inquire into the matter. The course adopted by the coroner had been the most convenient, because, if, without considering the claim made, the coroner had to hand the treasure over, the subject's only right would be the extremely precarious one of presenting a petition of right. DAY, J., accordingly refused the application on behalf of the Crown. Subsequently the coroner arranged to hold a fresh inquiry, H and upon receiving notice of such intention the Crown commenced the present action.

This was a motion on behalf of the Crown asking that the defendant might be ordered forthwith to deposit in court the articles in question, and claimed to be treasure trove belonging to Her Majesty, or otherwise that he might be restrained I by injunction until the trial of the action or further order from delivering, parting with, or in any manner disposing of the articles aforesaid to any person or persons otherwise than the Lords Commissioners of Her Majesty's Treasury.

*The Solicitor-General (Sir John Rigby) and Ingle Joyce for the Crown.  
Corner for the coroner.*

*A. J. David for the lord of the manor.*

**STIRLING, J.**—Having regard to the turn the matter has taken, it is not necessary for me to make a formal order; but I will say a few words in order to explain

the grounds upon which I proceed. This action is brought by the Attorney-General against the coroner for the Loominster division of the county of Hereford, and the circumstances are somewhat peculiar. It appears that the articles mentioned in the notice of motion were found concealed in the earth, that the finders took them to the coroner, and that the coroner now has them in his possession. An inquest has been held, but the proceedings have proved abortive. There appears to have been no question that the articles were treasure trove. The jury, as I understand, were willing so to find, but the coroner desired that the inquiry should be prosecuted further, and that the title to those articles should be found by the jury. The jury were unable to agree. The matter was, in pursuance of the Coroners Act, 1887, adjourned to the assizes. It came before DAY, J., who discharged the jury. Therefore there has been no finding as yet in the matter, and it is proposed by the coroner to hold a further inquest. With that I am not asked to interfere, and I conceive it to be no part of my duty to interfere. But, having regard to certain observations which are reported to have been made by the learned judge, I desire to refer to one or two of the authorities on the subject.

First of all, I will refer to CHITTY on the PREROGATIVE OF THE CROWN, where, at p. 152, "treasure trove" is thus defined :

"Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove; but if he that laid it be known or afterwards discovered, the owner and not the King is entitled to it; this prerogative right only applying in the absence of an owner to claim the property.

There is no question, at the present moment, that a *prima facie* case of treasure trove has been made out. *Prima facie*, the title to treasure is in the Crown, but no doubt that title will be displaced by producing a grant to a subject of the franchise of treasure trove. But the question between the Crown and the subject must be decided by an interpretation of the grant, and I cannot conceive that it is possible that that title can be decided either by the coroner or by the verdict of the coroner's jury. It does not seem to me that it is a matter which falls within the jurisdiction of the coroner in cases of this kind to determine that title under s. 36 of the Act of 1887. That section says :

"A coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who is suspected thereof."

The jurisdiction of the coroner is, therefore, limited to an inquiry who were the finders, and who is suspected thereof. I do not see, as at present advised, that he has any jurisdiction to determine the title. No doubt he may have incidentally to refer to the title, as was done in the case in which the verdict is set out on p. 536 of UMFREVILLE on the OFFICE AND DUTY OF CORONERS; but I think it is not according to law, that the title can be determined by the coroner.

That being so, I further think that, according to the authorities, the title of the Crown is independent of the finding of the jury. At p. 259 of CHITTY on the PREROGATIVE OF THE CROWN the law is stated thus :

"As to personalty, the general rule seems to be, that the King is entitled without office or other matter of record; as in the case of goods and choses in action of felons, wreck of the sea, treasure trove, or the profits of lands of clerks, etc., convicted of felony, or of persons outlawed, in a personal action";

and the learned author goes on to cite the following passage from BLACKSTONE'S COMMENTARIES (3 Bl. Com. at p. 259), which is to this effect :

"The inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure trove, and the like, and especially

- A** as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is not only with regard to chattels, but also as to real interests, in all respects an inquest of office; and if they find the treason or felony, or even the flight of the party accused (though innocent), the King is thereupon by virtue of this office found entitled to have his forfeitures; and also in the
- B** case of chance-medley, he or his grantees are entitled to such things by way of *deodand* as have moved to the death of the party."

I understand the meaning to be that, although it may be proper that an inquest should be held for the purpose of informing the Crown as to its rights, yet the finding of the jury is not essential to the title of the Crown to chattels.

- C** That view appears to me to be borne out by a case in Ireland to which I have been referred—*R. v. Toole* (1)—in which the conclusion was arrived at, after a careful examination of all the old cases, that, in an indictment for concealing treasure trove, it is not necessary to state any inquisition before the coroner or office found as to the title of the Queen. That being so, the Crown is entitled to come here and to have its title determined, and, as it would seem to me, most conveniently determined, in an action of this sort in which questions arise as to
- D** the construction of ancient Crown grants and other matters which cannot be properly gone into at the coroner's inquest. I think, therefore, the Attorney-General, on behalf of the Crown, is fully entitled to come here, and to have the articles, the title to which is in question, secured until the dispute which has arisen is settled. For that purpose it seems to me that the lord of the manor ought to be made a party, and the learned Solicitor-General is willing that he should be let
- E** in, and that the writ should be treated as amended at once, so that he would be made a defendant immediately. He appears on this occasion by counsel. The learned counsel for the coroner has asked me that he may not be deprived of the articles until after the inquest which he proposes to hold. I think that is reasonable; but he is willing to give an undertaking not to part with them until the further order of the court. I am willing to accept that undertaking. That is all
- F** that is necessary to dispose of this motion on the present occasion. The motion, therefore, will stand over generally, but when the coroner has performed his duty and held the inquest, I suggest that the most convenient course would be that he should make an application to the court, when the question of costs can be considered. There will be no undertaking in damages.

- G** Solicitors: *Solicitor to the Treasury*; J. T. & G. F. Marshall; H. Andrews for W. T. Sale, Leominster.

[Reported by W. IVIMBY COOK, Esq., Barrister-at-Law.]



## PERKINS v. BELL

[COURT OF APPEAL (Lindley, Bowen and A. L. Smith, L.JJ.), December 13, 17, 1892]

[Reported [1893] 1 Q.B. 193; 62 L.J.Q.B. 91; 67 L.T. 792;  
41 W.R. 195; 9 T.L.R. 147; 37 Sol. Jo. 130; 4 R. 212]

*Sale of Goods—Rejection—Defective quality—Right to reject—Sale by sample—Rejection at place of delivery.*

The plaintiff sold malting barley to the defendant by sample and later forwarded the bulk by railway to his local station. On the day on which he bought the barley the defendant re-sold it by the same sample to a firm of brewers and maltsters. Three days later the plaintiff sold some inferior barley to the defendant, and, by accident, this inferior barley was mixed with the barley previously sold by sample to the defendant. The defendant obtained a bulk sample of this mixed barley from the station-master at his local station to which it had been sent, and then directed that the bulk be forwarded to the brewers who rejected it as not being up to the original sample. The defendant thereupon rejected it to the plaintiff. In an action brought by the plaintiff to recover the value of the barley,

**Held:** as the place for inspection of the barley was the place of delivery, i.e., the defendant's local railway station, the defendant took possession of it there; the property in it passed to him there; and, therefore, he no longer had a right of rejection when he forwarded it to the brewers, and the plaintiff was entitled to judgment.

**Notes.** Section 34 of the Sale of Goods Act, 1893 (22 HALSBURY'S STATUTES (2nd Edn.) (1006) provides): "(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract." By s. 15 (2) of that Act there are three implied conditions in a sale by sample. They are that the bulk shall correspond with the sample in quality, that the buyer shall have a reasonable opportunity of comparing bulk with the sample, and that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Applied: *Hardy & Co. v. Hillerns and Fowler*, [1923] 1 K.B. 658.

As to acceptance of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 110 et seq.; and for cases see 39 DIGEST 453 et seq., 591 et seq.

Case referred to:

(1) *Grimoldby v. Wells* (1875), L.R. 10 C.P. 391; 44 L.J.C.P. 203; 32 L.T. 490; 39 J.P. 535; 23 W.R. 524; 39 Digest 455, 825.

Also referred to in argument:

*Kibble v. Gough* (1878), 38 L.T. 204, C.A.; 39 Digest 374, 124.

*Parker v. Palmer* (1821), 4 B. & Ald. 387; 106 E.R. 978; 39 Digest 453, 803.

*Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438; 41 L.J.C.P. 228; 27 L.T. 336; 20 W.R. 1005; 39 Digest 456, 828.

*Morton v. Tibbett* (1850), 15 Q.B. 428; 19 L.J.Q.B. 382; 15 L.T.O.S. 274; 14 Jur. 669; 117 E.R. 520; 39 Digest 370, 90.

*Page v. Morgan* (1885), 15 Q.B.D. 228; 54 L.J.Q.B. 434; 53 L.T. 126; 33 W.R. 793, C.A.; 39 Digest 371, 94.

- A** *Lorymer v. Smith* (1822), 1 B. & C. 1; 1 L.J.O.S.K.B. 7; 107 E.R. 1; sub nom. *Lorimer v. Smith*, 2 Dow. & Ry.K.B. 23; 39 Digest 454, 809.  
*Lucy v. Mouflet* (1860), 5 H. & N. 229; 29 L.J.Ex. 110; 157 E.R. 1168; 39 Digest 457, 839.  
*Poulton v. Lattimore* (1829), 9 B. & C. 4 Man. & Ry.K.B. 208; 7 L.J.O.S.K.B. 225; 109 E.R. 96; 39 Digest 471, 954.

**B** **Appeal** by the plaintiff from a decision of LAWRENCE, J., in favour of the defendant in an action brought by the plaintiff to recover the value of goods rejected as inferior to sample.

The following statement of facts is taken from the judgment of A. L. SMITH, L.J.

**C** On Oct. 4, 1890, the plaintiff, who was a farmer, sold to the defendant, who was a corn dealer, at his stand in Leicester market, by sample, thirty-one quarters of malting barley at 34s. a quarter, to be delivered in sacks at Theddingworth Station, about two and a half miles from the plaintiff's farm. At the time of the sale the plaintiff was aware that the defendant would re-sell the barley, and probably to brewers or maltsters, but had no knowledge when or to whom such re-sales would take place nor to where the defendant would consign the barley. As a matter of fact, as it turned out, the defendant on the same day re-sold the barley by the same sample to Messrs. Sharpe & Co., brewers and maltsters, at Sileby, at an advance of 2s. per quarter. On Oct. 7 the plaintiff sold to the defendant in Market Harborough market three more quarters of barley of not such good quality as the first; and it was arranged that the plaintiff should send to the defendant a sample of this barley, the price to be thereafter agreed upon. This barley was also to be delivered by the plaintiffs in sacks at Theddingworth Station. Upon the plaintiff's arriving home at his farm in the evening he found that his men, whilst winning the three quarters, had, against his orders, mixed them with the thirty-one quarters, and he at once wrote to the defendant informing him of what had been done, and adding that if the defendant complained that it made any difference to him in the sample he (the plaintiff) would make it good; but he hoped that it would not. Upon receipt of this letter the defendant, on Oct. 8, wrote to the station-master at Theddingworth station to forward him a sample of the "about thirty-five quarters of barley ex A. K. Perkins." This the station-master did, taking the sample out of twenty of the thirty-four quarters which had then arrived at his station. The residue arrived there the next day. It was admitted that the station-master took a fair sample of the barley.

**G** Having inspected this sample the defendant, on Oct. 9, ordered the station-master to forward the thirty-four quarters (called forty) to the order of Messrs. Sharpe & Co., maltsters, Silcby, at Sileby station, stating that the cost of carriage was to be placed to his account. The barley was sent off on Oct. 10. On Oct. 16 Messrs. Sharpe & Co., by telegraph to the defendant, rejected the barley, which was then at Sileby, and the defendant thereupon wrote to Messrs. Sharpe & Co. as follows:

"Oct. 16, 1890.—Your telegram to hand. I can only say we had a bulk sample from sending station before moving on, and considered it a fair delivery. However, will you bring large bulk sample on Saturday to Leicester market, and oblige? The barley left sending station on the 10th inst., according to my back rate.—Yours truly, William Ball, jun."

**I** On the same day, before the receipt of the above-mentioned letter, Messrs. Sharpe & Co. wrote to the defendant stating:

"It seems strange that you did not take a bulk sample of it yourself before ordering on to Sileby, and thus save carriage. We feel sure if you had done so, as promised, you would not have sent it, as it is quite unfit for the brewing of ale."

The barley was subsequently rejected by the defendant, and hence the present action.

On Mar. 16, 1892, the action came on for trial at the Leicester Winter Assizes before LAWRENCE, J., sitting without a jury. It was, however, adjourned to London for further consideration, and came on on May 26, 1892. The learned judge decided in favour of the defendant on the ground that the first opportunity the defendant had of such a complete and full inspection as he was entitled to have under a contract of the kind was when delivery took place at the brewers' station. The plaintiff appealed.

*Toller* for the plaintiff.

*Loyd, Q.C.*, for the defendant.

*Cur. adv. vult.*

Dec. 17, 1892.—**A. L. SMITH, L.J.**, read the following judgment of the court.—This is an action for goods sold and delivered, and the point raised is whether, under the contract and the circumstances existing in this case, the defendant was entitled to reject the goods purchased and throw them upon the plaintiff's hands; or, in other words, whether the property in the goods had passed to the defendant before he sought to reject them.

The case is of some importance, as it arises out of a contract of common occurrence between farmers and middlemen. [His LORDSHIP stated the facts and continued:] The sole point the parties raise is whether upon the contract between them, and the facts of this case, the defendant was in time in rejecting the barley as and when he did. My brother LAWRENCE held that he was; and hence the present appeal. It will be noticed that by the contract the plaintiff was to deliver the barley at Theddingworth station. No other destination was known to him, and we cannot doubt that if this had been a sale of specific ascertained barley, the property therein would have passed to the defendant upon its delivery to the railway company at the station by the plaintiff. The railway company would thereupon have become the agents of the defendant to receive it and to carry it to any place or places the defendant might direct.

But it was said by counsel for the defendant that inasmuch as this was a sale by sample, the defendant was entitled to a fair opportunity of comparing the bulk with the sale sample after delivery, before the property in the barley passed to him, and that the place for inspection need not necessarily be the place at which delivery is to be made; and in this we agree. The question, however, is if there can be read into this contract an implied term that inspection was to be had at any place fixed by the vendee without the knowledge of the vendor. This is not a case in which upon a sale by sample it is agreed that the destination of the goods shall be the vendee's premises or some other named locality, and that the transit thereto shall be performed partly by the vendor and partly by the vendee. In such a case it would be right to imply that the place of destination agreed upon was the place for inspection, and that the joint transit was only an agreed mode of getting the goods there: see *Grimoldby v. Wells* (1). This is a case in which at the time of sale the only known destination was Theddingworth station, at which the vendor undertook to deliver the barley at his own risk and expense. Of all that should take place afterwards as regards the barley, the vendor knew nothing. It was entirely at the disposal of the vendee, who might send it where and to whom he pleased, and when he pleased, and over which disposition the seller could exercise no control.

We find no evidence in this case to dislodge the presumption which *prima facie* arises, that the place of delivery is the place for inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places and at different distances from Theddingworth station, and until arrival at those places the barley would be at the risk of the vendor. If the barley was rejected by these sub-vendees upon arrival, then the vendor would have at his own risk and cost to



**A** take the barley back from whatever place or places it might happen to be, no matter how far they might be from Theddingworth station, or to arrange for its sale at the places where it then was. As to these risks the contract is wholly silent, and in our judgment it is impossible to read into it that the vendor undertook these risks, as we were invited by counsel for the defendant to do.

**B** It was argued that Theddingworth station was a mere road-side station, and that there was no opportunity there of comparing the bulk with the sample, and that consequently the station was not the place for inspection and that some other place was, and that this was the warehouse of the maltsters or brewers to whom the defendant might have chanced to have sent the barley. The evidence given shows that the bulb could be inspected in the sacks in the trucks at the station. The suggestion that the barley had to be shot, before inspection, is untenable, **C** and there is no evidence to support it. Moreover, the letters of Oct. 16 show that neither the defendant nor Messrs. Sharpe considered that there was any difficulty whatever in taking a bulk sample at the station; the one saying that he had had one taken, and the other saying that he should have done so, as promised. It seems to us that even if the plaintiff's country solicitors did take a wrong view of their client's position under the contract, as suggested by counsel for the defendant, this cannot affect its construction. And as there is nothing in the contract **D** itself, nor any evidence, to show that by usage of trade as applied to such a contract, or otherwise, the *prima facie* place for inspection had been altered, in our judgment, under the contract the place of delivery named was the place where the inspection was to be had, and that consequently Theddingworth station was the place where rejection should have taken place, and not the premises of the maltsters at Sileby. When the defendant took possession of the barley at the **E** station and ordered it to his sub-vendees, the property in the barley passed to him, and his right of rejection was then gone. For these reasons we think the plaintiff is entitled to judgment. LAWRENCE, J., does not appear to have had his mind sufficiently directed to the real nature of the contract between the parties. The appeal must be allowed with costs here and below, and judgment entered for the **F** plaintiff for £52 14s.

*Appeal allowed.*

Solicitors: *Crowders & Vizard* for J. H. Douglass, Market Harborough; *Warren, Murton & Miller* for G. & H. Lamb & Stringer, Kettering.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

# Re WALKER. SHEFFIELD BANKING CO. v. CLAYTON

[CHANCERY DIVISION (Stirling, J.), November 3, 1891, January 14, 1892]

[Reported [1892] 1 Ch. 621; 61 L.J.Ch. 234; 66 L.T. 315;  
40 W.R. 327; 8 T.L.R. 224; 36 Sol. Jo. 201]

*Guarantee—Surety—Collateral security given by principal debtor to surety—  
Right of principal creditor to security.*

A testator gave guarantees to a bank to secure the overdraft of two partners, and, to secure him against liability on these guarantees, the wife of one of the partners gave him two equitable mortgages. The partnership firm went into liquidation. The testator died, his affairs were administered by the court, and the estate was found to be insolvent. It was, accordingly, unable to make good the amount due under the guarantees, and the bank claimed to be entitled to the benefit of the equitable mortgages.

**Held:** a surety who took from the principal debtor a bond or indemnity did not become a trustee of that security for the principal creditor, and, therefore, the claim of the bank could not be maintained.

*Maure v. Harrison* (1) (1692), 1 Eq. Cas. Abr. 93, explained.

**Notes.** As to retention of counter-securities, see 18 HALSBURY'S LAWS (3rd Edn.) 463, 464; and for cases see 26 DIGEST (Repl.) 106, 107.

Cases referred to:

- (1) *Maure v. Harrison* (1692), 1 Eq. Cas. Abr. 93; 21 E.R. 904; 26 Digest (Repl.) 106, 732.
- (2) *Wright v. Morley*, *Morley v. St. Alban* (1805), 11 Ves. 12; 32 E.R. 992; 26 Digest (Repl.) 117, 814.
- (3) *Ex parte Waring* (1815), 19 Ves. 345; 34 E.R. 546; sub nom. *Re Brickwood & Co.*, *Re Bracken & Co.*, *Ex parte Waring*, *Ex parte Inglis*, 2 Rose, 182; 2 Gl. & J. 404; 3 Digest (Repl.) 338, 1088.

Also referred to in argument:

*Berwick-upon-Tweed Corpn. v. Murray* (1857), 7 De G.M. & G. 497; 26 L.J.Ch. 201; 5 W.R. 208; 44 E.R. 194; sub nom. *Berwick Corpn. v. Murray*, *Berwick Corpn. v. Dobie*, 28 L.T.O.S. 277; 3 Jur.N.S. 1, L.C.; 26 Digest (Repl.) 103, 707.

*Royal Bank of Scotland v. Commercial Bank of Scotland* (1882), 7 App. Cas. 366; 46 L.T. 360; 31 W.R. 49, H.L.; 5 Digest (Repl.) 770, 6580.

**Further Consideration** in an action for the administration of the real and personal estate of the testator Hugh Walker.

The testator in the year 1886 gave to the London and Yorkshire Bank two guarantees for the sum of £1,000 each to secure the overdraft of Arthur Spencer and Reuben Spencer trading as Spencer Brothers. At the same time Agnes Spencer, the wife of Arthur Spencer, gave to the testator as security for anything he might be called upon to pay under the guarantees, two equitable mortgages created by memoranda of deposit of title deeds. The memoranda were dated respectively July 5 and Aug. 18, 1886. Subsequently to these transactions Spencer Brothers transferred their account from the London and Yorkshire Bank to the Sheffield Banking Co. On Sept. 9, 1887, the testator gave to the Sheffield Banking Co. a guarantee to secure the repayment of all moneys then owing, or which might become owing to them by Spencer Brothers either on their current account or on any other account to the extent of £2,000. In May, 1889, Spencer Brothers went into liquidation.

The testator died on Nov. 4, 1888, leaving a will by which he appointed the defendants his executors. The will was proved by the defendants on Jan. 24, 1889. The plaintiff company then commenced a creditor's action for the adminis-

**A** tration of the testator's estate. An administration judgment was given in that action on April 25, 1890. The testator's estate was insufficient for payment of debts, including the liability of the testator under the guarantee given to the plaintiff company.

The plaintiff company now claimed to be entitled to the benefit of the equitable mortgages given to the testator by Agnes Spencer. The defendants, on the other **B** hand, contended that the plaintiffs were not so entitled, but could only rank as creditors *pari passu* with the other creditors of the estate.

*Graham Hastings, Q.C., and Curtis Price* for the plaintiff company.

*Buckley, Q.C., and Ingle Joyce* for the defendants.

*Cur. adv. vult.*

**C** Jan. 14, 1892. **STIRLING, J.**, read the following judgment of the court in which he stated the facts and continued.—The plaintiffs' contention was founded upon two cases. The first is an old case of *Maure v. Harrison* (1). It is reported very shortly as follows (1 Eq. Cas. Abr. at p. 93):

**D** "A bond creditor shall in [the Court of Chancery] have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt."

That case was decided in Michaelmas, 1692. The plaintiffs also relied upon a dictum of SIR WILLIAM GRANT in *Wright v. Morley* (2) which runs thus (11 Ves. **E** at p. 22):

"I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has fully as good an equity to the benefit of all the securities the principal gives to the creditor."

**F** As to the latter portion of the sentence, there is no question at all. It is well established at this date that the surety, on paying the debt, is entitled to stand in the place of the principal creditor, and to have the benefit of all the securities which the principal creditor had.

These two cases were very much discussed in the well-known case of *Ex parte Waring* (3), before LORD ELDON. That case is most fully reported perhaps in GLYN AND JAMESON'S REPORTS. It appears from that report that, in the course **C** of the argument, LORD ELDON spoke somewhat disparagingly of *Maure v. Harrison* (1). He said this (2 Gl. & J. at p. 411):

"I have never heard this case relied upon as a governing case at this day"

In the judgment as reported in 19 VESY, he puts it thus (19 Ves. at p. 348):

**H** "The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage...having been placed with Brickwood & Co. as a security against their acceptances, the holders of those bills have an equity to have that security applied specifically to the discharge of those acceptances upon the general ground that, upon a transaction of this kind, a person holding the bills which are the subject of indemnity has a right to the benefit of the contract between the principal debtor and the party **I** indemnified, and though not himself a party to that contract, to say that he, who has contracted for the payment of certain debts out of those pledges, is liable in equity to the demand upon the part of those whose demands are to be so paid for that application, and a case was cited [*Maure v. Harrison* (1)] which goes that length. With regard to that case, or cases in general, I desire it to be understood that I forbear to give any opinion upon that point."

Then he goes on to say that he decides not on *Ex parte Waring* (3) but on another ground.



The result of these two cases, namely, the dictum of SIR WILLIAM GRANT in *Wright v. Morley* (2) and the judgment and observations of LORD ELDON in *Ex parte Waring* (3), seems to me to be that SIR WILLIAM GRANT and LORD ELDON were not of the same mind on the point. Under these circumstances I was very anxious to discover what was really done in *Maure v. Harrison* (1), which is so shortly reported in ABRIDGEMENT OF CASES IN EQUITY. The registrar has been kind enough to make search for that case. No decree was drawn up, but the entry of the case has been found in the registrar's book, and the pleadings have been discovered, and I am indebted to the learned reporter of this court, Mr. Knox, for having made a summary of them for my use, the pleadings themselves being somewhat lengthy. From them and the notes in the registrar's book it is tolerably easy to discover what the case was.

The plaintiff was Thomas Maure, the defendants were William Harrison and William Morley and Mary his wife. Thomas Maure was the father of the first wife of William Harrison, the father of William Harrison the defendant. By that first marriage William Harrison the father had three children, viz., William, the defendant, Thomas, and Margaret. The first wife having died, William Harrison, the father, married his second wife Mary, the defendant, then the wife of William Maure, and afterwards he died intestate leaving this widow and three children by the first wife the persons entitled to his personal estate under the Statute of Distribution. Administration was taken out by his widow, and the shares of the three children in the intestate's property amounted to £120. It appears that the plaintiff, Thomas Maure, the grandfather of William Harrison the defendant, was very anxious that William Harrison, his grandson, should continue the business of a farmer which had been carried on by William Harrison the father, but for that purpose it was necessary that the sum of £120 which formed the portion of the intestate's estate belonging to the three children should be paid over to William Harrison the son, and that was accordingly done.

The two other children being infants, Thomas Maure the father and the plaintiff in the action gave a bond to the defendant Mary Morley, the legal personal representative of the intestate, to indemnify her against all claims by those children. It appears that at this time William Harrison, the defendant, was an infant, but the money was paid to him. He attained twenty-one, and carried on the farm for some time. After attaining twenty-one he repudiated the transaction and began to press William Morley and Mary his wife for payment of his share of his father's estate, which he had already received in point of fact, though apparently an infant. Thereupon William Morley gave him a bond for payment of his share, and William Morley and Mary his wife began to sue the plaintiff Thomas Maure in the Court of Exchequer for payment under the bond which had been given by him. Thereupon the plaintiff instituted this suit in equity to restrain the action, and to obtain delivery up of the bond which had been given by him. Of the other children who were interested in the intestate's estate, Thomas had died an infant and intestate, and Margaret was still an infant, and was not a party to the suit. The argument is stated in the registrar's book. It is to be observed that the bill is by the person who gave the bond to be relieved of it, and the result is thus stated in the registrar's book:

"By the court; Do declare that the defendant William is well paid, and he must deliver up the bond to the other defendant."

That is the bond (as I read it) which has been given by William Morley to the defendant William Harrison for payment of his share. Whether that relief ought to have been inserted in the decree may be a question, because that would be relief between co-defendants. Then it goes on,

"stay all proceedings at law on the plaintiffs' £100 [that is a mistake for £120 as clearly appears from the previous passage in the registrar's note, where it is corrected in the margin] till Margaret doth release, and when the plaintiff

A hath procured Margaret, who is not a party to the action, to release that bond, then that bond to be delivered up . . . but then the plaintiff's bond to be at suit for the recovery of Margaret's moiety of £120."

So that all that was decided in that action was that the plaintiff, who had given his bond of indemnity, was not entitled to have it delivered up to be cancelled till all claims had been settled.

B Under these circumstances it appears that the point for which it was cited in ABRIDGEMENT OF CASES IN EQUITY could not have been decided in that case, and that at most the reported statement amounts to a dictum in the course of the argument. It is now nearly two hundred years since this case was decided, and the sole authorities on a point which must have been of frequent occurrence are a dictum in 1692, a dictum early in this century by SIR WILLIAM GRANT in the year 1805, and what appears to me to be the contrary opinion of LORD ELDON a little later.

C Under those circumstances it seems to me that there is no authority for the proposition in question. Upon principle I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor. That is really the contention of the plaintiffs. Of course the other doctrine is well established, viz., that the surety who pays the debt is entitled to stand in the place of the principal creditor; but this doctrine rests entirely on those dicta which I have mentioned. It seems to me that under these circumstances I cannot give effect to the contention of the plaintiffs, and that they must simply be left to prove against the estate of the testator for what is due, without having the exclusive benefit of these securities in respect of which payments have been made to the estate.

Solicitors: *Pilgrim & Phillips; Few & Co.* for *John James*, Wirksworth.

[Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.]

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G

## LAW v. REDDITCH LOCAL BOARD

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), November 26, 1891]

[Reported [1892] 1 Q.B. 127; 61 L.J.Q.B. 172; 66 L.T. 76; 56 J.P. 292; 8 T.L.R. 90; 36 Sol. Jo. 90]

H

*Contract—Breach—Damages—Liquidated damages or penalty—Agreed sum "as and for liquidated damages" payable on happening of one event.*

When the parties to a contract have agreed that, in the case of one of them doing something or omitting to do something, he shall pay to the other a specified sum as damages, that specified sum is to be construed by the court to be liquidated damages and not a penalty.

I

By a contract for the building of some drainage works it was agreed that the works should "be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30." It was also agreed that in default of such completion the contractor should forfeit and pay the sum of £100, and £5 for every seven days during which the works should be incomplete after that date, and the sum so forfeited should be recovered by the defendants from the contractor "as and for liquidated damages."

**Held:** the agreed sum was payable on the happening of only one event, namely, the non-completion of the works by the specified date, and ought to be treated as liquidated damages and not as a penalty. A

Per LORD ESHER, M.R.: To the general rule one recognised exception is that if a large sum of money is to be paid in respect of the non-payment of a smaller specified sum, the court will treat it as a penalty. Another exception is that if the sum agreed to be paid is, with regard to the matter in reference to which it is to be paid, so large as to be an absurd amount if considered as liquidated damages, the court would declare that the sum to be paid was a penalty. There are also cases in which the parties to the contract have agreed to the payment by one of them of a certain fixed sum in respect of his failing to do one of several different things of varying degrees of importance. Such a sum is, as a general rule, to be treated in these cases as a penalty. B

Per LOPES, L.J.: The distinction between liquidated damages and a penalty depends on the intention of the parties, which is to be gathered from the whole contract. If their intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if their intention is to assess the damages for breach of the contract, it is liquidated damages. C

**Notes.** For the difference between liquidated damages and a penalty, see also *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1914-15] All E.R.Rep. 739. D

Applied: *Ward v. Monaghan* (1895), 39 Sol. Jo. 670. Considered: *Re White and Arthur* (1901), 84 L.T. 594. Referred to: *Stegmann v. O'Connor* (1899), 80 L.T. 234; *Alder v. Moore*, [1961] 1 All E.R. 1. E

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298 et seq.; and for cases see 17 DIGEST (Repl.) 148 et seq.

Cases referred to:

- (1) *Astley v. Weldon* (1801), 2 Bos. & P. 346; 126 E.R. 1318; 17 Digest (Repl.) 150, 495. F
- (2) *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; 35 W.R. 17, H.L.; 17 Digest (Repl.) 158, 555.
- (3) *Wallis v. Smith* (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 31 W.R. 214, C.A.; 17 Digest (Repl.) 280, 862.
- (4) *Peachy v. Duke of Somerset* (1721), 1 Stra. 447; Prec. Ch. 568; 93 E.R. 626, L.C.; 20 Digest (Repl.) 547, 2549. G
- (5) *Sloman v. Walter* (1788), 1 Bro.C.C. 418; 28 E.R. 1213, L.C.; 20 Digest (Repl.) 547, 2557.
- (6) *Kemble v. Farren* (1829), 6 Bing. 141; 3 Moo. & P. 425; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; 17 Digest (Repl.) 157, 546.

Also referred to in argument:

*Gainsford v. Griffith* (1667), 2 Keb. 76, 201, 213; 1 Saund. 51, 58; 84 E.R. 49, 125, 193; sub nom. *Gamsford v. Griffith*, 1 Sid. 328; 17 Digest (Repl.) 269, 729. H

*Re Newman, Ex parte Capper* (1876), 4 Ch.D. 724; 46 L.J.Bey. 57; 35 L.T. 718; 25 W.R. 244; 17 Digest (Repl.) 154, 519.

**Appeal** from a decision of HAWKINS, J., at the trial without a jury at Birmingham Assizes. I

The plaintiff was a building contractor, and the action was brought by him for work done for the defendants under a contract for the building of some drainage works. The defendants paid £400 into court and counterclaimed for money due from the plaintiff to them under a clause in the contract for default in completion of the works by a certain day. By the contract it was agreed that for the consideration therein mentioned the plaintiff would duly execute all the works and



**A** things mentioned in the contract, and a specification annexed, thereafter called "the works," and it was provided that

"the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889, to the satisfaction of the said surveyor, to be testified by a certificate under his hand; and in default of such completion, the contractor shall forfeit and pay to the urban authority the sum of £100, and £5 for every seven days during which the works shall be incomplete after the said time, and the sums so forfeited may be recovered by the urban authority from the contractor as and for liquidated damages."

**C** There was also a clause providing that, in default of the due performance and execution of the terms of the contract by the contractor, he should pay to the urban authority the sum of £200 as and for liquidated damages for the breach of the contract, in addition to any other penalties, forfeitures, and damages to which he might be liable under the contract. The works were not completed for twelve weeks after April 30, 1889, and the defendants counterclaimed for £160, being the £100 and the weekly payment of £5 provided for by the contract in such a case.

**D** It was admitted that the damage suffered by the defendants by reason of this delay of twelve weeks was considerably less in fact than £160, and it was agreed what the damage was. The only question, therefore, for the court to determine was whether the sum of money fixed by the contract for the non-completion was to be treated as liquidated damages according to the proviso in the contract or as a penalty. *HAWKINS, J.*, ruled that this sum ought to be treated as liquidated damages, and gave judgment accordingly for the defendants. The plaintiff

**E** appealed.

*Jelf, Q.C.*, and *Vachell* for the plaintiff.

*Hugo Young* and *R. Harrington*, for the defendants, were not called upon to argue.

**F** **LORD ESHER, M.R.**—It seems to me unnecessary in this case to go again through all the cases that have been decided on this subject, and their various circumstances. There is one rule which all judges have always agreed about, and which is, therefore, a canon of construction in interpreting these agreements, and that rule is this: When the parties to a contract have agreed that, in case of one of them doing something or omitting to do something, he shall pay to the other a specified sum as damages, then in such a case that specified sum is to be construed by the court to be liquidated damages, and not a penalty. To that general rule one recognised exception is, that if a large sum of money is to be paid in respect of the non-payment of a smaller specified sum, the court will treat it as a penalty, and not as liquidated damages. I think, too, that there is another exception, namely, that if the sum agreed to be paid is, with regard to the matter

**G** in reference to which it is to be paid, so large as to be an absurd amount if considered as liquidated damages, then the court would hold that the parties to the contract could not have intended such an absurdity, and it would declare that the sum to be paid was a penalty, and not liquidated damages. There are also cases in which the parties to the contract have agreed to the payment by one of them of a certain fixed sum of money in respect of his failing to do one of several

**H** different things of different degrees of importance. Such a sum is, as a general rule, to be treated in these cases as a penalty, and not as liquidated damages; but as to that there are many matters which may have to be considered hereafter, which I think we need not trouble ourselves about today.

**I** If the sums of £100 and £5 a week are payable under this contract which we now have to consider in respect of the non-performance of only one thing, if there is only one event in respect of which they are payable, then the case comes within the rule which has been followed in all the cases from the time of *HEATH, J.*, in *Astley v. Weldon* (1) down to *LORD HERSCHELL* in *Lord Elphinstone v. Monkland*

*Iron and Coal Co.* (2), and that sum is to be treated not as a penalty, but as liquidated damages. This contract we have now to consider is to be construed according to that canon of construction. Therefore, if there is under it only one event in respect of which these sums of £100 and £5 a week are to be paid, they are to be regarded, as liquidated damages and not as penalties. A

The contract is one for the construction of some drainage works, and it provides that B

“the works [meaning the drainage works] shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish on or before April 30, 1889.”

That is to say, two things, viz., the completion of the works and the clearance of them, shall take place by that day. Then the sentence goes on, C

“and in default of such completion the contractor shall forfeit and pay to the urban authority the sum of £100 and £5 for every seven days during which the works shall be incomplete after the said time.”

The default for which the money is payable is default in completion only, and in such completion as was mentioned before, that is to say, completion of the works which in the earlier part of the sentence is referred to as something distinct from the clearance of them. It seems to me, therefore, that there is only one event upon which the contractor's liability to pay the £100 and the £5 a week depends, namely, the non-completion of the works by April 30, 1889. Then the sentence goes on, D

“and the sums so forfeited may be recovered by the urban authority from the contractor as and for liquidated damages.” E

I do not think that any reliance, or rather I should say, very little, ought to be placed on these last words, for even if the sums were called penalties the same considerations might be applicable; but they must not be left out of consideration altogether. They go somewhat to show that the parties intended that these sums should be liquidated damages and not penalties. If that be the true construction of the contract, then there is no multitudinous event comprised in the word completion, and the clearance of the works is not a thing in respect of default in which the agreed sums would become payable. F

It was suggested that the specification modifies the meaning of the words in the contract; but there again it is only the completion of the works that is mentioned, and the meaning of the words in the contract is not affected. I have said that, to my mind, the word “completion” in the contract applies only to the completion of the works, and not to their clearance, but if that be not so, the same result follows. Both completion and clearance are to have taken place by April 30, so that, if “completion” includes the two, the non-completion on April 30 in respect of which the sums become payable would be only one event. So that, applying the same canon of construction to that view of the contract, the money being payable on the non-happening of a single event on a particular day, we must come to the conclusion that this sum is liquidated damages, and not a penalty. Whatever questions may some day arise on the judgment of *SIR GEORGE JESSEL, M.R.*, in *Wallis v. Smith* (3), no question on that case arises here now. The judgment of *HAWKINS, J.*, must be affirmed, and this appeal will be dismissed. G  
H  
I

**LOPES, L.J.**—The question is whether the sums of £100 and £5 a week are a penalty or liquidated damages. In the contract they are called liquidated damages; but this cannot be relied on much because the use of this expression or of “penalties” by the parties to the contract is not conclusive. The distinction between the two depends on the intention of the parties, which is to be gathered from the whole contract. If their intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if on the

**A** other hand their intention is to assess the damages for breach of the contract, it is liquidated damages. The Master of the Rolls has already referred to a canon of construction, according to which, if the specified sum is to be payable on the happening or non-happening of one event, not many, it is considered to be liquidated damages; but, if it is payable on the happening or non-happening of one of several events of unequal importance, then it is considered to be a penalty.

**B** Applying that rule to the present case, we must first construe the contract. It provides that,

“the works shall be completed in all respects and cleared of all implements, tackle, impediments, and rubbish on or before April 30, 1889.”

**C** Two things are here contemplated, the completion of the works and the clearing away of the rubbish, etc.; those are two separate things which have to be done. Then, “in default of such completion,” a sum of money becomes payable. That default refers, I think, only to the completion of the works which is mentioned at the beginning of the clause, and not to the clearance of them. According to this construction of the contract only one event is contemplated as being ground for the payment of the agreed sums, namely, the non-completion of the works on the day specified. Then, according to the canon of construction that has been referred to those sums are liquidated damages and not a penalty. Besides the

**D** clause I have read there is another clause in the contract which was referred to by counsel for the plaintiff, under which some money might be claimed as a penalty for failure to clear the works; but that clause does not affect the construction of the one which we have to construe, and it need not be considered any further.

**E** I will just refer shortly to the Scottish case in the House of Lords of *Lord Elphinstone v. Monkland Iron and Coal Co.* (2). The head-note to the case contains this (11 App. Cas. at p. 332):

“When one lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification.”

**F** And LORD HERSCHELL, L.C., in giving his opinion said (*ibid.* at p. 345):

“The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to show that the compensation is ordinate or extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle, or even convenience, for so holding.”

**H** This opinion is an authority which confirms the view we are taking on the construction of this contract.

**KAY, L.J.**—This contract contains the following words: [His LORDSHIP read the relevant clause of the contract and continued:] What is the meaning of those words? In very early times it was decided by courts of equity that, when a sum of money was agreed to be paid for a breach of a contract, the court would not allow this penalty to be exacted, but would assess the damages which had been actually caused by the breach that had occurred. The law began thus: LORD MACCLESFIELD in his judgment in *Peachy v. The Duke of Somerset* (4), in 1721, said (1 Stra. at p. 653) that

“the true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money and the court gives him all that he expected or desired.”



This doctrine was afterwards extended to other cases than the security of money. In 1784 LORD THURLOW, in *Sloman v. Walter* (5), said (1 Bro.C.C. at pp. 418, 419):

"The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken."

In that case the agreed sum was to secure the possession of a certain room, and LORD THURLOW regarding it as a penalty granted an injunction against a suit for its recovery. This rule was followed again and again, and it became settled law in equity that, when a sum of money was agreed to be paid upon the performance or non-performance of some collateral act in a contract, the actual damages arising from which could easily be estimated, the penalty would be cut down, and the actual damage suffered would be assessed. To avoid that law a custom grew up of inserting in contracts a clause settling what should be damages for the breach, and the amount agreed to be paid was to be paid "as and for liquidated damages." That was done to avoid the interference of courts of equity. But then the courts of law interfered and said that they would construe the sum that was agreed to be liquidated damages as a penalty.

A leading case on the subject is *Astley v. Weldon* (1) in which HEATH, J., said (2 Bos. & P. at p. 353):

"Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages."

And again, in *Kemble v. Farren* (6) the court seeing that the sum agreed to be payable as liquidated damages was to be paid on the performance or non-performance of several things which would have resulted in very different degrees of damage, treated this sum as only a penalty. The case, said TINDAL, C.J. (6 Bing. at p. 148), was

"precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

All the cases on this subject are very fully discussed by SIR GEORGE JESSEL, M.R., in *Wallis v. Smith* (3). It was no doubt a very serious interference with the terms of a contract to say that, though the parties to it had expressly stipulated that a sum was to be paid as liquidated damages, the court would refuse to allow it and would treat the sum as a penalty. It has never been done except in cases like *Kemble v. Farren* (6), where the sum of money has been made payable on the happening of any one of a number of events some of which must result in very inconsiderable damages.

In considering the case before us, we must construe the contract and see whether this agreed sum is made payable on the happening of only one event, or on the happening of one out of several events. As to that I agree with the judgment of HAWKINS, J., and with all that the Master of the Rolls has said. There is only one event, the non-completion of the works, upon the happening of which this money became payable; the failure to clear away the implements and rubbish is not a part of that event, the clearance is something which has to be done in addition to the completion, but the agreed sum is not payable upon its non-performance. But if the contract be read so as to make "completion" include the clearing away of the implements and rubbish, even then there will be only one event, non-completion by April 30, upon which the money is payable. I cannot agree with the argument that, because there are many matters, some very

A small, which would constitute non-completion, the agreed sums may be considered as becoming payable on the happening of several events. The causes may be many, but the actual non-completion by April 30, 1889, is a single event. I also agree that there is nothing in the specification which affects the construction of the clause in the contract which we have been considering. For these reasons I agree that the judgment of HAWKINS, J., was right, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Prior, Church & Adams* for Roden & Dawes, Kidderminster; *Fallows & Rider* for Harold C. Browning, Redditch.

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

## WATTEAU v. FENWICK

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Wills, J.), November 19, December 12, 1892]

[Reported [1893] 1 Q.B. 346; 67 L.T. 831; 56 J.P. 839; 41 W.R. 222; 9 T.L.R. 133; 37 Sol. Jo. 117; 5 R. 143]

*Agent—Principal—Undisclosed principal—Secret limitation of authority—Agent acting within scope of authority usually confided to such agents—Liability of principal.*

H., the owner of a public-house, sold it to the defendants, who retained him as their manager at a salary, his name being over the door and the licence continuing in his name. The plaintiff sold cigars to H. to be sold in the public-house in ignorance of the fact that he had been expressly forbidden by the defendants to purchase cigars on credit. Being unable to obtain payment from H., to whom alone he had given credit, the plaintiff, finding that H. was manager to the defendants, sued them.

**Held:** as the cigars were such as would usually be dealt in at such a house as the defendants', H. was acting within the scope of his implied authority as manager in ordering them, and the defendants could not as against the plaintiff set up any secret limitation of that authority.

**Notes.** Distinguished: *Johnston v. Reading* (1893), 9 T.L.R. 200. Applied: *Kinahan v. Parry*, [1910] 2 K.B. 389. Doubted and Distinguished: *Lloyds Bank v. Swiss Bankverein*, *Union of London and Smiths Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280. Distinguished: *Jerome v. Bentley & Co.*, [1952] 2 All E.R. 114.

As to relations between principal and third persons, see 1 HALSBURY'S LAWS (3rd Edn.) 208 et seq.; and for cases see 1 DIGEST (Repl.) 357 et seq.

I Case referred to:

(1) *Edmunds (Edmonds) v. Bushell and Jones* (1865), L.R. 1 Q.B. 97; 4 F. & F. 1044; 35 L.J.Q.B. 20; 30 J.P. 694; 12 Jur.N.S. 332; 1 Digest (Repl.) 364, 372.

Also referred to in argument:

*Yorkshire Banking Co. v. Beatson* (1879), 4 C.P.D. 204; 48 L.J.C.P. 428; 40 L.T. 654; on appeal (1880), 5 C.P.D. 109; 49 L.J.Q.B. 380; 42 L.T. 455; 28 W.R. 879, C.A.; 6 Digest (Repl.) 54, 479.

*Ramazzotti (Ramosotti) v. Bowring* (1859), 7 C.B.N.S. 851; 29 L.J.C.P. 30; 6 Jur.N.S. 172; 8 W.R. 114; 141 E.R. 1050; 1 Digest (Repl.) 431, 875.  
*Summers v. Solomon* (1857), 7 E. & B. 879; 26 L.J.Q.B. 301; 3 Jur.N.S. 962; 5 W.R. 660; 119 E.R. 1474; 1 Digest (Repl.) 404, 636.

**Appeal** from Middlesbrough County Court in an action brought to recover the price of certain cigars supplied by the plaintiff to the Victoria Hotel, Stockton-on-Tees.

The Victoria Hotel had been kept up to 1888 by one Humble, who in that year disposed of it to the defendants, but remained in the house as their manager at a salary. Humble's name remained over the door, and the licence continued to be held in his name. He was forbidden by the defendants to buy cigars on credit, but bought a quantity from the plaintiff, who gave credit to him alone for them, not knowing of the defendants. On finding out, however, that he was manager for the defendants, the plaintiff sued them, and the county court judge gave judgment in his favour. The defendants appealed.

*Finlay, Q.C.* (with him *Scott Fox*) for the defendants.

*Boydell Houghton* for the plaintiff.

*Cur. adv. vult.*

Dec. 12, 1892.—**LORD COLERIDGE, C.J.**, read the following judgment of **WILLS, J.**, as the judgment of the court.—The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept not by the defendants, but by a person named Humble. This person's name was over the door of the house. The plaintiff gave credit to him and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think the Lord Chief Justice during the argument laid down the correct principle, namely, once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so; otherwise in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail, and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal. But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant partner and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, in such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice and acted upon by the learned county court judge appears to be identical with that enunciated in the judgments of **COCKBURN, C.J.**, and **MELLOR, J.**, in *Edmunds v. Bushell and Jones* (1), the circumstances of which case, though not identical with those of the present case, come very near to them. There was no question of holding out, as the plaintiff knew nothing of the defendants. I appreciate the distinction drawn by counsel for the defendants in his argument, but the principle laid down by the judgment referred to, if correct, abundantly covers the present case. I cannot find that



A any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would result if the principle were not upheld. In my opinion, the appeal ought to be dismissed with costs.

Solicitors: *Belfrage & Co.* for *Bainbridge & Barnley*, Middlesbrough; *Johnson, Weatherall & Sturt* for *Marshall*, Sunderland.

B [Reported by G. H. GRANT, ESQ., Barrister-at-Law.]

C

## Re CHILD. Ex parte CHILD

D [QUEEN'S BENCH DIVISION (Vaughan Williams and Henn Collins, JJ.), February 10, 1892]

[Reported [1892] 2 Q.B. 77; 61 L.J.Q.B. 250; 66 L.T. 204;  
40 W.R. 560; 8 T.L.R. 319; 9 Morr. 103]

*Bankruptcy—Act of bankruptcy—Non-compliance with bankruptcy notice—For what amount to be issued—Part payment of judgment debt—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 4.*

E By s. 4 (1) of the Bankruptcy Act, 1883 [see now Bankruptcy Act, 1914, s. 1 (1) (g)], a debtor commits an act of bankruptcy: "(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it . . . and he does not . . . either comply with the requirements of the notice, or satisfy the court that he has a counterclaim set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

G A creditor who has obtained a final judgment against a debtor is not entitled to issue a bankruptcy notice for any larger amount than that for which he is entitled to issue execution. Therefore, a creditor who has been paid part of his judgment debt cannot issue a bankruptcy notice for the whole debt, but only for the balance remaining due after deducting any payments that have been made.

II **Notes.** Approved: *Re Raymond, Ex parte Raymond* (1892), 66 L.T. 400. Followed: *Re Miller, Ex parte Furniture and Fine Arts Depositories*, [1912] 2 K.B. 451. Referred: *Re Renison, Ex parte Greaves*, [1913] 2 K.B. 300.

As to non-compliance with a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 272; and for cases see 4 DIGEST (Repl.) 90 et seq. For s. 1 (1) (g) of the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 324.

I Cases referred to:

(1) *Re Bates, Ex parte Lindsey* (1887), 57 L.T. 417; 35 W.R. 668; 4 Morr. 192. D.C.; 4 Digest (Repl.) 91, 816.

(2) *Re Ide, Ex parte Ide* (1886), 17 Q.B.D. 755; 55 L.J.Q.B. 484; 35 W.R. 20; 2 T.L.R. 884; 3 Morr. 239; 4 Digest (Repl.) 93, 841.

Also referred to in argument:

*Re Tupper* (1874), 9 Ch. App. 312; 30 L.T. 102; 22 W.R. 381, L.J.J.; 4 Digest (Repl.) 92, 827.

*Re Sedgwick, Ex parte McMurdo* (1888), 60 L.T. 9; 37 W.R. 72; 5 T.L.R. 4; sub nom. *Re Sedgwick, Ex parte Sedgwick*, 5 Morr. 262, C.A.; 4 Digest (Repl.) 110, 981. A

**Appeal** by the debtor from the refusal of the registrar of the Wandsworth County Court to set aside a bankruptcy notice.

The debtor was agent for the Queen Insurance Co., and in December, 1888, was dismissed from their employment. On Dec. 20 the insurance company obtained judgment against the debtor for the sum of £154 17s. An arrangement was then made between the manager of the insurance company and Child, the debtor, by which Child assigned to the company certain book-debts and the lease of a house, and under the same arrangement it was agreed that Child should be credited in the books of the company as against the judgment debt with the sum of £118, being the amount due to him on renewals of policies of insurance effected with the company through his agency. Nothing further was done until November, 1891, when on Nov. 13 a bankruptcy notice was served on the debtor by the company requiring him to pay to the Queen's Insurance Co. the sum of £154 17s., as being the balance due on a final judgment obtained against him. The same day the debtor wrote denying any indebtedness, and pointing out that there was a balance due to him under the above arrangement. On Nov. 26 the debtor filed an affidavit claiming this set-off, and on Dec. 7 he appeared before the registrar in person and applied to have the bankruptcy notice set aside. The registrar ordered him to file before Dec. 11 a further affidavit setting out the particulars of his set-off, and adjourned the hearing until Dec. 14. The affidavit was not filed by Dec. 11, but an affidavit was subsequently filed. At the hearing, objection having been taken that the affidavit had not been filed in time, the registrar refused to read it, and also refused to set aside the bankruptcy notice, and from his decision this appeal was brought. B  
C  
D  
E

*Carrington* for the debtor.

*Herbert Reed* and *F. Mellor* for the company.

**VAUGHAN WILLIAMS, J.**—This case must go back to the county court. The case put forward on behalf of the debtor was, that he had paid the amount of the debt; he suggested that it may turn out that he has paid the whole, but whether or not this is so, at all events he has paid part, and, therefore, it is wrong that the summons should issue claiming £154 17s. as due. F

I wish to say one word as to the effect of s. 4 (1) (g). In the first place, the words of sub-s. (1) (g) are: [His LORDSHIP read sub-s. (1) (g), and continued:] I do not think myself that that section entitles a creditor who has obtained a final judgment to issue a bankruptcy notice for any larger amount than that for which he could lawfully issue execution, and in my judgment, if the circumstances of the case are such that the execution creditor has ceased to be entitled to issue execution for the whole of the debt, then he has ceased to be entitled to issue a bankruptcy notice for the whole amount. The section provides that, when a bankruptcy notice has been issued, and, as I understand it, rightly issued, so far as the requirements of the section are concerned, a debtor has two courses open to him: (i) to "comply with the requirements of the notice" and (ii), G  
H

"or satisfy the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained." I

In my opinion the occasion for a judgment debtor taking one or other of these two courses does not arise until a bankruptcy notice has been rightly issued. I think that, when once you have got a bankruptcy notice rightly issued, it is no avail that you have nearly complied with it by paying, say, £199 out of £200, or that you have merely a statutory answer of set-off or counterclaim, which to the extent of £199 goes far to equal the judgment debt, but does not go far enough by reason of the £1 deficit. I think that the distinction suggested between payment and

A set-off was well founded; if a creditor has accepted payment, the debtor has no set-off or counterclaim in respect of the amount he has so paid, and he could not sue the creditor for it.

Under these circumstances therefore it seems to me that a debtor who has paid money could have it put as an answer to the case he makes against the bankruptcy notice that his payment of less than the judgment debt was only a set-off of a less amount and was clearly excluded by the latter part of the section. It might have been the intention of the legislature that in all cases the bankruptcy notice should simply state the amount of the original judgment debt, and should take no notice of subsequent payments, but, according to my view, the cases show the contrary. The fact that MATHEW, J., in *Re Bates, Ex parte Lindsey* (1), thought it necessary that the bankruptcy notice should be amended by altering the amount shows that the proper practice is to give credit in the notice for the amounts paid. I do not forget that MATHEW, J.'s course might have been justified by saying that there was what was equivalent to a stay of execution to the extent of £20; but I think the proper way to look at the judgment is to suppose the learned judge thought that the bankruptcy notice could only be issued for the amount for which execution could have been issued, i.e., for the balance due.

D Where there has been a payment of the judgment debt and acceptance and a fi. fa. is issued for the whole amount the debtor is not obliged to wait until execution is put in, but he can at once say that the execution is wrong.

Taking this view, I need not consider the true effect of the words "execution thereon not having been stayed," or consider whether the judgment creditor has prevented the debtor from paying. It would amount almost to an absurdity to say that the Act of Parliament could require the debtor to pay the whole amount of the debt although a portion of it had been satisfied by payment having been accepted. When I look at the form of the bankruptcy notice and the notice endorsed on the back of the form, I find that both show that the judgment creditor is to deal with the amount due on the judgment debt. This case must go back to the registrar to ascertain whether the whole of this judgment debt has been paid, and if not, what part, if any, of it has been paid.

**HENN COLLINS, J.**—Counsel for the company said that, assuming all the facts to be correct, they did not answer or displace the right to issue the notice. I was a good deal pressed by s. 4 (1) (g), which seems to contemplate a right existing in a creditor to issue a bankruptcy notice, while he may at the same time be bound to admit that there is a right against him for some amount short of the debt. Counsel for the debtor removed the main difficulty, as he pointed out that, where payment of any part of a judgment debt would defeat a creditor's right to issue execution, then the notice cannot issue; but that a cross-claim or set-off would not necessarily be a ground for staying execution. This brings the case within LORD ESHER, M.R.'s comment in *Re Ide, Ex parte Ide* (2) where he says (17 Q.B.D. at p. 759):

"The words [of sub-s. (1) (g), seem to me necessarily to imply that the judgment must be one upon which execution could go immediately unless it was stayed."

I Before, then, the question whether or not execution has been stayed is considered we must look and see if the creditor could have insisted upon issuing execution at all, and if so he is entitled to issue execution though there is a cross-claim for the debt even if there is only £1 wanting, for there is nothing to prevent him in that case from proceeding under the Act. On the other hand, if he is not in a position to issue execution as to one portion of the original debt, he is only entitled to issue execution for a balance, and as the debtor here claims a balance in his favour, it may be more than what the creditor is entitled to issue execution for, and so it may be that his bankruptcy notice ought to be dismissed. It is these



facts that the learned registrar has refused to look into it. The case must go back A  
in order that the registrar may find out what amount has been paid.

*Appeal allowed.*

Solicitors: *Child & Co.; Robbins, Cameron, Kemm & Pothecarry.*

[*Reported by W. B. YATES, Esq., Barrister-at-Law.*] B

## Re BINSTEAD. Ex parte DALE

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), October 28,  
December 3, 1892]

Reported [1893] 1 Q.B. 199; 62 L.J.Q.B. 207; 68 L.T. 31;  
41 W.R. 452; 9 T.L.R. 114; 37 Sol. Jo. 117; 9 Morr. 319;  
4 R. 146] D

*Bankruptcy—Act of bankruptcy—Non-compliance with bankruptcy notice—  
Final judgment—Order in divorce suit against co-respondent for payment  
of petitioner's costs—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 4  
(1) (g).* E

By s. 4 (1) of the Bankruptcy Act, 1883 [see now Bankruptcy Act, 1914,  
s. 1 (1) (g)]: "A debtor commits an act of bankruptcy in each of the following  
cases . . . (g) If a creditor has obtained a final judgment against him for any  
amount, and execution thereon not having been stayed, has served on him  
. . . a bankruptcy notice under this Act, requiring him to pay the judgment  
debt in accordance with the terms of the judgment, or to secure or compound  
for it to the satisfaction of the creditor or the court, and he does not . . .  
either comply with the requirements of the notice, or satisfy the court that he  
has a counterclaim set-off or cross-demand which equals or exceeds the  
amount of the judgment debt, and which he could not set up in the action  
in which the judgment was obtained. . . ." I'

An order made in a divorce suit by which a co-respondent is ordered to pay  
the petitioner's costs is not a "final judgment" within s. 4 (1) (g) of the  
Act of 1883, and a bankruptcy notice cannot be served under that section in  
respect thereof. G

**Notes.** For the Bankruptcy Act, 1914, s. 1 (1) (g), see 2 HALSBURY'S STATUTES  
(2nd Edn.) 325. For the form of bankruptcy notice No. 6, see now the Bank-  
ruptcy Rules, 1952, Appendix 1. For ss. 27, 28, 31 and 33 of the Matrimonial H  
Causes Act, 1857, see now ss. 1, 5, 31 and 30 of the Matrimonial Causes Act, 1950  
(29 HALSBURY'S STATUTES (2nd Edn.) 388 et seq.). For s. 34 of the 1857 Act, see  
now s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925 (18  
HALSBURY'S STATUTES (2nd Edn.) 486).

Considered: *Re Owen, Ex parte Peters* (1900), 70 L.J.Q.B. 92. Applied: *Re  
Debtor*, [1929] All E.R.Rep. 401. Referred to: *Re Bankruptcy Notice, Ex parte  
Official Receiver*, [1895] 1 Q.B. 609; *Ivimey v. Ivimey*, [1908] 2 K.B. 260; *Re  
Hallman, Ex parte Ellis*, [1909] 2 K.B. 430; *Morse v. Muir*, [1939] 2 All E.R. 106. I

As to non-compliance with bankruptcy notice, see 2 HALSBURY'S LAWS (3rd  
Edn.) 272 et seq.; and for cases see 4 DIGEST (Repl.) 90 et seq.

Cases referred to:

(1) *Re Chinery, Ex parte Chinery* (1884), 12 Q.B.D. 342; 53 L.J.Ch. 662; 50  
L.T. 342; 32 W.R. 469; 1 Morr. 31, C.A.; 4 Digest (Repl.) 95, 852.

- A (2) *Re Faithfull, Ex parte Moore* (1885), 14 Q.B.D. 627; 54 L.J.Q.B. 190; 52 L.T. 376; 33 W.R. 438; 1 T.L.R. 263; 2 Morr. 52, C.A.; 4 Digest (Repl.) 95, 853.
- (3) *Re Alexander, Ex parte Alexander*, [1892] 1 Q.B. 216; 61 L.J.Q.B. 377; 66 L.T. 133; 40 W.R. 202; 8 T.L.R. 99; 9 Morr. 13, C.A.; 4 Digest (Repl.) 96, 868.
- B (4) *Re Riddell, Ex parte Earl of Strathmore* (1888), 20 Q.B.D. 512; 57 L.J.Q.B. 529; 58 L.T. 838; 36 W.R. 532; 4 T.L.R. 329; 5 Morr. 59, C.A.; 4 Digest (Repl.) 96, 866.

Also referred to in argument:

- C *Re Sanders, Ex parte Whinney* (1884), 13 Q.B.D. 476; 1 Morr. 185, D.C.; 4 Digest (Repl.) 95, 855.
- Salaman v. Warner*, [1891] 1 Q.B. 734; 60 L.J.Q.B. 624; 39 W.R. 547, C.A.; 30 Digest (Repl.) 160, 143.
- Re Fawsitt, Galland v. Burton* (1885), 30 Ch.D. 231; 55 L.J.Ch. 568; 53 L.T. 271; 34 W.R. 26, C.A.; 1 Digest (Repl.) 4, 13.
- Re Cohen, Ex parte Schmitz* (1884), 12 Q.B.D. 509; 53 L.J.Ch. 1168; 50 L.T. 747; 32 W.R. 812; 1 Morr. 55, C.A.; 4 Digest (Repl.) 96, 864.
- D *Re Henderson, Ex parte Henderson* (1888), 20 Q.B.D. 509; 57 L.J.Q.B. 258; 58 L.T. 835; 36 W.R. 567; 4 T.L.R. 283; 5 Morr. 52, C.A.; 4 Digest (Repl.) 95, 853.
- Re Crump, Ex parte Crump* (1891), 64 L.T. 799; 7 T.L.R. 556; 8 Morr. 174, D.C.; 4 Digest (Repl.) 97, 873.

E **Appeal** from an order of Mr. Registrar HOPE dismissing a bankruptcy petition.

The alleged debtor had been co-respondent in a suit in the Probate Division in which a husband, the alleged creditor in the bankruptcy petition, asked for a decree of divorce from his wife on the ground of his wife's adultery with the co-respondent. A decree nisi was granted on the ground of adultery between the co-respondent and the wife, and the co-respondent was condemned in the costs incurred and to be incurred on behalf of the petitioner in the cause. Afterwards the decree was made absolute, and an order was made in the suit that the co-respondent should, within seven days from the service of the order, pay to the petitioner or his solicitors the sum of £204 19s. 8d., being the amount of the petitioner's costs as taxed and certified by one of the registrars of the Probate Division. The costs not being paid in obedience to the order, the petitioner served on the co-respondent a bankruptcy order which was drawn up in accordance with the form No. 6, given in appendix to the Bankruptcy Rules. In consequence of non-compliance with this notice, a bankruptcy petition was presented by the creditor. The Registrar dismissed the petition. The creditor appealed.

By the Bankruptcy Act, 1883, s. 4 (1):

H "A debtor commits an act of bankruptcy in each of the following cases . . .  
(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court."

I The form of bankruptcy notice, No. 6 in the appendix of forms to the Bankruptcy Rules, is as follows:

"To A. B. of . . . Take notice that within        days after service of this notice on you, excluding the day of such service, you must pay to C. D. of        the sum of £       , claimed by him as being the amount due on a final judgment obtained by him against you in the        Court, dated       ; whereon execution has not been stayed; or you must secure or compound for the said sum to his satisfaction or the satisfaction of the court; or you must satisfy the court that you have a counterclaim, set-off, or cross-demand against C. D.

which equals or exceeds the sum claimed by him and which you could not set up in the action in which the judgment was obtained. Dated, etc."

*Herbert Reed, Q.C., and J. E. Bankes for the creditor.*

*Edward Clayton for the debtor.*

*Cur. adv. vult.*

Dec. 3, 1892. **LORD ESHER, M.R.** In this case the alleged judgment debtor had been co-respondent in a suit in the Divorce Court in which a husband sought for a divorce from his wife on the ground of her adultery with the co-respondent. In this suit it was found that the adultery had been committed, and the court ordered that the co-respondent, the alleged debtor, should pay the petitioner his costs of suit. Upon that the alleged creditor has presented a petition to make the co-respondent bankrupt on the ground that he had obtained a final judgment against him, and had served on him a bankruptcy notice which the alleged debtor had not obeyed. The alleged creditor took this course under s. 4 (1) (g) of the Bankruptcy Act, 1883. The registrar came to the conclusion that the alleged debtor was not a judgment debtor within the provisions of the subsection, and that therefore he could not declare him bankrupt. The alleged creditor has now appealed to this court.

We have, therefore, to construe s. 4 (1) (g) of the Bankruptcy Act, 1883, which describes one set of circumstances in which a debtor may commit an act of bankruptcy. When a man is made a bankrupt he is not only forced to pay what he can of an alleged debt, but all his other creditors are brought in. What happens is not merely the execution of a decree or order; a wide effect is produced on many other people, forcing them to come in and probably to be paid a part only of what is owing to them. This effect is highly penal. We have now to consider the question whether a decree of the Divorce Court is a "final judgment" within the meaning of the Act. It seems to me that it has been held that the construction to be put on the Bankruptcy Act must be a strict construction. In *Re Chinery, Ex parte Chinery* (1), COTTON, L.J., uses these words (12 Q.B.D. at p. 345):

"Now in legal language and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.' I think we ought to give to the words 'final judgment' in this subsection their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to show an intention to use the words in a more extended sense."

That seems to me to mean that we must construe the words in the subsection strictly. Can they apply to an order made in a suit for divorce? The subsection says that if a creditor has obtained a final judgment against the debtor, and has served on him a bankruptcy notice under the Act, and if the debtor does not within a certain limited time

"either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained,"

in such a case the debtor has committed an act of bankruptcy. That shows, in my opinion, that the "judgment" which the creditor has obtained means one obtained in an action in which the debtor might have had a counterclaim, set-off, or cross-demand which could have been set up. Is it possible to say that a suit



A for divorce is such a proceeding as that? It seems to me impossible. Therefore an order made by the court in a divorce suit is not a "final judgment" within the meaning of those words as used in s. 4 (1) (g) of the Bankruptcy Act, 1883.

B There is another consideration which I should like to mention. The bankruptcy notice follows the form, No. 6, given in the rules made under the Act, and calls upon the debtor to pay the amount of the final judgment obtained against him, or to secure or compound for it, or to satisfy the court that he has a counterclaim, set-off, or cross-demand against the creditor which equals or exceeds the sum claimed by him, and which he could not set up in the action in which the judgment was obtained. It seems to me obvious that the whole of that legislation if construed strictly is inapplicable to an order for the payment of costs in an action in the Divorce Court.

C It has also been contended before us that sub-s. (e) of s. 4 (1) also shows that such an order as we have now to deal with is not within sub-s. (g). By sub-s. (e) a debtor commits an act of bankruptcy if execution issued against him has been levied by seizure and sale of his goods "under process in an action in any court or in any civil proceeding in the High Court." I do not know whether the meaning of sub-s. (g) can be strengthened by sub-s. (e), but the result is the same.

D I am inclined to think that this order is not one on which execution can issue, but is one which the Divorce Court must enforce in its own manner. I do not give any decided opinion on that point, for I have doubts. But I think that the order does not come within sub-s. (g), and that the decision of the registrar was right. The appeal must be dismissed.

E **LOPES, L.J.**—In this case the alleged judgment debtor was co-respondent in a divorce suit, and a decree was made ordering him to pay the petitioner's costs.

The question for our consideration is, whether that decree or order was a "final judgment" within s. 4 (1) (g), of the Bankruptcy Act, 1883. I will not read that subsection; but, to my mind, it is plain that such a decree is not a "final judgment" within the section. Upon the question whether a garnishee order was a final judgment within s. 4 (1) (g), **COTTON, L.J.**, used words in *Re Chinery, Ex parte Chinery* (1), which are most applicable to the present case. He said (12 Q.B.D. at pp. 345, 346):

G "Undoubtedly a garnishee order absolute is a final order in the proceeding in which it is obtained, but is it a final judgment in the sense which I have mentioned? I think there is a good deal to be found in this subsection which is against that view. It speaks of a 'final judgment' obtained by a creditor against his debtor. To my mind this points to a liability of the debtor to the creditor being established in an action, and not to a proceeding of this kind which is not an action but a statutory proceeding for the purpose not of establishing any liability of the garnishee to the person who obtains the order, but of attaching a debt due by the garnishee to the debtor whose liability to the judgment creditor has been established by the judgment in the action. The latter part of the subsection, I think, confirms this view, and, indeed, everything in it, in my opinion, tends to show that the words 'final judgment' are used in their strict technical sense. And when the legislature enacts that a particular act or default shall be an act of bankruptcy, I think we ought not to give to their words any but their strictly proper meaning, unless we are clearly satisfied that it was the intention of the legislature to use the words in a larger sense."

I

And in the same case **BOWEN, L.J.**, said (*ibid.* at p. 346):

"The words 'final judgment,' having then a proper professional meaning, when they are found in a section of an Act of Parliament which is defining acts of bankruptcy, they should be construed as strictly as if they occurred in a section which was defining a misdemeanour, because the commission of an act of bankruptcy entails disabilities on the person who commits it. Is there

then anything in sub-s. 1 (g) to show that the legislature meant to use the words 'final judgment' in any wider sense? On the contrary, everything I think tends to show that they intended to use the term in its ordinary technical sense."

I agree with every word of that. Everything goes to show that the order made in this divorce suit is not a "final judgment" within the meaning of s. 4 (1) (g).

Subsection (e) also seems to me to be very important. It applies to an execution against a debtor "under process in an action in any court or in any civil proceeding in the High Court." The legislature has there used much larger words than are used in sub-s. (g) which only speaks of final judgment in an action, and I cannot help thinking that these larger words were used advisedly. It is unnecessary to say now whether sub-s. (e) might not have been used here in order to get an act of bankruptcy, though I am inclined to think so. The words used in sub-s. (g) are clear enough to justify the conclusion we have come to.

**KAY, L.J.**, read the following judgment.—The creditor seeks to make the debtor Binstead a bankrupt. The alleged act of bankruptcy is the non-compliance within the prescribed time with the requirements of a bankruptcy notice under s. 4 (1) (g) of the Bankruptcy Act, 1883. It has been decided that this subsection does not mean that the person serving the notice must have been a creditor before the judgment. Obviously such a construction would exclude judgments in actions of tort. It includes all cases in which the applicant becomes a creditor by the judgment. The meaning is, that he must be a judgment creditor when he gives the notice: *Re Faithfull, Ex parte Moore* (2). It is also settled that a judgment against a defendant for costs may be final, though other parts of the judgment direct accounts or inquiries, the result of which may be to find money due to him: *Re Faithfull, Ex parte Moore* (2); *Re Alexander, Ex parte Alexander* (3).

In the present case, if the decree had been a judgment in an action in the Chancery Division or in the Queen's Bench Division, it cannot be denied that it would be a good foundation for a bankruptcy notice. But it is a decree against a co-respondent in a proceeding for divorce ordering him to pay costs. The order was contained in the decree nisi which has since been made absolute. The costs have been taxed, and an order to pay them within a time fixed has since been made, like the four-day order which is familiar in Chancery practice. The real objection is, that this is not a judgment in an action to which alone, it is said, s. 4 (1) (g) refers.

First of all, the word "action" only occurs in the latter part of the subsection which provides that the debtor may show that he has not committed an act of bankruptcy by not complying with the notice, when he can satisfy the court that the debt may be expunged by "a counterclaim, set-off, or cross-demand" of equal or greater amount "which he could not set up in the action in which the judgment was obtained." That includes the case of an action in which for any reason a counterclaim could not be made, as for example, where the provisions as to counterclaim do not apply to the particular court in which the judgment was obtained. If there is no such proceeding in the Divorce Court, that circumstance does not seem to me to prevent the subsection applying. The objection appears to me to be highly technical. The final decision of a divorce proceeding is termed a "decree." The proceeding itself is usually styled a "cause" or "suit." It is commenced not by writ, but by a petition and citation which are served together upon the respondent. But a co-respondent may be decreed to pay damages as well as costs, and if the decree orders him to pay both or either, he is, to all intents and purposes in the same position as a judgment debtor in an action in the Chancery or Queen's Bench Division, and the same remedies by fi. fa. and elegit, or a receiver, may be had in order to render the decree effectual. Before the Matrimonial Causes Act, 1857, the course of proceedings for an injured husband was to

A bring an action at common law for criminal conversation against the alleged adulterer, and if that action succeeded, to apply for an Act of Parliament to dissolve the marriage. This costly proceeding was superseded by that statute which established a new court in which husband and wife might by petition apply for dissolution of the marriage (s. 27); and if the husband applies he may join the alleged adulterer as co-respondent (s. 28), and may claim damages against him, B either by that or by a separate petition (s. 33); and the court may (s. 34) order the co-respondent to pay all or any part of the costs of the proceedings. By s. 31 the dissolution of the marriage is to be by the "decree" of the court. In ss. 33 and 34, relating to the damages and costs which the co-respondent may be ordered to pay, the word "decree" is not used. But s. 33 provides that all the enactments contained in the Act with reference to the hearing and decision of petitions, shall C apply to the hearing of a petition for damages, and by s. 34 the order for costs may be made when the alleged adulterer is a co-respondent to a petition for dissolution. In practice, I presume, the order usually is made, as it was here, as part of the decree.

It seems to me that no difference can for this purpose be made between a decree giving damages and costs against a co-respondent and a decree giving costs only. D If the Bankruptcy Act, 1883, has excepted such a person from its description of a judgment debtor who commits an act of bankruptcy by failing to comply with a bankruptcy notice, there does not appear to be any sufficient reason for such an exception. But pursuing the investigation, the Supreme Court of Judicature Act, 1873, s. 3, united the Court of Chancery, the Courts of Common Law, of Probate, Admiralty, the Divorce Court, and the London Court of Bankruptcy, into one E Supreme Court of Judicature in England, and by ss. 4 and 5 made them the High Court and by s. 16 vested in that High Court the jurisdiction of each and every of them, and also of the courts created by commissioners of assize [see now Supreme Court of Judicature (Consolidation) Act, 1925, ss. 1, 2, 18]. Section 100 [see now s. 225 of the 1925 Act] provides that, in the construction of that statute, "cause"

F "shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown";

"suit" shall include "action"; "action" shall mean

G "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding by the Crown";

and "judgment" shall include decree. Therefore a "suit or cause" includes an "action" and a "judgment" includes a "decree."

The Bankruptcy Act, 1883, was passed ten years later, and when it speaks of a "judgment creditor" why should not the word "judgment" include a "decree"? H In the Court of Chancery proceedings were formerly called suits, and the decision of a suit was by decree. The suit was commenced by bill, and the appearance of the defendants was obtained by writ of subpoena, or, in certain cases, by service of a copy of the bill. By R.S.C., Ord. 1, suits in Chancery are to be called actions, and by Ord. 2 are to be commenced by writ, and by Ord. 40 the judgment of the court is to be obtained by motion for judgment. Order 68 provides that I nothing in the rules shall, save as expressly provided, affect the procedure or practice in proceedings in divorce. Accordingly, the Divorce Court is governed by its own rules in these respects, and its causes or suits are not called actions, and its decisions are not called judgments, but decrees.

This, and, as I think, this only, creates the difficulty. In strict language, a decree of the Divorce Court is not called a "judgment," nor is a suit for divorce called an "action." Section 4 of the Bankruptcy Act, 1883, contains eight subsections, every one of which applies to this debtor, unless sub-s. (1) (g) is an exception. Subsection (1) (e) provides that "execution levied by seizure and sale" of a



debtor's goods "under process in an action in any court, or in any civil proceeding in the High Court," shall be an act of bankruptcy. Therefore, if there had been such an execution by seizure and sale under this decree, as, I understand, according to the ordinary practice in the Divorce Court, there might be, if the correspondent had goods which could be seized, he might be made a bankrupt. But in sub-s. (1) (e) there are the words "in any civil proceeding in the High Court," which, it is said, would include this decree in the Divorce Court. However, I cannot see any reason for ascribing to the legislature an intention to allow the debtor to be made bankrupt under sub-s. (1) (e) and not under sub-s. (1) (g). COTTON, L.J., in *Re Chinery, Ex parte Chinery* (1) and again in *Re Faithfull, Ex parte Moore* (2) said that, as under sub-s. (1) (g) there is a new act of bankruptcy, created for the first time by the Act of 1883, "we ought to give the words their strict meaning." This language was adopted by the Master of the Rolls in *Re Riddell, Ex parte Earl of Strathmore* (4). Following that rule of construction, I most reluctantly come to the conclusion that "judgment in an action" does not strictly describe or include a decree in a suit for divorce. Therefore, the decision in the court below was right, and the appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors: *J. G. Dalzell; Ward, Perks & McKay.*

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

## HENTHORN v. FRASER

[COURT OF APPEAL (Lord Herschell, Lindley and Kay, L.JJ.), March 3, 26, 1892]

[Reported [1892] 2 Ch. 27; 61 L.J.Ch. 373; 66 L.T. 439;  
40 W.R. 433; 8 T.L.R. 459; 36 Sol. Jo. 380]

*Contract—Conclusion of contract—Acceptance of offer—Acceptance by letter—Acceptance at time of posting letter—Effect of letter withdrawing offer posted before but received after posting of letter of acceptance.*

The ordinary rule is that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer. Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

On July 7, 1891, the secretary of a building society handed to the plaintiff in the office of the society at Liverpool a letter giving him the refusal of the F. property at £750 for fourteen days. The plaintiff had been for some time in negotiation for the property, and had on two previous occasions made offers for the purchase of it which were not accepted by the society. The plaintiff being unable to write except to sign his name, the offers were made by means of letters, written by the secretary in the office of the society and signed by the plaintiff there. The plaintiff, who resided at Birkenhead, took away with him to that town the letter of July 7, and on July 8 a letter was posted in Birkenhead at 3.50 p.m., written by his solicitor, accepting the offer on his behalf. This letter was not received at the society's office until 8.30 p.m., on the same day, which was after office hours. On the same day a letter was

**A** sent to the plaintiff by the secretary of the society withdrawing the offer of July 7. This letter was posted in Liverpool between 12 and 1 p.m., and was received in Birkenhead at 5.30 p.m. In an action by the plaintiff for specific performance of the contract of sale,

**B** **Held:** in the circumstances it must have been within the contemplation of the parties that the plaintiff would communicate his acceptance by post, and, therefore, the contract was complete as soon as the letter of acceptance was posted, the withdrawal was too late, and the plaintiff was entitled to a decree of specific performance.

*Byrne & Co. v. Leon Van Tienhoven & Co.* (1) (1880), 5 C.P.D. 344, and *Stevenson, Jacques & Co. v. McLean* (2) (1880), 5 Q.B.D. 346, applied.

**C** **Notes.** Followed: *Raeburn and Vérel v. Burness* (1895), 11 T.L.R. 399. Applied: *Bruner v. Moore*, [1904] 1 Ch. 305; *James v. Chartered Accountants' Institute* (1907), 98 L.T. 225; *Eccles v. Bryant*, [1947] 2 All E.R. 63. Referred to: *Goffin v. Houlder* (1920), 90 L.J.Ch. 488.

As to acceptance of offers in contract, see 8 HALSBURY'S LAWS (3rd Edn.) 72 et seq.; and for cases see 12 DIGEST (Repl.) 57 et seq.

**D** Cases referred to:

(1) *Byrne & Co. v. Leon Van Tienhoven & Co.* (1880), 5 C.P.D. 344; 49 L.J.Q.B. 316; 42 L.T. 371; 44 J.P. 667; 12 Digest (Repl.) 85, 463.

(2) *Stevenson, Jaques & Co. v. McLean* (1880), 5 Q.B.D. 346; 49 L.J.Q.B. 701; 42 L.T. 897; 28 W.R. 916; 12 Digest (Repl.) 63, 343.

**E** (3) *Adams v. Lindsell* (1818), 1 B. & Ald. 681; 106 E.R. 250; 12 Digest (Repl.) 86, 477.

(4) *Dunlop v. Higgins* (1848), 1 H.L.Cas. 381; 12 Jur. 295; 9 E.R. 805, H.L.; 12 Digest (Repl.) 86, 470.

(5) *Re Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 587; 41 L.J.Ch. 621; 26 L.T. 781; 20 W.R. 690, L.J.J.; 12 Digest (Repl.) 85, 465.

**F** (6) *Household Fire and Carriage Accident Insurance Co. v. Grant* (1879), 4 Ex.D. 216; 48 L.J.Q.B. 577; 41 L.T. 298; 44 J.P. 152; 27 W.R. 858, C.A.; 12 Digest (Repl.) 72, 398.

(7) *Dickinson v. Dodds* (1876), 2 Ch.D. 463; 45 L.J.Ch. 777; 34 L.T. 607; 40 J.P. 532; 24 W.R. 594, C.A.; 12 Digest (Repl.) 66, 358.

(8) *Brogden v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, 300.

**G** (9) *British and American Telegraph Co. v. Colson* (1871), L.R. 6 Exch. 108; 40 L.J.Ex. 97; 23 L.T. 868; 12 Digest (Repl.) 87, 481.

(10) *Re National Savings Bank Association, Hebb's Case* (1867), L.R. 4 Eq. 9; 36 L.J.Ch. 748; 16 L.T. 308; 15 W.R. 754; 12 Digest (Repl.) 72, 399.

Also referred to in argument:

**H** *Stocken v. Collin* (1841), 7 M. & W. 515; H. & W. 84; 10 L.J.Ex. 227; 151 E.R. 870; 6 Digest (Repl.) 254, 1829.

**Appeal** from a decision of BRISTOW, V.-C., in favour of the defendants in an action for the specific performance of a contract to sell to the plaintiff certain house property situate in Flamank Street, Birkenhead.

**I** On July 7, 1891, the secretary of the building society whom the defendants represented handed to the plaintiff, in the office of the society at Liverpool, a letter in these terms:

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The plaintiff had been for some time in negotiation for the property, and had on two previous occasions made offers for the purchase of it, which were not accepted by the society. These offers were made by means of letters written by the secre-

tary in the office of the society and signed by the plaintiff there. The plaintiff was unable to write except to sign his name. The plaintiff resided in Birkenhead, and he took away with him to that town the letter of July 7 containing the offer of the society. On July 8 a letter was posted in Birkenhead at 3.50 p.m. written by his solicitor, accepting on his behalf the offer to sell the property at £750. This letter was not received at the defendants' office until 8.30 p.m., after office hours, the office being closed at six o'clock. On the same day a letter was addressed to the plaintiff by the secretary of the building society in these terms:

"Please take notice that my letter of the 7th inst. giving you the option of purchasing the property at Flamank Street, Birkenhead, at £750, for fourteen days, is withdrawn and the offer cancelled."

This letter was posted in Liverpool between 12 and 1 p.m., and was received in Birkenhead at 5.30 p.m. It will thus be seen that it was received before the plaintiff's letter of acceptance had reached Liverpool, but after it had been posted. The only other material fact was that on July 8 the secretary of the building society sold the same premises to Mr. Miller for the sum of £760, but the receipt for the deposit paid in respect of the purchase stated that it was subject to being able to withdraw the letter to the plaintiff giving him fourteen days option of purchase. The Vice-Chancellor decided that the revocation was good, and the plaintiff appealed.

*Farwell, Q.C., and T. R. Hughes* for the plaintiff.

*Neville, Q.C., and P. O. Lawrence* for the defendants.

*Cur. adv. vult.*

Mar. 26, 1892. **LORD HERSCHELL** read the following judgment in which he stated the facts, and continued.—If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in *Adams v. Lindsell* (3), which was approved by the Lord Chancellor in *Dunlop v. Higgins* (4), and also with the opinion of MELLISH, L.J., in *Re Imperial Land Co. of Marseilles, Harris' Case* (5). The very point was decided in *Byrne & Co. v. Leon Van Tienhoven & Co.* (1) by LINDLEY, L.J., and his decision was subsequently followed by LUSH, J., in *Stevenson, Jaques & Co. v. McLean* (2).

The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them, and not on the letter being posted.

It cannot, of course, be denied, after the decision in *Dunlop v. Higgins* (4) in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted; but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question therefore arises, in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted.

In *Household Fire and Carriage Accident Insurance Co. v. Grant* (6) BAGGALLAY, L.J., said that he thought that the principle established in *Dunlop v. Higgins* (4) is limited in its application to cases in which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post



A is expressly or impliedly authorised. And in the same case *THESTIGER*, L.J., based his judgment on the defendant having made an application for shares under circumstances from which it must be implied that he authorised the company, in the event of their allotting the shares applied for, to send the notice of allotment by post. The facts of that case were, that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the lords justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post.

Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind, that if he accepted it he should communicate his acceptance by means of the post.

I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the Post Office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated; the present case is in either view within it.

The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. *Dickinson v. Dodds* (7) was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given I think the judgment must be reversed and the usual decree for specific performance made. The defendants must pay the costs of the appeal and of the action.

H **LINDLEY, L.J.**—I concur.

**KAY, L.J.**—On July 7, 1881, the defendants gave to the plaintiff, who was then in their office in Liverpool, an offer in writing to sell him certain real property at Birkenhead, where the plaintiff resided. The plaintiff had been on several previous occasions at their office on this and like business. He was not able to write beyond signing his name. On July 8 his solicitor wrote by his direction accepting the offer. This letter was posted at 3.50 p.m., and arrived at 8.30 the same evening. This was after office hours, and it was not opened till ten o'clock next morning. In the meantime, on the same day, the defendants wrote withdrawing their offer, and posted their letter between 12 and 1 p.m. This was received and opened at 5.30 the same evening. On the same day the defendants entered into a contract to sell the same property to another person, with an express condition, if they were able to withdraw their offer to the plaintiff.

The question is: Was the withdrawal in time or too late? *Dunlop v. Higgins* (4) has decided that, where a letter sent by post was a proper mode of acceptance, the contract was complete from the time the letter was posted. In that case the letter was actually received, though by fault of the Post Office there was some delay in its transmission. Upon receipt of it the offer was withdrawn. The question was the same as in the present case, except that the withdrawal was after the actual receipt of the acceptance, which was treated as being too late. It was held that by posting the letter in due time the party by the usage of trade had done all that he was bound to do. He could not be responsible for the delay of the Post Office in delivering the letter, therefore there was from the time of the posting a valid acceptance. It might have still been doubtful whether posting a letter of acceptance in time would amount to an acceptance if the letter was never received. The ordinary rule is that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer: per LORD BLACKBURN in *Brogden v. Metropolitan Rail. Co.* (8); and per LORD BRAMWELL in *Household Fire and Carriage Accident Insurance Co. v. Grant* (6).

It may be that where the communication is in fact received the contract may date back to the time of posting the acceptance; but there is considerable reason for holding that if never received the posting might be treated as a nullity. The point was so decided in *British and American Telegraph Co. v. Colson* (9), and BRAMWELL, L.J., refers to this point in his judgment in *Household Fire & Carriage Accident Insurance Co. v. Grant* (6). However, in the last-mentioned case, which is a decision binding upon this court, the Court of Appeal, BRAMWELL, L.J., dissenting, held that the posting of a letter of allotment in answer to an application for shares constituted a binding contract to take the shares though the letter of allotment was not received. In his judgment in that case THESSIGER, L.J., refers to *Re National Savings Bank Association, Hebb's Case* (10), in which the decision in *Dunlop v. Higgins* (4) has been explained by saying that the Post Office was treated as the common agent of both contracting parties. That reason is not satisfactory. The Post Office are only carriers between them; they are agents to convey the communication, not to receive it. The communication is not made to the Post Office, but by their agency as carriers. The difference is between saying, "Tell my agent A. if you accept," and "Send your answer to me by A." In the former case A. is to be the intelligent recipient of the acceptance; in the latter he is only to convey the communication to the person making the offer, which he may do by a letter knowing nothing of its contents. The Post Office are only agents in the latter sense. All that *Dunlop v. Higgins* (4) decided was, that the acceptor of the offer having properly posted his acceptance was not responsible for the delay of the Post Office in delivering it, so that after receipt the other party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much further than the House of Lords intended.

BAGGALLAY, L.J., in his judgment in *Household Fire and Carriage Accident Insurance Co. v. Grant* (6), treats it (4 Ex.D. at p. 228) as applicable to cases in which

"by reason of general usage or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorised."

If for authorised the word "contemplated" is substituted I should be disposed to agree with this dictum. But I would rather express it thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post." Is that a proper inference in the present case? I think it is. One party resided in Liverpool, the other in Birkenhead. The acceptance would be expected to be in writing, the subject of purchase being real estate. These and the other circumstances to which

A I have alluded, in my opinion, warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 p.m. on July 8, when the letter of acceptance was posted, and before the letter of withdrawal was received.

B Then what was the effect of the withdrawal by the letter posted between twelve and one the same day and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by BRAMWELL, L.J., in *Household Fire and Carriage Accident Insurance Co. v. Grant* (6). A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received.

C No doubt there is the seeming anomaly pointed out by LORD BRAMWELL, in his judgment, that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, according to D the judgment of LORD COTTENHAM in *Dunlop v. Higgins* (4), has done all that he was bound to do by posting the letter. But this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the other party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late. A similar point has been decided in E *Byrne & Co. v. Leon Van Tienhoven & Co.* (1) and *Stevenson, Jaques & Co. v. McLean* (2), and I agree with those decisions.

Solicitors: W. C. Clennell for G. Dalby, Birkenhead; Kemble, Rose & Co. for Miller & Williamson, Liverpool.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]



## THE COUPÉ CO. v. MADDICK

[QUEEN'S BENCH DIVISION (Cave and Charles, JJ.), June 5, July 4, 1891]

[Reported [1891] 2 Q.B. 413; 60 L.J.Q.B. 676; 65 L.T. 489;  
56 J.P. 39]

*Master and Servant—Liability of master for act of servant—Act by servant in course of employment—Hire by master of horse and carriage—Negligence of servant—Injury to horse.*

The defendant hired from the plaintiff a horse and carriage. At the end of the day's work, the defendant's coachman, instead of taking the horse back to its stable as he had been instructed, went out of his way for his own purpose. While he was so doing the horse was injured as a result of his negligence. In an action brought by the plaintiff against the defendant for damages,

**Held:** the coachman was driving the horse in the course of his employment and the defendant was liable for his negligence.

Per CAVE, J.: Where one of two innocent parties has to suffer a loss from the misconduct of a third party, it is to the public advantage that the loss should fall on the one who could most easily have prevented the happening or the recurrence of the mischief.

**Notes.** Distinguished: *Sanderson v. Collins*, [1904-7] All E.R.Rep. 563. Explained: *Cheshire v. Bailey* (1904), 74 L.J.K.B. 176. Considered: *Aitchison v. Page Motors, Ltd.*, [1935] All E.R.Rep. 594.

As to the liability of a master to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST (Repl.) 125 et seq.

Cases referred to:

- (1) *Storey v. Ashton* (1869), L.R. 4 Q.B. 476; 10 B. & S. 337; 38 L.J.Q.B. 223; 33 J.P. 676; 17 W.R. 727; 34 Digest 140, 1093.
- (2) *Finucane v. Small* (1795), 1 Esp. 315; 3 Digest (Repl.) 76, 148.
- (3) *Foster v. Essex Bank*, 17 Mass. Rep. 479.

Also referred to in argument:

*Reedie v. London and North Western Rail. Co.*, *Hobbit v. Same* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 27, 56.

*Danzey v. Richardson* (1854), 3 E. & B. 144; 23 L.J.Q.B. 217; 18 Jur. 721; 2 C.L.R. 1442; 118 E.R. 1095; 3 Digest (Repl.) 90, 209.

*Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 3 Salk. 11; 92 E.R. 107; 3 Digest (Repl.) 99, 260.

*Dean v. Keate* (1811), 3 Camp. 4; 170 E.R. 1286, N.P.; 36 Digest (Repl.) 167, 902.

**Appeal** from a decision of the learned judge of Bloomsbury County Court.

The plaintiff company let out a horse and carriage to the defendant at £2 2s. per week. The defendant was a doctor, and arrived after his rounds at his house at 2 p.m. on Dec. 29, and told his coachman that he would not be wanted any more, and that he could go home (meaning to the stables). On the way to the stables the coachman pulled up at a public-house, and there met a friend, whom he drove in a different direction from that in which were the stables, thus deviating from his course. On returning from the direction he had taken to the stables, an accident occurred owing to his negligent driving, whereby the plaintiff's horse was injured. The learned county court judge, before whom the action was tried, decided that the hirer was not responsible, and gave judgment for the defendant. The plaintiffs appealed.

A *Fletcher Moulton, Q.C., and H. M. Sturges* for the plaintiff company.  
W. *Wills* for the defendant.

*Cur. adv. vult.*

B July 4, 1891. **CAVE, J.**, read the following judgment of the court.—The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant instead of taking the horse and carriage to his master's stables in the ordinary course of his duty, for his own purposes and to serve a friend takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while thus engaged contrary to his duty. The county court judge held that the  
C hirer was not responsible on the authority of *Storey v. Ashton* (1), in which it was held, under similar circumstances, that the master was not liable to a person who had been run over and injured by the servant, on the ground that the servant when he ran over the plaintiff was not acting in the course of his employment as servant.

D Counsel for the defendant contended that the ground of the hirer's liability to the owner of the horse and carriage is the same as the ground of his liability to a person who is injured by the negligent act of his servant, but we are unable to agree with this contention. Where a wayfarer is injured by the negligence of a person who is driving along a highway, he has a right of action founded on tort against the driver, and if the driver is a servant in the course of his employment,  
E the person injured has also a remedy against the master on the principle respondeat superior; but when a man hires a horse and carriage, there is an implied obligation on his part arising out of the contract to return them in the condition in which he received them, fair wear and tear and certain accidents excepted, and if they are injured by the negligence of the servant while driving in the course of his employment, the latter's remedy is by action on the contract, and can be enforced against the hirer only, and not against his servant.

F That there is a difference between the hirer's liability to the owner, and his liability to a wayfarer injured by the negligence of the person driving the carriage, is plain from the following instances. A. hires a horse and carriage for a year, and lends it for a day to B., who negligently drives over and injures C., at the same time injuring the horse and carriage. In that case, A. is not responsible to C., because B. is not his servant, and consequently the maxim respondeat superior  
G does not apply, but he is responsible to the owner of the horse and carriage for the damage done by B.'s negligence; so, again, if two partners hire a horse and cart for the purposes of their business, and one of them while driving the cart in the usual course of their business negligently runs against and injures a person passing along the highway, and at the same time injures the horse and cart, the partner driving alone is responsible to the person injured, but both are responsible to the  
H owner of the horse and cart they had hired. The responsibility of the hirer to the person from whom he hires is a responsibility arising out of contract; his responsibility to a person run over by the negligent driving of the horse and cart arises out of tort.

I Is there any authority for saying the responsibility of the hirer to take reasonable care of the goods hired does not extend to all injuries caused by the negligence of his servant to whom he has entrusted the care of them? Counsel for the defendant cited *Finucane v. Small* (2) and *Foster v. Essex Bank* (3), in which it was held that the hirer was not responsible where his servant had stolen the goods hired. But in those cases there was an act of the servant which was tortious as against the lettor of the goods, and which gave him a right of action against the servant for a conversion of the goods. But in this case the act of the servant was not tortious as against the owner of the horse and carriage. If the horse and carriage had got back safely to the stable, the owner would have had no right of

action against the servant, for, although the servant, as against his master, would have committed a breach of the duty arising out of the relationship of master and servant, he would not have been guilty of any tortious act as against the owner. Such an act would certainly not have amounted to a conversion of the horse and carriage by the servant, nor, as against the owner, would it have amounted to a trespass, seeing that the person who was entitled to the possession of the horse and carriage during the period occupied by the journey was the hirer, and not the owner. Nor could the fact that the horse and carriage were injured during the journey give the owner a cause of action against the servant, because it was not the owner who had entrusted the horse and carriage to the servant, but the hirer, his master, and consequently the duty of the servant to take care of them was a duty arising out of the relationship of master and servant, and owing to the master, and was not a duty owing to the owner, because there was no contractual relationship between the servant and the owner. The hirer, then, could maintain an action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged. But the owner could maintain no such action, because, as we have pointed out, there was no invasion by the servant of the lettor's right of ownership, and no contractual relation between them.

If we consider the case on the general principles of the public benefit, we arrive at the same result. Where one of two innocent parties has to suffer a loss from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probabilities of such a thing happening again, or, in other words, that it should fall on the one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under the circumstances, the loss is to fall on the owner, who does not engage and cannot dismiss the servant, and who cannot recover it against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw endless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer, it falls on one who thereby will be led to exercise greater care in the selection of a servant in the future, who can punish the servant for his misconduct by dismissing him, and who (theoretically, at all events), has a right of action against the servant.

No case in point can be found on either side of the question, but, on the general considerations set out above, we are of opinion that the hirer is liable, and consequently we must allow the appeal and remit the case for re-trial, and the defendant must pay the costs of appeal and such costs of the court below as have been thrown away.

*Appeal allowed.*

Solicitors: *Shaen, Roscoe, Massey & Co.; Greig, Meikle & Briggs.*

[Reported by T. R. BRIDGWATER, ESQ., Barrister-at-Law.]



A

## Re OWEN. FRISBY, DYKE &amp; CO. v. OWEN

[CHANCERY DIVISION (Kekewich, J.), May 14, 1892]

[Reported 66 L.T. 718; 36 Sol. Jo. 504]

**B** *Executor—Powers—Power to carry on business of testator—Business carried on—Priority of payment of executors' costs and expenses over payment of trading debts.*

A testator by his will directed his executors to carry on his business. This they did, and incurred certain debts. A creditor of the testator then commenced an administration action, and obtained judgment. The assets were

**C** insufficient to pay both the costs and expenses of the executors and the debts incurred by them in carrying on the business. The minutes having been referred to the judge by order of the district registrar,

**Held:** the executors had continued the business lawfully and with the consent of the creditors, and so they were entitled to be paid out of the assets their costs and expenses in priority to the debts incurred by them in carrying

**D** on the business.

**Notes.** Subject to the priority of funeral, testamentary, and administrative expenses, the priorities of debts and liabilities where the estate is insolvent are now to be determined by the same rules as apply in the case of bankruptcy: see the Administration of Estates Act, 1925, s. 34 (1), and Sched. 2 (9 HALSBURY'S STATUTES (2nd Edn.) 737, 766). For the priority of debts in bankruptcy, see the

**E** Bankruptcy Act, 1914, s. 33 (2 HALSBURY'S STATUTES (2nd Edn.) 366).

As to power to carry on business of testator, see 16 HALSBURY'S LAWS (3rd Edn.) 366 et seq.; and for cases see 24 DIGEST (Repl.) 664, 665.

Cases referred to:

(1) *Stott v. Milne* (1884), 25 Ch.D. 710; 50 L.T. 742, C.A.; 40 Digest (Repl.) 751, 2377.

**F**

(2) *Dowse v. Gorton*, post p. 1230; [1891] A.C. 190; 60 L.J.Ch. 745; 64 L.T. 809; 40 W.R. 17, H.L.; 24 Digest (Repl.) 664, 6530.

**Further Consideration** of administration action to determine priority of payment between executors' costs and expenses and debts incurred by them in carrying on the testator's business.

**G** The testator, Harold Owen, by his will, directed his executors to carry on his business. The executors carried on the business, paid off some of the debts of the testator, and paid some of the profits into court. Creditors of the testator commenced an action for the administration of the estate, and obtained judgment. The business was sold by order of the court. On further consideration the plaintiffs, the testator's creditors, were postponed payment of their debts in favour

**H** of the executors and of the creditors of the business as carried on by the executors after the death of the testator. Minutes were prepared by counsel for the executors on the footing that the executors were to be paid first their costs and expenses, and then the creditors with whom debts were contracted by the executors. The assets were insufficient, and these creditors objected. The district registrar

**I** referred the minutes to the judge to be spoken to.

*Church* for the executors.

*Clare* for the creditors.

**KEKEWICH, J.**—The point which has been argued today was not at all present to my mind last week. I think also that it was not present to the mind of the learned counsel who then addressed me. At any rate it was not put forward by them as a point worthy of consideration. What I then decided was that, as between the plaintiffs in the action, who were creditors of the testator, and the creditors of

the business which was carried on by the executors after the testator's decease, the plaintiffs were to be postponed. In postponing the plaintiffs I intended the available assets to be applied in the payment of the executors' costs and expenses, and the creditors whom I have referred to as the creditors of the business, creditors who have a personal claim against the executors, and who were not creditors of the testator. I did not intend to decide, and did not decide, that there was any priority of the creditors' debts over the executors' costs and expenses, because it did not occur to me that the assets were insufficient to pay them both; and whether they should be paid in one order or the other (there being enough, as was assumed) of course was immaterial. But now it appears that there is not enough for both. More than that, I conclude that, if the executors are paid their costs, there will be only a very small sum for the creditors—I think I am right as regards the figures; and if, on the other hand, the creditors are paid in full, there will be nothing left for the executors. Therefore the point comes to be of very great importance whether the executors or the creditors are to be paid first.

The ordinary rule in ordinary administrations, in cases before the court or not, is perfectly clear, and is stated concisely by LORD SELBORNE in *Stott v. Milne* (1), where he says (25 Ch.D. at p. 715):

"The right of trustees [executors are in the same position] to indemnify against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and corpus."

Of course the costs properly incurred include costs of administration, whether either the executors are defendants in an action, and are not ordered to pay the costs personally, or are plaintiffs in an action properly commenced by them. So that, if we were dealing with such a class of cases, there could be no question at all.

Then it is suggested that, because we are considering the creditors, not of the testator, but of the business, there is a difference. As far as I am aware, the question has not been discussed since the decision in *Dowse v. Gorton* (2), and I must express an opinion. What is the principle on which the creditors have any claim against the testator's estate? It is a right of indemnity through the executors; they are personal creditors of the executors; they are not creditors of the testator. The executors having a right of indemnity against the whole of the testator's estate, the creditors have a right through the executors—stand in their shoes, as it is sometimes expressed. Instead of working the administration through the executors, the court might pay the creditors direct out of the estate. This is what it comes to. The executors are liable to the creditors, and the executors have a right of indemnity, so the creditors are paid.

This is on the footing that the executors have done their duty, and have not exceeded their duty. If they have done what is wrong, a different result follows. That is put plainly by LORD MACNAGHTEN in his judgment in *Dowse v. Gorton* (2) (post p. 1235):

"Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or as improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued, and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors.

- A** The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath."
- B** That, to my mind, properly applied, settles the question I have to consider here. It has been assumed, and assumed properly, that here the creditors have approbated. The executors have continued the business lawfully and with the assent of the creditors, and the creditors, adopting that course, cannot come in and say they will oust the executors from the proper possession of what it is right they should be paid, namely, their costs and expenses in priority to everything else. They may have a right against the executors personally, but it would be inconsistent with the words of LORD MACNAGHTEN in *Dowse v. Gorton* (2) to say that they had a right against the assets in priority to the executors. Therefore, the general rule applies, and the executors must be paid their costs and expenses first, and the minutes as drawn are right.
- C**

Solicitors: *Pearce, Jones & Co.*; *Norris, Allens & Chapman* for *North, Kirk & D Cornett*, Liverpool.

[Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.]

**E**

## HURSELL v. BIRD

**F**

[QUEEN'S BENCH DIVISION (Mathew and A. L. Smith, JJ.), October 29, 1891]

[Reported 65 L.T. 709; 8 T.L.R. 8]

*Executor—Executor de son tort—Creditor taking payment of debt from executor de son tort—Creditor taking deceased's stock-in-trade in satisfaction of debt.*

- G** A creditor who obtains payment of a debt from an executor de son tort does not thereby become an executor de son tort.

The deceased, a publican, at his death owed rent to the defendant, his landlady. The defendant took over the public-house, including the stock-in-trade at a valuation, as a going concern in part satisfaction of the debt. In an action brought by the plaintiff, a creditor, against the defendant for administration of the deceased's estate on the grounds that by receiving the value of the stock-in-trade in part payment of the rent due, the defendant had become an executrix de son tort,

**H**

**Held:** the defendant had not rendered herself liable to be sued as an executrix de son tort.

*Paull v. Simpson* (1) (1846), 9 Q.B. 365, and *Hill v. Curtis* (2) (1865), L.R. 1 Eq. 90, followed.

**I**

**Notes.** As to executors de son tort, see 16 HALSBURY'S LAWS (3rd Edn.) 145 et seq.; and for cases see 23 DIGEST (Repl.) 65 et seq.

Cases referred to:

- (1) *Paull v. Simpson* (1846), 9 Q.B. 365; 15 L.J.Q.B. 382; 11 Jur. 13; 115 E.R. 1313; 23 Digest (Repl.) 69, 620.
- (2) *Hill v. Curtis* (1865), L.R. 1 Eq. 90; 35 L.J.Ch. 133; 13 L.T. 584; 12 Jur.N.S. 4; 14 W.R. 125; 23 Digest (Repl.) 69, 621.



Also referred to in argument :

*Carmichael v. Carmichael* (1846), 2 Ph. 101; 9 L.T.O.S. 17; 10 Jur. 908; 41 E.R. 880, L.C.; 23 Digest (Repl.) 71, 636.

*Sharland v. Mildon*, *Sharland v. Loosemore* (1846), 5 Hare, 469; 15 L.J.Ch. 434; 7 L.T.O.S. 223; 10 Jur. 771; 67 E.R. 997; 23 Digest (Repl.) 67, 588.

### Appeal from Tunbridge Wells County Court.

Frederick Bird had been a tenant of the King's Arms, a public-house, since 1886 up to the time of his death. Mrs. Simpson was the landlady of the house. Bird died intestate and insolvent, and amongst others Mrs. Simpson was a creditor to the amount of £220 for rent of the premises and for goods supplied. The defendant Bird, who was the widow of Frederick Bird, was permitted by Mrs. Simpson to retain possession of the house, and to carry on the business. Mrs. Simpson sent her manager to make a valuation of the stock-in-trade, and this realised £175. It was then arranged that Mrs. Bird should transfer the stock, at that valuation, to Mrs. Simpson in part payment of the debt owing to her. This was accordingly done, and £175 was struck off the amount of the debt. Mrs. Bird then took out letters of administration to her husband's estate.

An action was then brought in the county court by Hursell, the plaintiff, who was one of Bird's creditors, to administer his estate as an intestate, and he joined Mrs. Simpson also as a defendant, suing her as an executrix de son tort on the ground that she had put herself in that position by receiving the value of the stock-in-trade as part payment of the debt owing to her. The learned judge in the county court granted a decree for administration against the defendant Mrs. Bird, but, as regards the action against the other defendant Mrs. Simpson, he dismissed it with costs, without giving any reasons, however, for so doing. The plaintiff appealed against the dismissal of the suit against Mrs. Simpson.

*Stewart-Smith* for the plaintiff.

*Upjohn* for the defendant Mrs. Simpson.

**MATHEW, J.**—The judgment of the learned judge in the county court must be affirmed. This case has been argued at great length owing to the fact that the judge had given judgment in favour of Mrs. Simpson without informing this court of the grounds of his decision, and the real question that we have to decide has to be found out without the assistance of the judge's notes. On looking closely into the case, however, it seems that the sole question that we have to decide is whether Mrs. Simpson has rendered herself liable as an executrix de son tort. It appears that Mrs. Bird, the widow, had made herself an executrix de son tort of her husband, and that Mrs. Simpson, who was a creditor of the deceased, had obtained payment of part of her debt from Mrs. Bird. It was then sought by the plaintiff to make Mrs. Simpson liable as an executrix de son tort for having done so; but this it is clear he cannot do. The law is, that a creditor who obtains payment of his debt from an executor de son tort does not, by reason of so doing, become an executor de son tort himself. I am of opinion, therefore, that Mrs. Simpson was rightly dismissed from this suit, and the judgment of the learned county court must be affirmed.

**A. L. SMITH, J.**—I am entirely of the same opinion. Here Bird was a yearly tenant of Mrs. Simpson, and at his death owed her money for rent and goods supplied. Mrs. Simpson sends her agent to get that rent and the other money that was due. The stock-in-trade is valued, and the widow is induced to hand over the house, including the stock-in-trade, at a valuation, as a going concern, in satisfaction of a part of the debt due by the deceased to Mrs. Simpson. The latter, however, does not, by receiving this payment, render herself liable as an executrix de son tort. The law upon the subject is clear: it is, that a creditor getting his debt, whether in money or in kind, does not thereby become an executor de son tort. This is laid down in *Paull v. Simpson* (1) and in *Hill v. Curtis* (2),

A and we must follow those cases, and the judgment in the court below must be affirmed.

*Appeal dismissed.*

Solicitors: Nisbet & Hinds; Sole, Turner & Knight for W. C. Cripps & Son, Tunbridge Wells.

B [Reported by A. H. LEFROY, ESQ., Barrister-at-Law.]

C

## R. v. FARMER AND ANOTHER, SALFORD JUSTICES

D

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), December 14, 1891]

[Reported [1892] 1 Q.B. 637; 61 L.J.M.C. 65; 65 L.T. 736;  
56 J.P. 341; 40 W.R. 228; 8 T.L.R. 159; 36 Sol. Jo. 123;  
17 Cox, C.C. 413]

E

*Bastardy—Summons—Service—Service at "last place of abode" in England—Defendant residing abroad.*

A bastardy summons was left at the putative father's last place of abode in England. At the hearing the justices found, in his absence, that the summons had been duly served on him and, on the corroborated evidence of the mother, made an order against him under s. 4 of the Bastardy Laws Amendment Act, 1872. The putative father applied for the issue of a writ of certiorari to bring up the order to be quashed on the ground that the summons had not been properly served. On the application fresh evidence was adduced that, when the summons was served, the putative father was in America and had a place of abode there.

G

**Held:** the court had power to review the decision of the justices on the question of service of the summons; as at the date of service the putative father had a place of residence in America, the summons had not been duly served; and, therefore, the justices had no jurisdiction to proceed under s. 4 of the Act of 1872, and a writ of certiorari would issue to quash the order.

H

**Notes.** That part of s. 4 of the repealed Bastardy Laws Amendment Act, 1872, relating to service of the summons, has been replaced by r. 76 (1) (a), (b) of the Magistrates' Courts Rules, 1952, S.I. 1952, No. 2190: 13 HALSBURY'S STATUTORY INSTRUMENTS, title MAGISTRATES.

Applied: *R. v. Webb*, [1896] 1 Q.B. 487.

I

As to service in bastardy proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 117; and for cases see 3 DIGEST (Repl.) 450 et seq. As to application for an order of certiorari, see 3 HALSBURY'S LAWS (3rd Edn.) 135; and for cases see 3 DIGEST (Repl.) 468 et seq.

Cases referred to:

- (1) *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; 4 Moore, C.P. 50; 129 E.R. 789; 21 Digest (Repl.) 269, 455.
- (2) *Ex parte Price Jones* (1850), 1 L.M. & P. 357; 4 New Mag. Cas. 88; 15 L.T.O.S. 142; sub nom. *R. v. Evans and Yale*, 4 New Sess. Cas. 191; 19 L.J.M.C. 151; 3 Digest (Repl.) 450, 396.

- (3) *R. v. Lee* (1888), 58 L.T. 384; 52 J.P. 344; 36 W.R. 415; 4 T.L.R. 263; 16 A  
Cox, C.C. 404, D.C.; 3 Digest (Repl.) 450, 399.
- (4) *Berkley v. Thompson* (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1;  
49 J.P. 276; 33 W.R. 525, H.L.; 3 Digest (Repl.) 451, 407.
- (5) *R. v. Bolton* (1841), 1 Q.B. 66; Arn. & H. 261; 4 Per. & Dav. 679; 10  
L.J.M.C. 49; 5 J.P. 370; 5 Jur. 1154; 113 E.R. 1054; 16 Digest (Repl.)  
468, 2876. B

Also referred to in argument:

- Rè Baker* (1857), 2 H. & N. 219; 26 L.J.M.C. 155; 29 L.T.O.S. 218; 21 J.P.  
486; 3 Jur.N.S. 937; 5 W.R. 661; 157 E.R. 92; 16 Digest (Repl.) 288, 588.
- R. v. Brown* (1859), 1 L.T. 29; 24 J.P. 5; 8 W.R. 60; 3 Digest (Repl.) 468, 512.
- R. v. Damarell* (1867), L.R. 3 Q.B. 50; 8 B. & S. 659; 37 L.J.M.C. 21; 32 J.P.  
245; 3 Digest (Repl.) 450, 398. C
- R. v. Higham* (1857), 7 E. & B. 557; 26 L.J.M.C. 116; 29 L.T.O.S. 105; 22 J.P.  
6; 3 Jur.N.S. 691; 5 W.R. 507; 119 E.R. 1352; 3 Digest (Repl.) 469, 519.
- R. v. De Winton* (1888), 59 L.T. 382; 53 J.P. 292; 16 Cox, C.C. 455, D.C.;  
affirmed sub nom. *Ex parte Baggott*, 4 T.L.R. 671, C.A.; 3 Digest (Repl.)  
451, 405. D

**Appeal** by the applicant from an order of the Queen's Bench Division (Lord COLERIDGE, C.J., and WRIGHT, J.), refusing to grant a rule nisi for a writ of certiorari to bring up to be quashed an affiliation order made by the justices against the applicant under s. 4 of the Bastardy Laws Amendment Act, 1872, on the ground that the summons was not duly served.

The applicant, Riley, applied for a rule nisi, calling upon Sir James Farmer and Richard Husband, Esq., justices of Salford, to show cause why a writ of certiorari should not issue to bring up an affiliation order of the justices, made on Mar. 25, 1891, adjudging the applicant to be the putative father of a bastard child of Elizabeth Howarth, on the grounds that when the summons was issued and alleged to be served the applicant's place of abode was in America, and the order was made in his absence and without notice to him, and without his knowledge thereof, or of the summons, and that the order was made without jurisdiction. the summons not having been served personally nor left at the applicant's last place of abode. E

On Feb. 26, 1891, Elizabeth Howarth was delivered of a bastard child, of which she alleged that the applicant was the father, and obtained a summons against him, under s. 3 of the Bastardy Laws Amendment Act, 1872. The applicant had been living at his father's house in Salford, and had no other place of abode in England. The summons was obtained on Mar. 13, 1891, and on that day was left at the house of the applicant's father. On Mar. 25 the summons came on to be heard; the applicant himself was not present; it was proved that the summons had been left at the house of the applicant's father on Mar. 13, and a witness swore that she had seen the applicant in Salford on Mar. 15, but the applicant's father stated that he had gone to America in February. The complainant gave evidence, which was corroborated, that the applicant was the father of the child, and the justices found that the summons had been actually served upon the applicant, and made an order adjudging him to be the putative father of such bastard child, and ordered him to pay 5s. a week until the child was fourteen. Upon the application for a certiorari it appeared from fresh evidence, then adduced upon affidavit, that the applicant was actually in America on Mar. 5, 1891, that he had gone there with the intention to stay and settle down, and had a place of abode at his brother's house in America. He swore that as soon as he heard of the order he determined to return to England to contest it; that he was prevented by illness from returning until September; that he was taken ill on arriving in England, and that owing to those causes his application for a certiorari was not made until more than six months after the date of the order of the justices. F G H I

The application for a rule nisi for a certiorari to bring up the order to be quashed was refused by the Divisional Court and the applicant appealed.



A On the question of the application being out of time, the court extended the time.

*Cluer* for the justices.

*Le Riche* for the applicant.

B **LORD ESHER, M.R.**—In this case the justices made an order against the applicant for the rule adjudging him to be the putative father of a child born in England, upon the application of its mother. The man appeals upon the ground that the justices had no jurisdiction to make the order, and his appeal is not against any proceeding taken to enforce that order, but is an application for a certiorari to bring up that order to be quashed.

C If this were a case of proceedings taken to enforce the order of the justices, I think that *Brittain v. Kinnaird* (1) would be conclusive to show that, inasmuch as the justices had jurisdiction to inquire whether service of the summons had been properly made, this court could not inquire into the question whether the decision of the justices was right or wrong. This, however, is an application for a certiorari to bring up the order to be quashed, and, therefore, *R. v. Evans and Yale* (2) is a clear authority that the court can not only inquire whether there was any evidence before the justices to justify their order, but can also consider whether it agrees with the justices in their findings upon the facts. The decision in *R. v. Evans and Yale* (2) seems to be clear that, upon an application for a certiorari, the court can say whether it agrees with the finding of the justices, and *R. v. Lee* (3), decided by **HAWKINS and CHARLES, JJ.**, is to the same effect. I think that we cannot overrule *R. v. Evans and Yale* (2) but must follow it, and uphold the distinction drawn by that case that upon proceedings to enforce an order of justices the court cannot inquire whether the order was right or wrong, but that if an application is made to bring up an order to be quashed the court is bound to consider the evidence which was before the justices, and to say then whether the order was right or not.

E Further than that, if we have jurisdiction to make that inquiry, we are not confined to the evidence which was before the justices, but can hear further evidence. In this case we are called upon to say whether the decision of the justices upon a preliminary point was right or wrong. It is not material for us to consider whether, if the evidence had been the same before us as it was before the justices, we would have agreed with their decision or not, for we have now further evidence before us. The justices decided, upon the evidence before them, that service of the summons had been made at the house in which the applicant then abode at the time of the service, and was abiding for at least two days after, and they naturally inferred that the summons came to his knowledge. Can we now agree with that decision? I disregard the affidavit of the woman who swore at the hearing that she had seen the applicant about after the day on which the summons was served, and now swears that she was mistaken. At the hearing her evidence was contradicted by the applicant's father, who swore that his son had gone to America some time before the summons was served. If the evidence were now the same, I would agree with the decision of the justices. Now, however, the applicant himself swears that he was in America when the summons was served, and he is corroborated in that by a letter which is produced written by the applicant from America, and dated there on Mar. 5, and bearing a postmark in America of that date. The service of the summons was on Mar. 13, and if the applicant's story is true we see at once that the finding of the justices was incorrect, for the man was not, on Mar. 13, abiding at his father's house where the summons was served.

I We must, therefore, now consider whether the service of the summons at his father's house in England, which was his last place of abode in England, was a good service. We must consider whether he had a place of abode in America. If he went to America for the purpose only of seeing his brother, with the intention

of presently returning to his father's house in England, then he had no place of abode in America; if he went away simply with the intent to avoid service of this summons, meaning to return as soon as the thing had blown over and it was safe to return, then he had no place of abode in America. In such cases it would be correct to say that his last place of abode was his father's house in England. There is, therefore, a question of fact to be determined in this preliminary inquiry as to the service of the summons, and we must undertake that inquiry and determine that question. Upon the materials before us can we safely say that he went abroad simply to avoid service of the summons, or only temporarily? Ought we to infer a dishonest act on his part, when the evidence is equally consistent with honesty? I do not think that there is any sufficient evidence that he went to America to avoid service, or that we can say that he did not go to America in order to live and earn his livelihood there. I come to the conclusion, therefore, that he had a place of abode in America.

Then comes the question, what is the true construction of s. 4 of the Bastardy Laws Amendment Act, 1872, which enacts that:

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode . . . the justices . . . shall hear the evidence . . . and . . . they may adjudge the man to be the putative father of such bastard child. . . ."

Can we say that "left at his last place of abode" means his last place of abode in England, though he has acquired a place of abode abroad? Suppose a case where a man had a place of abode in England, that he left that place of abode and went to live in another part of England, but the people who wished to summon him could not find him although he was living in England. Which place, in that case, would be his "last place of abode"? I think that the place he was last living at would be his last place of abode. In my opinion, the words "last place of abode" mean the place he is actually abiding in, or, if he has no abode at the time when service is to be made, but is wandering about or moving about so as to have no place of abode, the last place at which he was abiding. Does it, then, make any difference if a man has left his place of abode in England and has gone abroad and fixed his place of abode abroad? I think that we cannot read the words of the statute as making any such difference. We must, therefore, inquire whether the applicant's last place of abode was in England or in America. The answer to that inquiry determines this case, and I have already said that he had his last place of abode in America. The service, therefore, of the summons in England at his father's house was not a good service, and the justices had no jurisdiction to hear the summons.

There is a further point raised, which is the one mentioned by LORD SELBORNE, L.C., in *Berkley v. Thompson* (4), that, even if the man were only wandering about in America and had no place of abode there, yet he would be abroad and out of the jurisdiction, and that there could, in such case, be no service at his last place of abode in England, because there could not be any personal service abroad. There is, I think, much to be said in favour of that view, but it is not necessary to determine that question here, because the man had his last place of abode abroad.

We must decide that there was no due service of the summons in this case under the statute, and that the justices had, therefore, no jurisdiction to inquire into it, and their order must be brought up to be quashed. We differ from the decision of LORD COLERIDGE, C.J., in the court below in his application of the principles laid down in *Brittain v. Kinnaird* (1) and *R. v. Bolton* (5) to the present case, because he missed the distinction between proceedings to enforce an order of justices and an application for a certiorari to bring up an order of justices to be quashed. This rule must be made absolute.

**A LOPES, L.J.**—This is an application for a certiorari to bring up an order of justices to be quashed, upon the ground that they had no jurisdiction to make the order because there had been no proper service of the summons upon the appellant. It is to be observed that this is not an application for a certiorari to bring up a decision, after a hearing upon the merits, to be quashed, for, if it were, *Brittain v. Kinnaird* (1) and *R. v. Bolton* (5) would apply to and govern it; and **B** this is the mistake which was made by LORD COLERIDGE, C.J., who missed the distinction between those cases and *R. v. Evans and Yale* (2). As to the former cases there is another observation to be made, that both parties were present at the hearing, whereas in this case only the complainant was present. It appears to me that the present case is on all fours with *R. v. Evans and Yale* (2) and *R. v. Lee* (3), which show clearly that the court may inquire into the evidence upon a preliminary point as to the service of the summons, and consider both that evidence and other evidence upon the point. Here the justices decided that the defendant, **C** the present applicant, was the putative father of the complainant's child; but there was a question as to the due service of the summons as the defendant did not appear. It was said that the summons had been actually served upon the defendant, and the evidence before the justices was sufficient to satisfy them of that, and on that evidence we could not disagree with them. Now, however, there **D** is further evidence before us which shows that the defendant was not in this country when the summons was served, and, upon the evidence, I believe that to be the fact. That being so, it is clear that the justices were wrong in their decision as to the service of the summons, this evidence not being before them.

It is then said that this service was good, because by s. 4 of the Bastardy Laws Amendment Act, 1872, the justices may make an order "upon proof that the **E** summons was duly served on such person, or left at his last place of abode," and this summons was left at his last place of abode, namely, his father's house. I do not think that this house was his last place of abode under the circumstances of this case, but I believe that his last place of abode was his brother's house in America. Therefore, in my opinion, the service at his father's house was not **F** sufficient. The case would be different if he had gone away in order to avoid service of the summons simply, as was said in *R. v. Evans and Yale* (2) and other cases; but there is no evidence of that being the case here, or that he intended to return to his father's house. The words of the statute, "upon proof that the summons was left at his last place of abode," are not satisfied, and this order was made without jurisdiction.

**G KAY, L.J.**—This case is not before us upon the merits of the case between the complainant and the defendant, but upon an application for a certiorari to bring up the order of the justices as having been made without jurisdiction. Two questions of very great importance arise, and I, therefore, desire to add my own views upon those questions. The one question is, whether this court has any power to enter- **H**tain an application for a certiorari in a case like this; and the other whether, if the court has such power, the decision of the justices was right or not. The justices decided, in the absence of the present applicant, that he had been duly served with a bastardy summons, which had been left at his father's house, which was his last place of abode in England. The justices thought, indeed, that he still resided there when the summons was served, upon evidence that was adduced at the hearing of the summons. At this hearing the applicant was neither present **I** nor represented; but his father, who did not and could not represent him, gave some evidence that he had left England before service of the summons.

The first question is, whether this court can enter upon an inquiry whether the justices were right or wrong in holding that the summons had been duly served. It would be, in my opinion, a very serious matter to hold that an order can be made upon a man behind his back upon an irregular service of a summons, and that he has no power whatever to question it afterwards if it was wrong. Suppose a case in which, upon an absolutely false affidavit of the service of a summons,



a magistrate made an order against a man where he was not present. Can it be possible that the defendant would have no power at all to set the matter right and question the decision of the magistrate upon clear proof that the affidavit was false? I do not think so; and there are distinct authorities to the contrary. *Brittain v. Kinnaird* (1) and *R. v. Bolton* (5) are clearly different cases, for in those cases both parties were present, and each had an opportunity of showing that the evidence of the other was wrong. In this case the defendant was not present, and was not represented, and had no opportunity of showing what the real facts were. The proceedings were entirely *ex parte*. If, therefore, the service of the summons was insufficient, I think that it is necessary, as a matter of natural justice, that the defendant should have the right to appeal here, and to show that the justices had no jurisdiction to make the order because there had been no service of the summons upon him. This very point has been expressly decided in *R. v. Evans and Yale* (2), which was followed in *R. v. Lee* (3), which show that the defendant has a right to apply for a *certiorari* to bring up the order to be quashed upon the ground that there had been no service of the summons.

The next question, then, is, whether there was a proper service of the summons or not. Upon the facts now before us it is perfectly clear that there was no service of the summons upon the defendant himself, for he had left England and gone to America some time before the summons was left at his father's house. Under these circumstances, was the service of the summons at his father's house a good service under s. 4 of the Bastardy Laws Amendment Act, 1872? In my opinion, only one meaning can be given to the words of s. 4 of the Act, "on proof that the summons was left at his last place of abode," and I think that "his last place of abode" means the last place of abode which he had at the time when the summons was served; that is, his actual abode, or, if he had no actual abode, the last place at which he had been abiding. The section does mean his last place of abode in England; but he has not his last place of abode in England if he has a place of abode abroad, and, therefore, if the applicant had a place of abode in America, as I think he had, he had not a last place of abode in England within the meaning of the section. The truth is that when a man has left England and is abiding abroad—that is, has a place of abode abroad—before the service of the summons, he is not amenable to this Act at all. The Act, in s. 3, has a provision to meet such a case, and separately contemplates and deals with the case where a man is out of England and s. 4 is inapplicable. LORD SELBORNE, L.C., expresses that opinion in *Berkley v. Thompson* (4), where he says, referring to s. 3 of the Act (10 App. Cas. at p. 49):

"It is impossible to read that provision without seeing that this legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach."

I think that he there gives the real meaning of the statute, and that service of the summons cannot be made at all where the man is actually residing abroad at the time when the summons purports to be served. This rule must be made absolute to bring up this order to be quashed.

*Rule absolute for a certiorari.*

Solicitors: *Le Riche & Stephens; Jaques & Co.*

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]

A

## MEYER &amp; CO. v. DE CROIX, VERLEY ET CIE

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Bramwell, Lord Herschell and Lord Morris), June 30, July 30, 1891]

B

[Reported [1891] A.C. 520; 61 L.J.Q.B. 205; 65 L.T. 653;  
40 W.R. 513; 7 T.L.R. 729]

*Bill of Exchange—Acceptance—General acceptance—Acceptance “in favour of drawer only”—Qualified acceptance—Consideration of words used and situation in which placed—Need for words of qualification to form part of acceptance and indicate clearly restriction meant to be introduced—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 19 (2).*

C

A bill of exchange was drawn by F. upon the appellants payable “to order F.” The appellants stamped on the face of the bill: “Accepted payable at A. Bank London.” Above these words they wrote “In favour of F. only, No. 28.” The word “order” was struck out, but it did not appear when or by whom. In an action by the respondents, who were endorsees for value, against the acceptors, the acceptors claimed that they were not liable on the ground that the acceptance was qualified.

D

**Held:** (i) in deciding whether the acceptance was qualified, regard should be had both to the words used and to the situation in which they were placed; (ii) words of qualification could only be effective if they were incorporated in the acceptance or at least so connected with the acceptance as obviously to form part of it, and if they indicated plainly and intelligibly (or, per LORD WATSON and LORD HERSCHELL, clearly and unequivocally) the nature of the restriction which they were meant to introduce; and (iii) (LORD BRAMWELL and LORD MORRIS dissenting) applying the above test, the acceptance was general, and the acceptors were liable.

E

Per LORD HERSCHELL (LORD BRAMWELL and LORD MORRIS disagreeing): No relevance could be attached to the erasure of the word “order.”

F

Decision of the Court of Appeal, 25 Q.B.D. 343, affirmed.

**Notes.** As to general and qualified acceptances, see 3 HALSBURY'S LAWS (3rd Edn.) 169; and for cases see 6 DIGEST (Repl.) 59–61. For the Bills of Exchange Act, 1882, ss. 8, 19, see 2 HALSBURY'S STATUTES (2nd Edn.) 511, 515.

Cases referred to in argument:

G

*Rowe v. Young* (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E.R. 372, H.L.; 6 Digest (Repl.) 60, 534.

*Steele v. McKinlay* (1880), 5 App. Cas. 754; 43 L.T. 358; 28 W.R. 17, H.L.; 6 Digest (Repl.) 54, 480.

*Smith v. Vertue* (1860), 9 C.B.N.S. 214; 30 L.J.C.P. 56; 3 L.T. 583; 7 Jur.N.S. 395; 9 W.R. 146; 142 E.R. 84; 6 Digest (Repl.) 59, 528.

H

**Appeal** by the defendants, H. Meyer & Co., from a decision of the Court of Appeal (LORD ESHER, M.R., LINDLEY and BOWEN, L.JJ.), reported 25 Q.B.D. 343, reversing a decision of the Queen's Bench Division (CAVE and A. L. SMITH, JJ.), upon a Special Case by which the Queen's Bench Division had held that the defendants were not liable to the plaintiffs, De Croix, Verley et Cie.

I

The action was brought by the endorsees of a bill of exchange against the acceptors, and the question was whether the bill was accepted in such a way as to render it not negotiable. The bill was drawn by one Flipo, in France, addressed to the defendants, H. Meyer & Co., who were merchants in London, and payable to Flipo, and it was accepted by the defendants as follows: “In favour of Mr. L. Delobbel-Flipo only,” which words were in writing, the rest of the acceptance being impressed by a stamp. Flipo endorsed the bill to the plaintiffs, the present respondents, who were bankers in France, and they discounted it and placed the amount less discount, to the credit of Flipo, not noticing that the bill was accepted

in any unusual form. On the plaintiffs presenting the bill for payment it was dishonoured on the instructions of the defendants. The Divisional Court held that the acceptance was such as to make the bill not negotiable, and, therefore, that the plaintiffs could not recover, but that decision was reversed by the Court of Appeal, who ordered judgment to be entered for the plaintiffs. The defendants appealed.

*Sir Richard Webster, Q.C., Horne Payne, Q.C., and Bower* for the appellants.  
*Finlay, Q.C., and R. M. Bray* for the respondents.

The House took time for consideration.

July 30, 1891. The following opinions were read.

**LORD HALSBURY, L.C.**—I am of opinion that in this case the judgment of the Court of Appeal ought to be affirmed. The action was brought by the plaintiffs, who are bankers at Lille, against the defendants, a limited company, carrying on business in London, upon a bill drawn by one Flipo, and accepted by the defendants.

The only question is, whether the bill, as accepted, was a negotiable instrument. As to the form which purports to be the acceptance, no one can doubt that it was an ordinary mercantile form accepted and payable at the Alliance Bank with the proper signatures. But the question arises by reason of some words written above that which every mercantile man would look upon as the acceptance, and these words are, "In favour of Mr. L. Delobbel-Flipo only, No. 28." These words are written above what I have called the acceptance, and I think any mercantile man would regard the words I have quoted as something apart from, and not forming any portion of, the acceptance itself. Nor is it easy to construe them as giving any qualification to the acceptance. I think much depends on the exact form, and on an apparently complete acceptance being found in its usual place in the bill. A known mercantile instrument with the word "accepted" printed by a stamp, and in ordinary mercantile form, is sought to be cut down and qualified by some words written, it is true, on the same piece of paper, and above the acceptance, but which to my mind, even now that I have heard the argument, convey no particular meaning. I am not certain that I understand what is the true meaning of the words treated as separate writing "in favour of Mr. L. Delobbel-Flipo only." The form of the instrument, so far as the ordinary mercantile language is concerned, is quite intelligible. The bill is accepted, payable at a particular bank. It is suggested in the argument that it was intended that these words should tell the holder of the bill that it was only payable to the drawer himself. I am not certain that I can even now gather the meaning of the words themselves, but I am quite certain that any ordinary mercantile man, looking at the stamped acceptance in ordinary form and stamped across the bill, would assume that it was a clean acceptance, and that the words written above it, whatever the meaning they might convey to the immediate parties, would certainly not convey anything which would qualify or cut them down to a person who had nothing before him but the bill itself.

I am happy to think that the decision in this case involves nothing more than the proposition that, if a person writes across a bill that which unqualified would, in ordinary course, import a clean acceptance of a bill, and intends to qualify its operation, he must do so by plain and intelligible language, and make that qualification sufficiently part of the acceptance itself to be intelligible in the ordinary course of business. If any other principle were laid down I think it would be fatal to the convenience of trade and the conduct of mercantile affairs, which demand for their transaction convenient and compendious forms, to which the law merchant has attached a definite meaning. Such ambiguous and inappropriate language as is sought to be made here a qualification of an ordinary mercantile instrument would defeat the very object which mercantile instruments are intended to effect. I move your Lordships that the judgment of the Court of Appeal be affirmed, and this appeal dismissed with costs.



- A LORD WATSON.**—A bill of exchange for £778 4s. 2d. was drawn in France by one L. Delobbel-Flipo, in favour of himself as payee, and was accepted by the appellants in London, payable there at the Alliance Bank. When the bill matured, the appellants refused to make payment to the respondents, who are endorsees for value, upon the ground that, by the special terms of their acceptance, its contents were payable to Flipo only. In this action, which has been brought by the respondents, the law of France is not pleaded by either party. The issue between them is raised by a Special Case, the fifth article of which states :

"It is not suggested that there is any custom upon which the defendants can rely, by which the addition of the words, 'in favour of L. Delobbel-Flipo only' restricts the negotiability of the bill. The defendants rely solely on the provisions of the Bills of Exchange Act, 1882."

- C** Section 19 (2) of that statute enacts that "a qualified acceptance in express terms varies the effect of the bill as drawn." In order to produce that effect, the words of qualification must, in my opinion, be incorporated in the acceptance, or at least so connected with the acceptance as obviously to form part of it; and must also be such as to indicate clearly and unequivocally the nature of the restriction which they are meant to introduce.

- D** There is a clean acceptance by the appellants stamped in printed letters across the face of the bill; above that acceptance, on separate lines, and forming a separate paragraph, appear the words "In favour of Mr. L. Delobbel-Flipo only. No. 28." These words and figures are in writing, with the exception of the word "No." which is stamped. In the position which they occupy I do not think the words "in favour of Mr. L. Delobbel-Flipo only" can be regarded as part of the acceptance, or have the effect of qualifying its terms; they are not inserted in it, and are not grammatically connected with it, but occur as a preface to "No. 28," which forms no part of the acceptance. "No. 28" is a memorandum for the purposes of accounts kept between the acceptors and the drawers, or between the former and their bankers, and therefore relates to matters with which holders of the bill, or persons acquiring right to it, have no concern. In my opinion the preface would naturally be regarded as an integral part of that memorandum, having no reference to the terms of the acceptance, and would not convey any intimation that the acceptance was meant to be restricted. I am accordingly of opinion that the order of the Court of Appeal ought to be affirmed.

- G LORD BRAMWELL.**—I consider what was written and printed by the defendants on the face of the bill as one—one thing only, an acceptance and no more—not an acceptance and something else. That being so, I am unable to see any difference between "in favour of Flipo only. accepted payable," &c., and "accepted in favour of Flipo only, payable," &c. I do not know where the body of the acceptance begins, unless at the beginning of what is written. It is said that "in favour of Flipo only" does not necessarily mean the same as "accepted in favour of Flipo only." I think it does, but, if not necessarily, what does it naturally mean, especially when it is remembered that the word "order" was erased? That was no doubt unauthorised, if done by the drawees, but it clearly shows the intention of the drawees if done by them, and the knowledge by the drawer of that intention if done by him. The striking out of "order" was not a memorandum for the use of the drawee. I cannot find that any other cause for what was done can be suggested.

As to the thing being clear and unequivocal, I begin to doubt if there is such a thing, but it is enough if words are intelligible. Can there be a doubt that this bill might have been protested for non-acceptance according to its tenour? I suppose from the form of the acceptance that the appellants thought they had, or might have, some cross-claim against Flipo; Flipo, probably, was glad to get anything from them, and so put up with the acceptance, and perhaps endorsed it in

satisfaction of a bad debt to those glad to get anything from him. I think the judgment should be reversed. A

**LORD HERSCHELL.**—The respondents in this case seek to recover from the appellants the amount of a bill of exchange accepted by them. The defence set up is, that the acceptance was a qualified one, and restricted the right to require payment to the payee alone, and that the acceptors are, therefore, under no obligation to the respondents who took by endorsement from him. B

It was not disputed at the Bar that the acceptor of a bill of exchange may make his acceptance a qualified one. If he do so the drawer may, of course, refuse to take such an acceptance, and treat the bill as dishonoured; but, if he takes the bill, the obligation of the acceptor is not absolute, but subject to the qualification which he has introduced. I think further that it is beyond dispute that, if an acceptor seeks to qualify his acceptance, and thus to modify the obligations which an acceptance ordinarily imposes, he must do so on the face of the bill in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to an expressed qualification. C

About these propositions I do not think there can be any difference of opinion; the difficulty lies in applying them to the facts of the particular case. The bill in question was drawn in France by a person named Delobbel-Flipo upon the appellants, and forwarded to London for their acceptance. The bill is drawn on a printed form containing the word "order" immediately following the name of Delobbel-Flipo, which has been inserted as the payee of the bill. This word "order" has been erased, but it does not appear by whom, nor do I think it material. If, as suggested, it was done by the acceptors, they were not justified in making the erasure, and in any case there would be nothing to show a person taking the bill that the word had not been struck out by the drawer at the time he inserted the name of the payee. I do not think, therefore, that the erasure of the word "order" can in any way assist the contention that the acceptance was a qualified one. That must be determined by a consideration of the effect of the words written across the bill by the acceptors. D

For the purpose of accepting the bill the appellant company impressed upon it by means of a stamp the words "accepted payable at the Alliance Bank," underneath which the signatures of two directors and the secretary were written. The acceptors wrote across the bill above the word "accepted" the words "in favour of M. L. Delobbel-Flipo only"; between these words and the word "accepted" was written "No. 28." In considering whether the effect of the words "in favour of M. L. Delobbel-Flipo only" was to make the acceptance a qualified one in the manner suggested, regard must be had both to the words used and to the situation in which they are placed. It may be that, if the same words had been found in the body of the acceptance following the word "accepted," they would have amounted to the qualification contended for. The presence of any words in the body of the acceptance would of itself suggest the idea that some qualification of it was intended; but where the words are not inserted in the body of the acceptance, I do not think the same impression is likely to be produced, though the words may, of course, be so clearly intended to qualify the acceptance and so incapable of any other reasonable construction that they would be as effectual for the purpose. But in the present case the words written above the acceptance are not "payable to Delobbel-Flipo only," which is the meaning sought to be attached to them, but "in favour of Delobbel-Flipo only," which do not seem to me necessarily to bear the same meaning. The words "in favour of," when used in relation to a bill of exchange, do not ordinarily mean that it is payable only to the person in whose favour it is said to be drawn; the words are equally applied when the bill is made payable to his order. The words "in favour of," therefore, are properly paraphrased by "payable to, or to the order of"; but then it is that the insertion of the E

A word "only" after Flipo's name would show that this could not be the meaning intended. It must be remembered, however, that between these words and the acceptance "No. 28" was inserted, which separates the words which it is suggested qualify the acceptance from the acceptance itself.

Under these circumstances I do not think that it is impossible that a person taking the acceptance by way of endorsement might suppose that the words "in favour of Delobbel-Flipo only" were like the "No. 28," a mere memorandum inserted by a party to the bill, and not intended to affect the acceptance. It might be supposed to indicate that it was the 28th bill, or No. 28 of the bills accepted "in favour of Delobbel-Flipo only" as distinguished from bills, accepted in favour of Flipo and some other persons. I do not say that this would be the interpretation given to it by a person who carefully and critically considered it, but that is not the question. It is impossible, as I have said, to dissociate the words used from the position and collocation in which they are found, and if these be such as to suggest that the words are a mere memorandum, a person taking the bill, even if he exercised the ordinary care to be expected in such transactions, would not be likely to examine or weigh them with the same care as if they were found in the body of the acceptance. In my opinion the qualification was not made in clear and unequivocal terms, and in such a manner that any person taking the bill if he acted reasonably could not fail to understand that it was accepted subject to that qualification. I think, therefore, the judgment ought to be affirmed.

**LORD MORRIS.** The respondents are French bankers, and sue the appellants, who are a limited company carrying on business in London, to recover the amount due on foot of a bill of exchange for £778 4s. 2d., dated Sept. 12, 1889, drawn by one L. Delobbel-Flipo, accepted by the appellants, and endorsed by Flipo to the respondents, who discounted it for Flipo. I assume that when drawn by Flipo, and when sent by him for acceptance, it contained in the body of the bill the word "order"; but that before accepting the bill the appellants struck out the word "order," the effect of which was that the bill would, except for the Bills of Exchange Act, 1882, s. 8 (4), be a bill payable to Flipo only, and would not be transferable. The appellants state that the bill was so altered in the body by them when accepting, and it was not controverted by the respondents. I attach some importance to this, as an erasure of the word "order" in the body of the bill ought to have attracted the attention of the respondents, and made them scan the acceptance carefully. It is stated that the respondents do not understand the English language, and that their attention was not called to the form of the acceptance till after the dishonour of the bill; but their ignorance of English cannot avoid the natural and reasonable effect of the acceptance. The Queen's Bench Division held that the bill was not negotiable. I concur in that judgment, and in that of LORD BRAMWELL. I read the words "In favour of Mr. L. Delobbel-Flipo only" as indicating an intention that the bill should not be transferable within the meaning of s. 8 of the Bills of Exchange Act, 1882, as equivalent to the words "payable to L. Delobbel-Flipo only"; and I do not attribute any importance to the insertion of "No. 28" between the words qualifying the acceptance and the stamped acceptance. It is not adverted to in any of the judgments of the Court of Appeal: it was most probably the number of bills that had been then accepted.

But it is said that the qualified acceptance should be plain and intelligible, and that, of course, there are several modes of expressing the qualification of the acceptance upon which no question could arise. That is so; but it does not solve the question here, whether in the present case the acceptance fairly and intelligibly indicated, not to a person who could not read it, but to anyone who could, that the acceptance was a qualified one. The qualifying words "In favour of L. Delobbel-Flipo only" immediately precede, are connected with and control the stamped acceptance which follows. They should have attracted the respondents' attention, when they would have observed the form of the acceptance, that is the qualifying



form of the acceptance. The respondents ought to have observed it, and, if they had, they would have read the terms upon which the appellants had affixed their stamped acceptance.

*Appeal dismissed.*

Solicitors: *William Webb & Co.; G. E. Samuel.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

## GOODDEN v. GOODDEN

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), October 27, November 6, 1891]

[Reported [1892] P. 1; 65 L.T. 542; 40 W.R. 49; 8 T.L.R. 32;  
36 Sol. Jo. 60]

*Judicial Separation—Permanent alimony—Jurisdiction to grant—Decree of judicial separation on ground of wife's cruelty—Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), s. 17.*

The power of the ecclesiastical courts to grant permanent alimony to a wife who was divorced a mensa et thoro on account of her misconduct was not taken away from the Divorce Court by the Matrimonial Causes Act, 1857, s. 17. Accordingly, the Divorce Court has jurisdiction to grant permanent alimony to a wife against whom a decree of judicial separation has been pronounced on account of her cruelty.

*White v. White* (1) (1859), 1 Sw. & Tr. 591, and *Dart v. Dart* (2) (1863), 3 Sw. & Tr. 208, overruled.

Decision of JEUNE, J., reported [1891] P. 385, affirmed.

**Notes.** For the relevant provisions of s. 17 of the Matrimonial Causes Act, 1857 (repealed), see now s. 20 of the Matrimonial Causes Act, 1950, as amended by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule.

Considered: *Leslie v. Leslie*, [1911] P. 203.

As to permanent alimony after decree of judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) 427 et seq.; and for cases see 27 DIGEST (Repl.) 602 et seq. For the Matrimonial Causes Act, 1950, s. 20, see 29 HALSBURY'S STATUTES (2nd Edn.) 408; and for the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule, see 38 HALSBURY'S STATUTES (2nd Edn.) 441, 453.

Cases referred to:

- (1) *White v. White* (1859), Sea. & Sm. 77; 1 Sw. & Tr. 591; 1 L.T. 197; 6 Jur.N.S. 28; 164 E.R. 874; 27 Digest (Repl.) 307, 2546.
- (2) *Dart v. Dart* (1863), 3 Sw. & Tr. 208; 32 L.J.P.M. & A. 125; 9 L.T. 23; 9 Jur.N.S. 474; 11 W.R. 551; 164 E.R. 1254; 27 Digest (Repl.) 552, 5019.
- (3) *Covell v. Covell* (1872), L.R. 2 P. & D. 411; 41 L.J.P. & M. 81; 27 L.T. 324; 20 W.R. 894; 27 Digest (Repl.) 603, 5645.
- (4) *Cooke v. Cooke* (1812), 2 Phillim. 40; 161 E.R. 1072; 27 Digest (Repl.) 606, 5682.
- (5) *Kirkman v. Kirkman* (1807), 1 Hag. Con. 409; 161 E.R. 598; 27 Digest (Repl.) 301, 2465.

- A (6) *Furlonger v. Furlonger* (1847), 5 Notes of Cases, 422; 27 Digest (Repl.) 307, 2538.  
 (7) *Waring v. Waring* (1813), 2 Hag. Con. 153; 2 Phillim. 132; 161 E.R. 699; 27 Digest (Repl.) 309, 2574.  
 (8) *Prichard v. Prichard* (1864), 3 Sw. & Tr. 523; 10 L.T. 789; 10 Jur.N.S. 830; 164 E.R. 1878; sub nom. *Pickard v. Pickard*, 33 L.J.P.M. & A. 158; 13 W.R. 188; 27 Digest (Repl.) 307, 2541.
- B

Also referred to in argument:

*Bradley v. Bradley* (1878), 3 P.D. 47; 47 L.J.P. 53; 39 L.T. 203; 26 W.R. 831; 27 Digest (Repl.) 634, 5948.

**Appeal** by the husband from a decision of JEUNE, J.

- C The husband petitioned for judicial separation on the ground of the cruelty of his wife. She, by her answer, denied the cruelty alleged, and charged the husband with cruelty and violence, and asked for a judicial separation on that account. The action was tried on June 12, 1890, and a decree of judicial separation was pronounced on the husband's petition, the custody of the three elder children being given to the father and the custody of the youngest to the mother. On June 18, 1890, an agreement was made between the husband and wife, whereby the husband agreed to pay the wife £2 per week by way of alimony, having regard to his then means and position, and it was expressly stipulated that the agreement should not act as an estoppel, or in any way operate to the prejudice of either party in any application either of them might make for a variation of the amount of the allowance. In the latter part of 1890, the husband came into a considerable estate, and on June 6, 1891, the wife filed a petition asking for an allotment by way of permanent alimony. The husband filed an answer admitting a net income amounting to £1,244, or thereabouts. The wife applied by summons for further particulars of the husband's property, income and outgoings, and the summons was referred to the registrar, who fixed July 30, 1891, to hear the parties. On July 18, 1891, the husband took out a summons to dismiss the petition for alimony, on the ground
- E that the court had no jurisdiction to decree permanent alimony to the wife under the circumstances. The registrar dismissed the petition. The wife appealed to JEUNE, J., who allowed the appeal, and directed the question of allowance to be referred back to the registrar. The husband now appealed from that decision.
- F

*R. H. Pritchard* (*Inderwick, Q.C.*, with him) for the husband.

*Priestley* for the wife.

G

*Cur. adv. vult.*

- Nov. 6, 1891. **KAY, L.J.**, read the following judgment of the court.—The question on this appeal is as to the jurisdiction of the Divorce Court to grant permanent alimony to the wife after a decree for judicial separation on account of the cruelty of the wife. If the decree had been founded on misconduct of the husband, it is conceded that such a grant could have been made. It would be strange if there were jurisdiction in the one case and not in the other. It may not have been customary to grant it to a wife who was at fault, but to say that there is no jurisdiction to do so seems unreasonable. A case was put during the argument by **BOWEN, L.J.**, of a husband who, by the marriage settlement, was entitled during his life to all the income of the wife's property. Can it possibly be the law that the wife must be left totally unprovided for under such circumstances because the court has no jurisdiction to make a provision for her even out of that which before the marriage was her own property? The question depends on the several statutes under which the present Divorce Court was founded. But in construing them, regard must be had to the jurisdiction existing before they were passed. Unless there is something in them expressly taking away powers before exercised by the ecclesiastical courts, we should be reluctant to hold that the Divorce Court has a more limited authority than they had.
- H
- I

In the first Act, by which the Divorce Court is constituted (the Matrimonial Causes Act, 1857, s. 22), it is provided that A

“In all suits and proceedings other than proceedings to dissolve any marriage, the said courts shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.” B

LORD PENZANCE decided, in *Covell v. Covell* (3), that the Divorce Court could, after a decree for judicial separation, entertain a petition for alimony, and he founded his judgment on the previous practice in that respect of the ecclesiastical courts in cases of divorce a mensa et thoro, citing *Cooke v. Cooke* (4) as a case in which this was done. There seems to be no decision that this might not have been done by the ecclesiastical courts when the separation was decreed on account of the misconduct of the wife. In the text-books and digests, there are mentioned two cases of applications to the ecclesiastical court for divorce a mensa et thoro on account of the cruelty of the wife—*Kirkman v. Kirkman* (5) and *Furlonger v. Furlonger* (6). These are referred to by counsel in *White v. White* (1) as the only reported cases. But it seems always to have been competent for the husband to obtain a divorce a mensa et thoro on this ground: *Waring v. Waring* (7). In one of these cases, the divorce was granted, but there was not any application for alimony. The granting or refusing of alimony after a divorce a mensa et thoro seems to have been a matter on which the ecclesiastical courts exercised a large discretion. It appears to have been their practice not to grant alimony to a wife divorced a mensa et thoro on the ground of her adultery, but no doubt is thrown on the jurisdiction of the court to do so: see *White v. White* (1). In applications to Parliament for a divorce a vinculo matrimonii, it was usual to insert in the Bill a provision for permanent alimony to the wife, although the divorce was sought on the ground of her adultery, and such alimony, it is said, was usually granted when the wife brought a fortune to the husband: *MACQUEEN'S PRACTICE OF THE HOUSE OF LORDS* at p. 537. C  
D  
E  
F

Under the new law, three cases have occurred. In *White v. White* (1) and *Dart v. Dart* (2), alimony was refused, and in the latter the Judge Ordinary expressed his opinion that he had no jurisdiction to grant alimony in such a case. However, in *Prichard v. Prichard* (8), the Judge Ordinary refused to follow those decisions and granted alimony, saying that, if there were no precedent, he ought to make one. G

The argument against the jurisdiction was not founded on any words in the statute expressly negating it. There are no such words. It was rested chiefly on s. 17 of the Matrimonial Causes Act, 1857, which provides that application for judicial separation may be made by either husband or wife, and the court may decree judicial separation accordingly, H

“and where the application is by the wife may make any order for alimony which shall be deemed just.”

That seems to contemplate an order for alimony in the decree itself, when such decree was made on the wife's application. In such a case, all the facts would probably be before the court at the original hearing, whereas, if the decree was on the suit of the husband, the wife must make a separate application for alimony, which the husband would not be likely to make for her. It would be giving extraordinary and unnatural force to the language of s. 17 to say that it takes away or even negatives the jurisdiction of the court to grant alimony where the decree for separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision. Section 32, which refers to alimony, and prescribes the mode of granting it, has been treated as referring to a decree for dissolution of marriage only: see per LORD PENZANCE in *Covell v. Covell* (3). Jurisdiction to I



A make such a decree was given for the first time by the statute, and it was necessary to give jurisdiction also to grant alimony in such cases, and that may have been the sole object of this section. But this would leave unaffected the power of granting alimony in a case of judicial separation if the ecclesiastical courts had such power.

B On the whole, we see no reason to doubt that the ecclesiastical courts had jurisdiction to grant permanent alimony in a case like the present, and we cannot construe the recent Divorce Act as depriving the Divorce Court of a like jurisdiction. Our opinion, therefore, is that the Divorce Court has jurisdiction in this case to grant permanent alimony if it shall see fit to do so. Whether it will be proper to make such a grant is not now to be determined, as the reference on the subject is general, and has to be considered before that can be decided. The appeal  
C must be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Darley & Cumberland; G. J. Vanderpump & Son.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

D

E

## Re O'SHEA'S SETTLEMENT. COURAGE v. O'SHEA

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), December 18, 19, 1894]

[Reported [1895] 1 Ch. 325; 64 L.J.Ch. 263; 71 L.T. 827; 43 W.R. 232; 39 Sol. Jo. 168; 2 Mans. 4; 12 R. 70]

F

*Bankruptcy—Protected transaction—Charging order against fund in court belonging to bankrupt—Judgments Act, 1838 (1 & 2 Vict., c. 110), s. 14—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 49 (d).*

G

A charging order under s. 14 of the Judgments Act, 1838, on a fund in court belonging to a bankrupt judgment debtor is not a protected "transaction" within the meaning of s. 49 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 45].

*Bankruptcy—Act of bankruptcy—Notice—Notice of dismissal of petition.*

Per LINDLEY, L.J.: *Quære*, whether a person who has notice that a bankruptcy petition has been dismissed has notice that an act of bankruptcy has been committed by the debtor.

H

**Notes.** Sections 45 and 49 of the Bankruptcy Act, 1883, have been repealed and replaced by ss. 40 and 45 of the Bankruptcy Act, 1914.

Considered: *Wild v. Southwood*, [1895-9] All E.R.Rep. 1193. Applied: *Hosack v. Robins*, [1918-19] All E.R.Rep. 565. Considered: *Re Love, Ex parte Official Receiver v. Kingston-upon-Thames County Court Registrar*, [1951] 2 All E.R. 321.

I

As to the effect of bankruptcy on antecedent transactions, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq.; and for cases see 5 DIGEST (Repl.) 974 et seq. For the Judgments Act, 1838, s. 14, see 13 HALSBURY'S STATUTES (2nd Edn.) 366, and for the Bankruptcy Act, 1914, ss. 40 and 45, see *ibid.* vol. 2 at pp. 376, 382.

Cases referred to:

(1) *Re Wright, Ex parte Arnold* (1876), 3 Ch.D. 70; 45 L.J.Bey. 130; 35 L.T. 21; 24 W.R. 977, C.A.; 5 Digest (Repl.) 990, 7984.

(2) *Re Curtoys, Ex parte Pillers* (1881), 17 Ch.D. 653; 50 L.J.Ch. 691; 44 L.T. 691; 29 W.R. 575, C.A.; 5 Digest (Repl.) 979, 7897.

- (3) *Lucas v. Dicker* (1880), 6 Q.B.D. 84; 50 L.J.Q.B. 190; 43 L.T. 429; 29 W.R. 115, C.A.; 5 Digest (Repl.) 986, 7944. A
- (4) *Re Sedgwick, Ex parte Hobbs* (1892), 8 T.L.R. 623; 9 Morr. 217; 5 Digest (Repl.) 988, 7968.

Also referred to in argument:

- Re Hutchinson, Ex parte Hutchinson* (1885), 16 Q.B.D. 515; 55 L.J.Q.B. 582; 54 L.T. 302; 34 W.R. 475; 3 Morr. 19, D.C.; 5 Digest (Repl.) 874, 7312. B
- Re Matanlé, Ex parte Schulte* (1874), 9 Ch. App. 409; 30 L.T. 478; 22 W.R. 462, L.J.; 5 Digest (Repl.) 991, 7991.
- Krehl v. Great Central Gas Co.* (1870), L.R. 5 Exch. 289; 39 L.J.Ex. 197; 23 L.T. 72; 19 W.R. 1035; 5 Digest (Repl.) 977, 7884.
- Graham v. Furber* (1853), 14 C.B. 134; 23 L.J.C.P. 10; 22 L.T.O.S. 119; 2 W.R. 39; 18 Jur. 61; 2 C.L.R. 10; 138 E.R. 56; 5 Digest (Repl.) 978, 7892. C
- Re Leavesley*, [1891] 2 Ch. 1; 60 L.J.Ch. 385; 64 L.T. 269; 39 W.R. 276, C.A.; 21 Digest (Repl.) 755, 2405.
- Holy v. Barry* (1868), 3 Ch. App. 452; 37 L.J.Ch. 723; 18 L.T. 491; 16 W.R. 654, L.J.J.; 21 Digest (Repl.) 761, 2460.

**Appeal** by the official receiver, as trustee in bankruptcy, from an order of NORTH, J., refusing an application to vary the chief clerk's certificate. D

In November, 1892, S. Hannington obtained a final judgment against W. H. O'Shea in respect of goods sold and delivered, and costs. Not being able to obtain payment of the amount he presented a bankruptcy petition against O'Shea, which was dismissed on April 21, 1893, on the understanding that other petitions then pending against O'Shea in London were also dismissed, and that payment of the judgment debt was made in certain instalments. The London petitions, presented at the date of the dismissal of Hannington's petition, were dismissed in May, 1893. The arrangement for settlement of the judgment debt having fallen through, and there being a fund in court belonging to O'Shea, on June 1, 1893, on the application of Hannington, a charging order nisi was made ex parte by NORTH, J.'s chief clerk, and a date fixed for O'Shea to show cause against the same being made absolute. O'Shea having filed evidence in opposition, the chief clerk declined to grant the charging order absolute. The matter was referred to the judge, and, on July 17, 1893, the order absolute was made. On Aug. 4, 1893, the action of *Re O'Shea, Courage v. O'Shea*, came before NORTH, J., on further consideration, when an inquiry was directed, among others, as to what was due to various creditors on the fund in court (including Hannington) for costs incurred in respect of their securities, and also as to the priority of the various creditors. The inquiry was founded on the chief clerk's certificate, dated Aug. 3, 1893, which included Hannington as a creditor on the fund. On Dec. 13, 1893, a receiving order was made against O'Shea on a petition which had been presented by one Moore, on May 30, 1893. E F G

The official receiver applied by summons to vary the chief clerk's certificate by discharging the finding that the charging order obtained by Hannington was a valid encumbrance on the fund in court. NORTH, J., dismissed the summons on the ground that it had not been shown that, when Hannington obtained the charging order, he had notice of the act of bankruptcy alleged to have been committed by O'Shea. He was, further, not satisfied that the alleged act of bankruptcy had been committed. The official receiver appealed. H

By s. 49 of the Bankruptcy Act, 1883: I

"Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy— . . . (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely—(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be,

A takes place before the date of the receiving order; and (2) The person (other than the debtor) to, by, or with whom the payment . . . was made, executed, or entered into, has not at the time of the payment . . . notice of any available act of bankruptcy committed by the bankrupt before that time."

Muir Mackenzie and Greig for the official receiver.

B S. Hall, Q.C. (A. H. Carrington with him) for the judgment creditor, Han-  
nington.

A. à Beckett Terrell for the trustee of the fund.

C LORD HALSBURY.—I think that we are all agreed with counsel for the official  
receiver as to the construction of s. 49 of the Bankruptcy Act, 1883, that this  
charging order is not a protected transaction, but is really more in the nature of  
an execution. But that will not suit the creditor's case. Looking at the language  
of the section, it is impossible, to my mind, to give any other interpretation to the  
word "transaction." I agree with the view taken by MELLISH, L.J., in *Re Wright*,  
*Ex parte Arnold* (1). It seems to me that a "dealing" is very much the same  
thing when you look at the words with which the term "transaction" is accom-  
panied. I cannot overlook that the general idea founded by the legislature was  
D that what they are really protecting by that section are bona fide dealings with  
the bankrupt as a trader, which, having been completed before notice of the act  
of bankruptcy, ought to be protected. That being the condition of things, I think  
that counsel for the official receiver's point is a good one, and that the answer  
to it is insufficient.

E It becomes unnecessary, therefore, to enter into the other question at all,  
because that depends on a comparison of all the affidavits, and I am not prepared  
to say that my mind is fully made up as to what decision I should arrive at if  
that was the question which I had to determine. We are now in this position,  
that we have not before us the same question which was argued before NORTH, J.  
We are sitting in appeal on a totally different point from that which was raised  
F before him. Furthermore, I have this observation to make, that every part of  
this transaction seems to me to be tainted with irregularity or error. This is not  
a motion to vary the chief clerk's certificate at all. The chief clerk's certificate  
is perfectly right. It seems to me that it ought to have been an application to  
make an order notwithstanding the chief clerk's certificate. The result is that  
I think that the Official Receiver must succeed, but that he must be satisfied with  
not receiving any costs, for we will not give any costs of this appeal.

G LINDLEY, L.J.—I am of the same opinion. The substantial question is  
whether a charging order obtained against a fund in court belonging to the judg-  
ment debtor under the Judgments Act, 1838, s. 14, falls either within s. 45 or s. 49  
of the Bankruptcy Act, 1883, and is valid as against the official receiver acting  
as the trustee in bankruptcy of the judgment debtor, whose title to the fund  
H relates back to a time anterior to the charging order. Unless the charging order is  
protected under one or other of those two sections, it is not protected at all as  
against the official receiver's title relating back to a time anterior to it. Therefore,  
the question which we have to consider is whether it is either a "protected execu-  
tion" within s. 45 or a "protected transaction" within s. 49.

I Section 45 is so worded as to exclude the possibility of holding that this is a  
protected execution within that section. Counsel for the creditor admits that,  
and has very properly not argued it. Therefore, we may disregard s. 45. But,  
although we need not consider s. 45, it will not do to lose sight of the real nature  
of the charging order, which is much more akin to an execution than what is  
commonly called a "dealing or transaction." It must not be forgotten that a  
charging order is obtained in the first instance *ex parte*. The practice is to get  
an order *nisi*, and then to give notice to the debtor. All the subsequent proceed-  
ings are, no doubt, done on notice to the debtor. That being the nature of the step



taken in the present case, I cannot think that it is fairly construing the expression A  
 "contract, dealing, or transaction," in s. 49 of the Bankruptcy Act, 1883, to hold  
 that a step taken behind the back of a debtor and without his sanction, and in  
 which he takes no part whatever, is a "contract, dealing, or transaction by or  
 with" him. I think that that would be stretching the words too far. I do not  
 think that this is a novel decision at all, having regard to *Re Curtoys, Ex parte*  
*Pillers* (2), in which it was held that a charging order was not a dealing under the B  
 previous Bankruptcy Act, 1869, because it was a step in invitum, and not in any  
 fair sense a contract or dealing. In substance and in principle that decision covers  
 the present case. Section 4 of the Act of 1883, re-enacting the language of s. 94  
 of the Act of 1869, has had put into it the word "transaction" after "dealing."  
 I for one very much doubt whether anything has been gained by that. "Contract,  
 dealing, or transaction by or with the bankrupt" means something done—some- C  
 thing in which the bankrupt would not be put in the same position as he is in the  
 case of a charging order. I think that it would be straining the language of s. 14  
 of the Judgments Act, 1838, which says that a man who has a charging order  
 is to have the like remedies as a person would have if he had an agreement of  
 charge, if we were to hold that he was to be deemed a person in whose favour such  
 an agreement has been made. I think that we should be straining the language, D  
 and, the case not being within s. 49, the opposition to this appeal fails. As  
 regards the question of notice we need not go into it.

I am not at all satisfied that the doctrine of *Lucas v. Dicker* (3) could be  
 stretched so far as counsel for the official receiver is asking us to stretch it here,  
 for this reason amongst others, that all the petitions were dismissed. I doubt  
 very much whether *Lucas v. Dicker* (3) and *Re Sedgwick, Ex parte Hobbs* (4) E  
 can be pressed so far as to say that a man who has notice that a bankruptcy petition  
 has been dismissed has notice that an act of bankruptcy has been committed by  
 the debtor. I say no more about that, as it is unnecessary for the determination  
 of the present case.

As regards the costs, the summons is all wrong. The certificate was perfectly  
 right when it was made. Here is a creditor who has a charge on the fund in F  
 court, and his priority is quite right; but, by reason of the bankruptcy of the judg-  
 ment debtor, his charge is invalid as against the official receiver acting as trustee  
 in bankruptcy. The proper form of the application would have been an applica-  
 tion to the court, notwithstanding the chief clerk's certificate, that the money  
 should not be paid out to the judgment creditor, but should be paid out to the  
 official receiver. Having regard, therefore, to the fact that the proceedings are G  
 all wrong in form, and having regard also to the fact that this point was never  
 taken before NORTH, J., and further affidavits having been filed on the subject, I  
 do not think that it would be right to give the official receiver any costs. I think  
 that the case must be treated as fought out on the merits, and that there ought  
 to be an expression of opinion of this court that that charging order is invalid as  
 against the official receiver acting as the trustee in bankruptcy. That would put H  
 the matter right. But I do not think that he should be allowed any costs of the  
 appeal.

**A. L. SMITH, L.J.**—This case comes before this court in a peculiar way. The  
 point argued before NORTH, J., on which he gave judgment, has been practically  
 abandoned. NORTH, J., gave judgment on the hypothesis that the only evidence I  
 and knowledge of an act of bankruptcy was the knowledge of the petition, which  
 itself would contain a statement of the act of bankruptcy which was subsequently  
 dismissed. The learned judge said that he was not quite satisfied on the evidence  
 that any act of bankruptcy had ever been committed at all. Therefore, he gave  
 judgment against the official receiver. Thereupon the official receiver appeals,  
 and the first thing that he does is not to controvert the judgment of NORTH, J., but  
 begins with another affidavit of Captain O'Shea for the purpose of showing, what  
 he had not deposed in his former affidavit, that there was an act of bankruptcy de

A fact on April 7. So he begins with a new statement of facts in this court. Further, counsel for the official receiver takes a point of law, which nobody took on behalf of the official receiver when before NORTH, J., viz., that the charging order is not protected because of either s. 45 or s. 49 of the Bankruptcy Act, 1883. Section 45 of the Act of 1883 is abandoned. The present case is not within that section. But it is said that it is not a transaction protected within s. 49. On that point of law, for the reasons which have been given by LORD HALSBURY and LINDLEY, L.J., the official receiver succeeds. He has, however, brought up an entirely new case, which I do not think NORTH, J., would have recognised if he had been sitting here. Having brought up a new case of facts and law he gets a judgment. But what is right to be done as to costs? I think that the least to be done is not to let him have his costs of the appeal; and, therefore, he gets judgment without costs.

*Appeal allowed.*

Solicitors: *Graham Gordon; Nye & Moreton for J. K. Nye & Treacher, Brighton; Leman, Groves & Leman.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

## Re FRASER. Ex parte CENTRAL BANK OF LONDON

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.JJ.), August 5, 1892]

[*Reported* [1892] 2 Q.B. 633; 67 L.T. 401; 36 Sol. Jo. 714;  
9 Morr. 256]

*Bankruptcy—Petition—Hearing—Petition based on judgment debt—Jurisdiction of court to go behind the judgment.*

*Partnership—Holding out as partner—Retirement of partner—Debt incurred by firm—Judgment obtained against existing and retired partners—Proper steps taken to notify retirement—No evidence of holding out to creditors.*

J. F., a partner in the firm of J. and W. F., retired, the bankers and principal customers of the firm being notified of that fact. J. F. consented to the firm continuing under its existing name. The firm incurred a debt by accepting a bill. The creditors, who had not previously dealt with the firm and had no knowledge of the dissolution of the partnership, obtained judgment under Ord. 14 for the debt against both J. F. and W. F. J. F. did not appear at the hearing of the summons, and an application by him to set aside the judgment was refused. A bankruptcy notice having been served on him by the creditors and a bankruptcy petition presented against him for non-compliance with the notice,

**Held:** (i) the Bankruptcy Court had power to go behind the judgment and inquire into the liabilities upon which it was founded; (ii) as J. F. had taken proper steps to notify his retirement and there was no evidence that he had held himself out to the creditors to be a partner, he had not made himself liable for the debt; and, therefore, the petition should be dismissed.

Per LORD ESHER, M.R.: The doctrine of "holding out" is a branch of the doctrine of estoppel, and its effect is that, if a man holds himself out to be a partner and makes a man act upon that supposition, he cannot afterwards say

that he is not a partner. Estoppel can only be relied on by a person towards whom some act has been done or to whom some statement has been made when he has acted upon the faith of such act or statement.

**Notes.** The Bankruptcy Act, 1883, ss. 4, 7, have been repealed and replaced by the Bankruptcy Act, 1914, ss. 1, 5.

Considered: *Re A Debtor* (No. 686 of 1916), [1916-17] All E.R. Rep. 797; *Re Debtor* (No. 229 of 1927), [1927] All E.R. Rep. 282. Referred to: *Re Debtor* (No. 21 of 1937), *Petitioning Creditor v. Debtor*, [1938] 2 All E.R. 356; *Re A Debtor* (No. 66 of 1955), *Ex parte The Debtor v. Trustee of the Property of Waite*, [1956] 2 All E.R. 94.

As to non-compliance with a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 315-316; as to holding out as partners, see 28 HALSBURY'S LAWS (3rd Edn.) 492-494. For cases see 4 DIGEST (Repl.) 353; 36 DIGEST (Repl.) 445. For the Bankruptcy Act, 1914, ss. 1, 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 324, 332.

Cases referred to:

- (1) *Re Lennox, Ex parte Lennox* (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest (Repl.) 355, 3231.
- (2) *Ex parte Bryant* (1813), 1 Ves. & B. 211; 2 Rose, 1; 35 E.R. 83; 4 Digest (Repl.) 17, 89.
- (3) *Newsome v. Coles* (1811), 2 Camp. 617; 170 E.R. 1271, N.P.; 36 Digest (Repl.) 497, 650.

**Appeal** by the Central Bank of London from an order of Mr. Registrar HOPE dismissing their petition for a receiving order against J. Fraser.

J. Fraser had been a partner in the firm of J. and W. Fraser. Upon his retirement the bankers and principal customers of the firm were notified. He consented to the firm continuing under its existing name and it accepted a bill of exchange. The creditors, the Central Bank of London, had not previously dealt with the firm. An action was brought by them against the firm of J. and W. Fraser upon one bill of exchange. Judgment was obtained, under Ord. 14, against both J. and W. Fraser, J. Fraser not appearing upon the hearing of the summons for judgment. J. Fraser subsequently applied to have the judgment against him set aside, and for leave to defend the action, upon the ground that he had ceased to be a partner when the bill of exchange was accepted. The master, judge, Divisional Court, and Court of Appeal all refused to set aside the judgment.

The Central Bank of London issued a bankruptcy notice against J. Fraser in respect of this judgment, and presented a petition in bankruptcy against him founded on non-compliance with that notice. Upon the hearing of the petition, Mr. Registrar HOPE, after hearing evidence, decided that J. Fraser had ceased to be a partner at the time when the bill of exchange had been accepted, and that he was not liable thereon, or for the debt in respect of which the judgment had been obtained. Notice had been given of the dissolution to the bankers and principal customers of the firm, but the dissolution had not been advertised, the petitioning creditors had not previously dealt with the firm, and did not know of the dissolution. W. Fraser had continued the business under the title of J. and W. Fraser. The registrar dismissed the petition. The petitioning creditors appealed.

The Bankruptcy Act, 1883, provided:

"Section 7 (3). If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

*Hopkinson, Q.C.*, for the petitioning creditors.  
*Mellor* for J. Fraser.



A **LORD ESHER, M.R.**—In this case the petitioning creditors applied to the Bankruptcy Court to make a receiving order against J. Fraser, and the registrar decided not to make the order. Thereupon this appeal is brought. The petitioning creditors had obtained a judgment against the alleged debtor, that judgment being against him as one of the partners in a firm of J. and W. Fraser. That judgment was obtained under Ord. 14 upon admissions by W. Fraser. J. Fraser had applied B to have that judgment, obtained under Ord. 14, set aside as against him, and for leave to defend the action. Upon that application the matter was in the discretion of the court, and the court declined to set aside the judgment upon many grounds, one of the grounds being the delay in making the application.

This judgment, therefore, at law stands good, and cannot now be questioned by J. Fraser in any court but the Bankruptcy Court. When, however, the attempt is C made to use this judgment in the Bankruptcy Court in order to make J. Fraser a bankrupt, the Bankruptcy Court has to exercise the discretion which has been given to it. This duty is imposed upon the Bankruptcy Court by s. 7 of the Bankruptcy Act, 1883. The question, then, is whether the registrar had not, under s. 7, power to refuse this receiving order, and rightly exercised his discretion. The mere fact that there was a judgment at law does not prevent the registrar D from inquiring whether there was or was not a good judgment debt. The Court of Bankruptcy can go behind a judgment debt and can inquire into the liabilities upon which the judgment was founded. The Bankruptcy Court does not set aside the judgment, but goes round it; it has jurisdiction to inquire into the subject-matter upon which it is founded.

It has been argued that, under s. 4 (1) (g), the judgment is the foundation of the E bankruptcy notice; but, when we look at s. 7, it is clear that the court may see that there is no good cause for making a receiving order in spite of the judgment; that is settled by *Re Lennox, Ex parte Lennox* (1). In that case it was decided that, when there is a judgment against a defendant which he cannot set aside, he may ask the Court of Bankruptcy to go behind the judgment, although he cannot get it set aside, and to refuse to make a receiving order. That rule has been based F upon the highest ground, namely, that in the Court of Bankruptcy the court is not dealing only between the debtor and the judgment creditor, but in a manner which affects all the creditors, and it has been said that the court ought not to exercise the tremendous power which it possesses unless it is satisfied that there is a good petitioning creditor's debt after it has gone behind the judgment.

Then, has the registrar in this case exercised that part of his duty properly? or G ought he to have exercised his great powers by making this man a bankrupt? The question is, whether there was a good petitioning creditor's debt due from J. Fraser under the judgment against him. The facts relating to that question have to be dealt with by the registrar. In this case the petitioning creditors took a bill of exchange accepted by the firm of J. and W. Fraser. If J. Fraser was at that time a member of the firm, there was a good debt due from him; if he was H not then a member of the firm, then he was not liable, because it was not his promise to pay. The registrar, when the matter was before him, upon hearing evidence and seeing the witnesses, decided that there was then no partnership, the partnership having been dissolved before the bill was accepted. It was, therefore, proved that this was not the acceptance of J. Fraser.

I It was urged that J. Fraser was liable because he had held himself out to be a partner. The doctrine of "holding out" is a branch of the doctrine of estoppel, and its effect is that, if a man holds himself out to be a partner and makes a man act upon that supposition, he cannot afterwards say that he is not a partner. Estoppel can only be relied upon by a person towards whom some act has been done or to whom some statement has been made, when he has acted upon the faith of such act or statement. There is no evidence whatever that J. Fraser held himself out as a partner to the appellants, and they had never dealt with the firm before.

It is then said that this is *res judicata*. The question previously adjudicated upon was whether this judgment should be set aside as a judgment. The present question is not that at all, but is whether, the judgment standing good at law, it is the proper subject-matter of a bankruptcy petition. That is not the same question. This appeal fails, and must be dismissed. A

**BOWEN, L.J.** I am of the same opinion. B

**KAY, L.J.**—I am of the same opinion. In no case in the Court of Bankruptcy is a judgment conclusive as to the petitioning creditor's debt. As long ago as 1813, in *Ex parte Bryant* (2), it was stated by LORD ELDON (1 Ves. & B. at p. 214) that, C

“proof upon a judgment will not stand merely upon that, if there is not a debt due in truth and reality; for which the consideration must be looked at.” D

As to the argument that the matter is *res judicata* because there had been an attempt to get this judgment set aside which had failed, I cannot see how the matter is on that account any the more *res judicata* than if no such application had been made. E

Then it is said that there was a holding out of himself as a partner by J. Fraser. I think that it was clearly proved that, when the acceptance was given, J. Fraser was not, in fact, a partner with W. Fraser. He had been a partner, but the partnership had been dissolved, and W. Fraser carried on the business. These particular creditors had not dealt with the firm before the dissolution. Does, then, the permission given by J. Fraser to W. Fraser to carry on the business in the old name amount to the holding out of himself as a partner by J. Fraser? According to *Newsome v. Coles* (3) a man does not continue liable as a partner if he has taken the proper steps to notify his retirement. That case is not precisely the same as the present case, because, in that case, there was an advertisement of the dissolution. F

The principle, however, is the same, because here there had been a notification to the bankers and principal customers of the firm of the dissolution. I think, therefore, that the facts of this case bring it entirely within the principle of *Newsome v. Coles* (3), and, that there was no holding out of himself as a partner by J. Fraser, either by words or conduct, which can estop him from saying that he was not a partner. As J. Fraser was not in fact a partner when the acceptance was given, he ought not to be treated in the Bankruptcy Court as a debtor against whom a receiving order should be made. This appeal must be dismissed. G

*Appeal dismissed.*

Solicitors: *Morten, Cutler & Co.; Williams & Neville.*

[Reported by J. H. WILLIAMSON, Esq., Barrister-at-Law.]

## REEVES v. BUTCHER

[COURT OF APPEAL (Lindley, Fry and Lopes, L.JJ.), July 10, 1891]

[Reported [1891] 2 Q.B. 509; 60 L.J.Q.B. 619; 65 L.T. 329;  
39 W.R. 626]

*Limitation of Action—Accrual of action—Loan—Lender entitled to call in whole loan on default of borrower paying quarter's interest for 21 days—Accrual of action to recover principal and interest at end of 21 days.*

By an agreement in writing, under which the plaintiff lent a sum of money to the defendant, the defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay the interest. It was further provided that if the defendant should make default in the payment of any quarterly payment of interest for twenty-one days, the plaintiff might immediately call in the principal. Nothing was ever paid by the defendant on account of interest or principal. Within six years from the end of the term of five years the plaintiff commenced this action to recover the principal and also the interest due thereon for the period within six years before the date of the issue of the writ.

**Held:** the cause of action arose at the expiration of twenty-one days from the date when the first instalment of interest became due, which was the earliest time at which the plaintiff could have brought the action, and, therefore, the plaintiff's claim was barred by the Statute of Limitations.

*Hemp v. Garland* (1) (1843), 4 Q.B. 519, approved.

**Notes.** The Statute of Limitations, 1623, s. 3, has been repealed and replaced by the Limitation Act, 1939, s. 2 (1).

Explained: *Coburn v. Colledge*, [1895-9] All E.R.Rep. 539. Considered: *Dennerley v. Prestwich U.D.C.*, [1929] All E.R.Rep. 647. Referred to: *Henton v. Paddison* (1893), 68 L.T. 405; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833.

As to limitation of actions for the recovery of money lent, see 24 HALSBURY'S LAWS (3rd Edn.) 214; and for cases see 32 DIGEST 337. For the Limitation Act, 1939, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

Case referred to:

(1) *Hemp v. Garland* (1843), 4 Q.B. 519; 3 Gal. & Dav. 402; 12 L.J.Q.B. 134; 7 Jur. 302; 114 E.R. 994; 32 Digest 337, 209.

**Appeal** by the plaintiff, Mrs. Harriett Elizabeth Reeves, from a decision of the Divisional Court (DAY and LAWRENCE, JJ.), holding that her claim against the defendant, Sarah Ann Butcher, for the recovery of money lent with interest was barred by the Statute of Limitations.

The action was commenced on Feb. 13, 1891, to recover a principal sum of £425 18s., with interest thereon at the rate of 7 per cent. per annum, which the plaintiff alleged was due to her from the defendant under an agreement in writing dated April 25, 1880. The defendant pleaded the Statute of Limitations, 1623, s. 3, as a bar to the claim both for principal and interest. The plaintiff, in reply, gave up any claim for interest accrued due prior to Feb. 13, 1885.

By the agreement, after reciting that the defendant had applied to the plaintiff to lend her the sum of £425 18s. for a term of five years (subject to the power to call in the same at an earlier period in the events thereafter mentioned) upon her personal security, which the plaintiff had agreed to do upon the defendant executing the now stated agreement, the defendant agreed with the plaintiff that the defendant would pay to the plaintiff interest on the said sum of £425 18s. from the date of the agreement at the rate of 7 per cent. per annum, by equal quarterly payments. And the plaintiff thereby agreed with the defendant not to call in the said principal sum or any part thereof during the term of five years from the date



of the agreement, if the defendant should so long live, and should duly and regularly pay the said interest. Provided always, that in case the defendant should die before the expiration of the said term, it should be lawful for the plaintiff to call in the said principal sum upon giving to the executors or administrators of the defendant six calendar months' previous notice in writing of her intention so to do; provided also, that in case the defendant should make default in payment of any quarterly payment of interest as aforesaid for the period of twenty-one days next after the same should become payable, it should be lawful for the plaintiff immediately upon the expiration of such twenty-one days to call in and demand payment of the said principal sum and all interest then owing or accruing in respect thereof. No payment in respect of principal or interest had ever been made by the defendant.

The plaintiff brought this action within six years after the expiry of the term of five years mentioned in the agreement, to recover the principal and also the interest for the six years immediately prior to the issue of the writ.

The Divisional Court (following *Hemp v. Garland* (1)) held the plaintiff's claim was barred by the Statute of Limitations, as that statute began to run when an instalment of interest was twenty-one days in arrear. From this decision the plaintiff appealed.

By the Statute of Limitations, 1623, s. 3:

"... all actions of debt grounded upon any lending or contract without specialty . . . shall be commenced and sued within the time and limitation hereafter expressed and not after (that is to say) . . . within six years after the cause of such actions or suit and not after."

*McCall, Q.C.*, and *Morton Smith* for the plaintiff.  
*Loehnis* for the defendant.

**LINDLEY, L.J.**—I am of opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan of five years subject to a provision that, if default is made in punctual payment of interest, the principal shall be recoverable at once. The Statute of Limitations, 1623, enacts that such actions as therein mentioned, including "all actions of debt grounded upon any lending or contract without specialty," shall be brought "within six years next after the cause of such action or suit, and not after." This expression "cause of action" has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* (1), decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

**FRY, L.J.**—We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law. I am of opinion that it is. The agreement contains a stipulation that the lender shall not call in the principal sum for a period of five years, if the borrower should so long live, and should duly and regularly pay the interest. This implies a contract by the borrower that the principal should be paid at once on the death of the borrower, or on default in payment of interest. The subsequent provisos imply a contract by the lender not to enforce payment after the death of the borrower until the expiration of six months' notice, and a contract not to enforce a payment of the capital for default in payment of interest until twenty-one days after such default, thus giving the borrower further time. Subject to these stipulations the implied contract to pay the principal remained in force. The principal, therefore, became payable twenty-one days after the first quarterly instalment of interest became due, and from that time the Statute of Limitations began to run. If authority is wanted, *Hemp v. Garland* (1) is in point.

- A LOPES, L.J.** -The defendant alleges that the cause of action arose more than six years before the action was commenced, and that the action is barred by the Statute of Limitations. When first had the plaintiff a cause of action? When default was made for twenty-one days in payment of an instalment of interest. *Hemp v. Garland* (1) is in point. It is said that this case is not good law, and that it has not been referred to for many years. I think that it has not been referred to because it has been acquiesced in, and it does not appear that it has ever been questioned.

*Appeal dismissed.*

Solicitors: *E. C. Goldring; Marsland, Hewitt & Urquhart* for *W. J. Read*, Blackpool.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

**D**

## Re LEPINE. DOWSETT v. CULVER

[COURT OF APPEAL (Lindley, Bowen and Fry, L.JJ.), December 10, 1891]

**E** [Reported [1892] 1 Ch. 210; 61 L.J.Ch. 153; 66 L.T. 360]

*Administration of Estates—Appropriation of estate to interest of beneficiary—Power of executor—Implied power—No direction in will—Mortgage—Delivery to beneficiary—No transfer executed.*

**F** A testator directed that his estate should be converted and the residue divided among six beneficiaries. The will contained no express power of appropriation. The executor agreed with one of the beneficiaries, but without the consent of the others, to appropriate to him at a proper value a mortgage as part of his share of residue, and handed him the mortgage deed, but executed no transfer of the mortgage to him. At the time when this was done the sum secured by the mortgage was less than the estimated amount of this beneficiary's share of the residue, but some of the assets were subsequently lost and the residuary estate greatly reduced. In an action by another residuary beneficiary for a declaration that the mortgage was part of the assets of the testator's estate,

**G** **Held:** (i) the executor had power, even though there was no express direction in the will, to agree with a beneficiary to appropriate to him one of the assets of the estate provided that it was appropriated at its proper value and that this value did not exceed the amount which it was estimated at the time of appropriation the beneficiary was entitled to receive; and (ii) the appropriation had been completely carried out, even though no transfer had been executed, and the mortgage no longer formed one of the assets of the testator's estate.

**H** **Notes.** In addition to their power of appropriation under the general law, **I** executors now have a statutory power of appropriation under the Administration of Estates Act, 1925, s. 41 (9 HALSBURY'S STATUTES (2nd Edn.) 746).

Considered: *Re Nickels, Nickels v. Nickels*, [1895-9] All E.R.Rep. 783. Referred to: *Re Brooks, Coles v. Davis* (1897), 76 L.T. 771; *Re Beverley, Watson v. Watson*, [1901] 1 Ch. 681; *Re Hall, Foster v. Metcalfe* (1902), 72 L.J.Ch. 74; *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379; *Jopling v. I.R.Comrs.*, [1940] 3 All E.R. 279.

As to appropriation by personal representatives, see 16 HALSBURY'S LAWS (3rd Edn.) 372-376; and for cases see 24 DIGEST (Repl.) 645 et seq.

**Appeal** by G. L. Jackson from a decision of KEKEWICH, J., holding that a mortgage for £700 which he claimed had been appropriated to him by the executor of George Lepine deceased towards satisfaction of his share of the residue had not been validly appropriated. A

By his will, dated Sept. 14, 1887, George Lepine gave the residue of his real and personal estate to J. R. Lewis and the defendant, C. T. Culver, upon trust to convert the same, and after payment thereof of his funeral and testamentary expenses, debts, and legacies, to stand possessed of the residue of the proceeds thereof, as to one-sixth part in trust for his niece, Anne Jackson; as to another sixth part in trust for his nephew, George Lepine Jackson; as to another sixth part in trust for his nephew Finch L. Jackson; as to another sixth part in trust to invest the same in manner therein mentioned, with power to vary the investments, and to pay the income thereof to his sister, Alice L. Jackson, during her life, and after her death for her son, the plaintiff, Thomas F. Jackson; as to another sixth part in trust to invest the same in manner aforesaid, and to pay the income to the plaintiff, George F. Dowsett, during his life, and after his decease in trust for his wife and children as therein mentioned; and as to the remaining sixth part in trust to invest the same in manner aforesaid, and to pay the income to his niece, Mary E. Strange, during her life for her separate use, without power of anticipation, and after her death in trust for her children, as therein mentioned. And the testator appointed J. R. Lewis and the defendant executors of his will. The will contained no express power to appropriate specific portions of the estate to the residuary legatees. The testator died on May 23, 1878, and his will was proved by the defendant alone, J. R. Lewis having renounced probate. The testator's residuary real estate was valued, at his death, at about £1,750, and his residuary personal estate at about £18,163, of which more than £11,000 was invested on mortgage. B C D E

This action was brought by G. F. Dowsett, as tenant for life of one of the settled shares, against the executor Culver, who, as was alleged, had misappropriated some of the estate, and had absconded, for administration of the testator's real and personal estate. Culver did not appear, and an order for administration and a receiver was made in his absence. From the chief clerk's certificate it appeared that the defendant had soon after the testator's death deposited with George L. Jackson, as part of his sixth share of the estate, a mortgage deed dated Jan. 4, 1870, by which a sum of £700 with interest was secured to the testator. No transfer of the mortgage to George L. Jackson had been executed, but he received the interest on the mortgage debt for more than ten years. The defendant had also paid George L. Jackson £2,270 in further satisfaction of his share. In consequence of the loss of some of the assets, it afterwards appeared that the two sums of £700 and £2,270 represented more than the proper amount of his share. The plaintiff asked for a declaration that the mortgage of Jan. 4, 1870, was not properly made over to George L. Jackson in part satisfaction of his share of the testator's estate. On July 29, 1891, the action came on for further consideration before KEKEWICH, J., who held that the arrangement that G. L. Jackson should take the mortgage for £700 as part of his one-sixth share could not be made against the other parties and made an order to the effect that the mortgage formed part of the estate of the testator. From this decision G. L. Jackson appealed. F G H I

. *Cozens-Hardy, Q.C.*, and *Swinfen Eady* for G. L. Jackson.

*Carson* for the plaintiff, T. F. Jackson; and *A. à B. Terrell* for A. F. Jackson.

*W. Baker* for Mrs. Strange and her children.

**LINDLEY, L.J.**—If all that has been said about what executors cannot do were true, executors would find it very difficult to administer any estate at all.

The trusts of this will are simple enough. What appears to have been done is this. The executor, the defendant Mr. Culver, shortly after the testator's death, proceeded to distribute the estate. One of the persons entitled to one-sixth was a person who was of age and capable of entering into an agreement with the executor as to how he should take his sixth; and instead of taking it in cash he and the



**A** executor agree together that he should take a mortgage for £700 in part payment of his legacy. Assuming for the moment that there were assets, and that the £700, in addition to what he got in cash or other securities, did not exceed the amount due to him, what is there amiss with that? What is there to prevent the trustee or the executor making such a transaction? It is said that he cannot do it. It is said that the executor cannot make an agreement with one legatee of one-sixth

**B** without the consent of all the persons entitled to the other five-sixths. But why? If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, "I will not trouble you to turn my share into cash; give me something instead of it which I will take."

Of course, it must be a fair transaction. The legatee says, "There is a mortgage for £700—a very good security—and I am content to take it at £700." Nobody is

**C** likely to give more than twenty shillings in the pound, I suppose, for a mortgage—and he takes it at that price. He does not take a legal transfer of the mortgage it is true; but he takes the deed. For more than ten years he takes the interest on the mortgage, and now because the executor has some ten years after the death of the testator absconded and some of the residuary estate cannot be found—some of the settled shares I suppose have been made away with—it is said on behalf of the

**D** persons entitled to the settled shares, "You, the legatee, who have been satisfied, must refund or give up the mortgage security." On what conceivable principle is he to do that? Just consider what has been done. The inference from that which took place is irresistible. The true inference is, that the legatee took this mortgage in satisfaction of his legacy to the extent of £700. It might have been put in a more formal shape. The executor might have said to the legatee, "I can sell you

**E** this mortgage for £700. Will you buy it, and will you agree to set off your legacy against the purchase money." All that might have been gone through, but the substance of that has been done; and to say that an executor cannot enter into a transaction like that with a residuary legatee or any other legatee is tantamount to saying that an executor cannot do what any other business man could do with similar obligations.

**F** I cannot accede to the proposition that the executor in any way failed to discharge his duty to that legatee or to the other legatees, provided, as I said before, he did not give any legatee more than his share. That is the whole of this transaction. The claim is based upon the theory that the three legatees who were entitled to receive their shares have not received them; and there is nothing in the pleadings seeking in any way to disturb what has been done. The pleadings are

**G** simply addressed to getting in and protecting what remains, and in the course of the inquiry the facts to which I have alluded have come out, and the learned judge has taken away from the legatee the mortgage which he has received in satisfaction of this legacy, because forsooth he has not got a legal transfer. Whether this gentleman will ever be able to get a legal transfer from Mr. Culver, who has absconded, I do not know; he may perhaps be able to get a vesting order; I do not

**H** say anything about that. He is not asking us for anything; he is only asking to remain as he is. It appears to me that those who have brought him here, who have raised this controversy and sought to deprive him of his mortgage, must pay the whole of the costs here and below.

**BOWEN, L.J.**—I should not add anything except that we are differing from the

**I** judgment of a very experienced judge, and, therefore, I wish to add my view of the matter. The case of T. F. Jackson and A. F. Jackson has been argued with the greatest ingenuity by their counsel, and I cannot conceive any better way of putting their case. But the more you look at the case and sift it, the more clear it becomes to my mind that it breaks down. They have endeavoured to assimilate this to the case of a voluntary assignment of a beneficial interest in a mortgage without consideration, and one not completed by a transfer of the legal estate.

The first observation that occurs to me is, that this is not the case of a voluntary assignment without consideration. It seems to me that there is ample considera-

tion of a character which will appear in a moment; it was a completed transaction, and if it is equivalent to a payment, it is quite certain that this cannot now be set aside. It seems to me that it is accord and satisfaction; that is equivalent to a payment. The transaction had been effected by the handing over of these deeds to the legatee, and his receipt of the amount of interest in respect of the mortgage. It cannot be doubted that the executor might have sold the mortgage by private contract for what it was worth. It cannot be doubted that he might sell it to the legatee, and agree to set off the purchase money against the legacy; and then he might further agree with the legatee that he should hold the legal estate for him. The whole of that can be put in a short compass, and it is exactly what has been done. The right to the legal estate is not a right which after this transaction any longer depends upon the will; it depends upon the transaction itself. I cannot myself see how executors could carry on business if this sort of arrangement was to be invalid.

**FRY, L.J.**—I also find myself unable to agree with the learned judge. There are two propositions which have been put before us in various forms by the learned counsel who have argued for T. F. Jackson and A. F. Jackson which I think are perfectly true. Supposing an executor or trustee divides the estate in such a manner as that he gives to one legatee or cestui que trust property or securities worth twenty shillings in the pound, and he gives to another rubbish and trash which is not worth its nominal value or the value at which he takes it, I have no doubt that such trustee or executor is guilty of a breach of trust, and that any legatee who takes the good securities with notice of what has been done may be made liable for that breach of trust. That is one proposition that I think is perfectly true. Another that has been put forward from time to time is to this effect: Where there is an imperfect gift made and the legal estate remains in the donor, there being no consideration, the whole transaction being in the nature of a gift, there the court will not assist the donee to perfect that gift. This again is a perfectly true proposition of law. But neither of these two propositions of law seems to me to have the remotest relation to the present discussion.

In the present case, for anything that appears, the trustee did his duty at the time at which he divided the estate. There is no suggestion before us that he improperly appropriated the funds to the settled shares, or that he showed any favour whatever to George Lepine Jackson, to whose share he appropriated this mortgage. It appears to me that all that is before us is this: The executor, being under an obligation to realise the estate and to get it in, got in this mortgage by sale of it to George Lepine Jackson, and George Lepine Jackson agreed to set off the purchase money which he was to pay for that mortgage against his share of the estate. If that was done honestly and righteously and equally between all the cestuis que trust, that was an unobjectionable transaction—that is all that it was. I think, therefore, that there is nothing whatever to be complained of in this transaction. I am bound to say that I cannot assent to the view which the learned judge has taken of the obligation of trustees. I agree as fully as it can be expressed that it is the duty of trustees to hold a perfectly even hand between all their cestuis que trust; but, provided they do that, there is no objection whatever to their entering into arrangements which are of the nature of the sale of a particular asset which they are bound to convert to a cestui que trust, setting off the purchase money for that asset against the portion which the cestui que trust is entitled to in the testator's estate. I think, therefore, that the judgment below must be reformed by striking out the declaration of the learned judge to the effect that this forms part of the estate of the testator.

*Appeal allowed.*

Solicitors: *Marshall, Parry-Jones & Co., for Bridgman & Co., Chester; Warren, Gardner & Murton, for Hallett, Creery & Co., Ashford; E. A. Fuller; Sole, Turner & Knight.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

A

STAMFORD, SPALDING AND BOSTON BANKING CO., LTD.  
v. SMITH

[COURT OF APPEAL (Lord Herschell, Lindley and Kay, L.J.J.), February 16, 1892]

B

[Reported [1892] 1 Q.B. 765; 61 L.J.Q.B. 405; 66 L.T. 306;  
56 J.P. 229; 40 W.R. 355; 8 T.L.R. 336; 36 Sol. Jo. 270]

*Limitation of Action—Acknowledgment—Part payment—Payment to stranger—  
Promissory note assigned without maker's knowledge—Payment by maker  
to original holder.*

C

A part payment only postpones the running of time under the Statute of Limitations if it is made to the creditor or his agent so as to be a pro tanto discharge of the debt. Where, therefore, part payments of principal and interest were made by the maker of a promissory note to the original holder after such holder had, without the knowledge of the maker, assigned the note,  
**Held:** the payments did not postpone the running of time.

D

Per LORD HERSCHELL: There may possibly be an exception to this general rule, e.g., where a payment is made to a person as filling a representative capacity or who is believed to fill a representative capacity, and is received by that person for the benefit of those whom he represents, it may be that such payment enures for the benefit of the persons for whose benefit it was intended to be made.

E

Per LINDLEY, L.J.: A mistake by both parties would not prevent the payment having the effect that it was intended to have.

*Tanner v. Smart* (1) (1827), 6 B. & C. 603 and *Godwin v. Culley* (2) (1859), 4 H. & N. 373, followed.

*Clark v. Hooper* (3) (1834), 10 Bing. 480, discussed.

F

**Notes.** The Statute of Limitations, 1623, s. 3, has been repealed and replaced by the Limitation Act, 1939, s. 2 (1). The Statute of Frauds Amendment Act, 1828, s. 1 (Lord Tenterden's Act) was repealed by the Limitation Act, 1939, and the provisions as to acknowledgments and part payments are contained in ss. 23–25 of that Act.

G

Referred to: *Re Beavan, Davies, Bankes & Co. v. Beavan*, [1912] 1 Ch. 196; *Lloyd v. Coote and Ball*, [1915] 1 K.B. 242; *Bowring-Hanbury's Trustee in Bankruptcy Bowring-Hanbury*, [1943] 1 All E.R. 48.

As to part payment, see 24 HALSBURY'S LAWS (3rd Edn.) 304 et seq.; and for cases see 32 DIGEST 390. For the Limitation Act, 1939, s. 2, 23–25, see 15 HALSBURY'S STATUTES (2nd Edn.) 1160, 1184–1188.

Cases referred to:

H

(1) *Tanner v. Smart* (1827), 6 B. & C. 603; 9 Dow. & Ry.K.B. 549; 5 L.J.O.S.K.B. 218; 108 E.R. 573; 32 Digest 364, 490.

(2) *Godwin v. Culley, Edwards and Godwin v. Culley* (1859), 4 H. & N. 373; 157 E.R. 886; 32 Digest 369, 529.

(3) *Clark v. Hooper* (1834), 10 Bing. 480; 4 Moo. & S. 353; 3 L.J.C.P. 159; 131 E.R. 981; 32 Digest 391, 717.

I

Also referred to in argument:

*Meggison v. Harper* (1834), 2 Cr. & M. 322; 4 Tyr. 94; 3 L.J.Ex. 50; 149 E.R. 784; 32 Digest 387, 692.

*Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662; 1 Jur. 940; 160 E.R. 560; sub nom. *Greenfell v. Girdlestone*, 7 L.J.Ex. Eq. 42; 32 Digest 355, 377.

*Houcutt v. Bonser* (1849), 3 Exch. 491; 18 L.J.Ex. 262; 154 E.R. 939; sub nom. *Howkett v. Bonsor*, 13 L.T.O.S. 97; 32 Digest 399, 777.

*Davies v. Edwards* (1851), 7 Exch. 22; 21 L.J.Ex. 4; 18 L.T.O.S. 64; 15 Jur. 1014; 155 E.R. 839; 32 Digest 380, 626.



- Green v. Humphreys* (1884), 26 Ch.D. 474; 53 L.J.Ch. 625; 51 L.T. 42, C.A.; A  
32 Digest 361, 449.
- Smith v. Thorne* (1852), 18 Q.B. 134; 21 L.J.Q.B. 199; 16 Jur. 332; 118 E.R.  
50; 32 Digest 367, 518.
- Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; 25 L.T. 319;  
19 W.R. 1130, L.J.J.; 32 Digest 358, 412.
- Morgan v. Rowlands* (1872), L.R. 7 Q.B. 493; 41 L.J.Q.B. 187; 26 L.T. 855; B  
20 W.R. 726; 32 Digest 380, 627.
- Cripps v. Davis* (1843), 12 M. & W. 159; 13 L.J.Ex. 217; 2 L.T.O.S. 125; 152  
E.R. 1152; 32 Digest 371, 547.
- Williams v. Griffiths* (1849), 3 Exch. 335; 18 L.J.Ex. 210; 154 E.R. 872; 32  
Digest 370, 542.

**Appeal** by the plaintiffs, the Stamford, Spalding and Boston Banking Co., Ltd., C  
from a decision of VAUGHAN WILLIAMS, J., holding that their action against the  
defendant Alfred Smith on a promissory note was barred under the Statute of  
Limitations.

The action was brought by the plaintiffs, as holders of a promissory note for  
£200, with interest, dated Oct. 9, 1879, made by the defendant, payable on demand  
to Charles Konow or his order. Konow had endorsed the note without the know- D  
ledge of the defendant to the Northamptonshire Union Bank as security for  
the overdraft of his current account. In 1882 Konow transferred his account to  
the plaintiffs, who paid off his overdraft with the Northamptonshire Bank, and  
took over the securities which that bank held, including the note, which was  
endorsed to the plaintiffs. In 1883 the defendant commenced to pay to Konow E  
interest and principal on the note by instalments, and ultimately paid him the  
balance on Dec. 6, 1889. Konow gave the defendant a receipt for the whole  
amount, but did not give up the note. He said that he had not got the note with  
him, but told the defendant that he would destroy it. Konow died shortly after-  
wards. The plaintiffs subsequently notified to the defendant that they were the F  
holders of the note and requested him to meet it; but they credited him with the  
sum of £50 which he had paid to Konow on account on Nov. 9, 1885, and which  
Konow had paid to the plaintiffs, and they had entered against his security.

As a defence to the action the defendant set up the plea of the Statute of Limitations G  
(1623), the note being more than six years old, and contended that the  
payments to Konow were no acknowledgment of indebtedness to the plaintiffs.  
The plaintiffs relied on the payment of £50 on Nov. 9, 1885, as an acknowledgment  
to take the case out of the statute. The action was tried before VAUGHAN  
WILLIAMS, J., sitting without a jury, at the Northamptonshire Summer Assizes,  
1891. He held that the action was barred under the Statute of Limitations. From  
that decision the plaintiffs appealed.

*Lindsell (W. Graham with him)* for the plaintiffs.

*Etherington Smith and John Raymond* for the defendant.

**LORD HERSCHELL** shortly stated the facts above set out, and continued: The H  
action on the promissory note is *prima facie* barred by the Statute of Limitations.  
But the plaintiffs seek to avoid the operation of the statute by saying that there  
has been a part payment made by the defendant in respect of the note which takes  
the case out of the statute. The payment relied on was made on Nov. 9, 1885. I  
If that payment can be relied on by the plaintiffs as a part payment or acknowl-  
edgment of the debt, then, as it was made within six years before this action was  
brought, it would take the case out of the statute. That payment, however, was  
not made to the plaintiffs who now hold the note. It was made to Konow, the  
original holder of the note. The plaintiffs, however, contend that payment being  
made in respect of the note, amounted to an acknowledgment that the remainder  
of the debt was still due, and that that acknowledgment enures to the benefit of  
the plaintiffs. The balance of the note was at the later date paid to Konow by

A the defendant, who did not know that the note had been endorsed away by Konow. The plaintiffs argue that, although the payment was not made intentionally to Konow as agent for them, or with the knowledge that they had any interest in the note, but was made in the belief that the debt was still due to Konow, yet nevertheless the plaintiffs can take advantage of the payment as being in effect an acknowledgment by the defendant that he still owed the remainder of the debt to anyone who was entitled to sue upon the note.

B It cannot now be disputed that an acknowledgment, in order to exclude the operation of the Statute of Limitations, must be absolute and unconditional, and one from which a promise to pay the debt can be inferred. It was argued by counsel for the plaintiffs that the fact of the acknowledgment was the material thing, and that it did not signify to whom it was made. Such appears to have been the law at one time. There are certainly dicta to that effect. But, in my opinion, the law is now well settled that an acknowledgment by way of part payment to a stranger will not be sufficient. The acknowledgment must be such that a promise to pay, made either with the creditor or his agent, can be inferred from it. The law is so stated by POLLOCK, C.B., in *Godwin v. Culley* (2).

C Counsel for the plaintiffs relied mainly on *Clark v. Hooper* (3), where a payment had been made to a person as administratrix who had not, in fact, taken out letters of administration in the proper diocese. There are no doubt dicta in some of the judgments in that case that the payment had the same effect as an acknowledgment made to a third person, and that that was sufficient. In my opinion the decision in that case cannot be supported on that ground, although the decision itself may be supported on the ground (which I will presently explain) of its being an exception to the general rule.

E If then an acknowledgment, in order to be sufficient, must amount to a promise to pay made either with the creditor or his agent, it would seem a fortiori that the payment must be a payment made either to the creditor or his agent. Indeed, if it were not made to the creditor or his agent, it would be a misuse of language to call it a payment at all. Unless it operated as a discharge wholly or pro tanto of the obligation in respect of which it was given, it could not be a payment. Money might pass, but there would be no payment—no discharge of the debt—unless it was received by the person to whom the debt was due, or by an agent on his behalf.

F There may, however, possibly be an exception to this general rule of law; e.g., where a payment is made to a person as filling a representative capacity, or who is believed to fill a representative capacity, and is received by that person for the benefit of those whom he represents. It may be that such payment enures for the benefit of the persons for whose benefit it was intended to be. *Clark v. Hooper* (3) may be supported on that ground. The payment in that case was intended to be for the benefit of the estate of the deceased creditor. At the time the payment was made there was no person to whom the payments due to the estate could properly be made. But the intention of the debtor in making the payment was to make a payment in discharge of his debt due to the estate, and not to the administratrix for her own benefit. And it might well be that such payment enured for the benefit of the estate, and that when a proper administration was taken out the proper administrator could avail himself of it.

H In my opinion, therefore, the acknowledgment or payment must be made to the creditor or to some person on his behalf. In the present case, however, the defendant, when in 1885 he made the payment to Konow, did not intend to pay it to him in any representative capacity. He paid it in the belief that he was discharging the liability he thought himself to be still under to Konow. There was no promise or acknowledgment to anyone except Konow. The plaintiffs, therefore, can only establish their case by showing that Konow was their agent. At the time of payment Konow was admittedly not their agent; and, therefore, at that time there was really no payment at all, and the plaintiffs could have the next day sued the defendant for the full amount of the note. But it is said on behalf

of the plaintiffs that they afterwards adopted the transaction and accepted Konow as their agent, and treated the payment as a payment made in respect of the note. I am not satisfied that that would be sufficient. But even if it were sufficient, then the plaintiffs are in this difficulty, that, if they adopt Konow as their agent for receiving the payment made by the defendant in 1885, they cannot repudiate the subsequent transactions in which Konow, acting just as he had done before, received other payments from the defendant, who had received no notice from the plaintiffs that they had put an end to Konow's agency. The plaintiffs would, therefore, be bound by Konow's receipt of the balance on the subsequent occasion. The plaintiffs have consequently not established any case for excluding the operation of the statute, and their action is accordingly barred by the statute. The appeal must be dismissed with costs.

**LINDLEY, L.J.**—I am of the same opinion. It would be very hard on the defendant if he were compelled to pay the note over again. The note had been negotiated without the defendant's knowledge, and he had honestly paid the person whom he believed to be his creditor. The question is, whether he can make a good defence under the Statute of Limitations? I am happy to think that he can. This is one of the few cases in which the Statute of Limitations comes in aid of an honest defence. The question resolves itself into this, whether the payment made in 1885 by the defendant to Konow can be treated by the plaintiffs as such an acknowledgment of the defendant's indebtedness as would prevent him setting up the Statute of Limitations as a defence.

There was a time no doubt when an acknowledgment to a third person would have been held sufficient. But since *Tanner v. Smart* (1) the law has changed in that respect, and it is now well settled that to take the case out of the statute the payment must be a payment to the creditor or his agent so as to be a pro tanto discharge.

*Clark v. Hooper* (3) only amounts to this, that a mistake made by both parties would not prevent the payment having the effect that it was intended to have. The payment there was made and intended to operate as a payment to an administrator, although he had not taken out administration in two counties. It was made to him as administrator and was held good. I agree, however, that the grounds given for the decision cannot now be supported. But I see no reason to quarrel with the decision itself.

**KAY, L.J.**—I think that the short and simple answer to the plaintiffs' case is this: The money handed by the defendant to Konow was not a payment of part of the debt. There are two modes in which you may escape the operation of the Statute of Limitations, namely, by part payment or a written acknowledgment. Lord Tenderden's Act, s. 1, provided that no acknowledgment or promise by words only should be deemed sufficient evidence of a new contract whereby to take any case out of the operation of the Statute of Limitations. But Lord Tenderden's Act did not take away or lower the effect of any payment of principal or interest. Before Lord Tenderden's Act a part payment of the debt within the statutory limit of time was held sufficient to take the case out of the Statute of Limitations. But it was never held that the mere handing over of money to a third person—not the creditor or his agent—was a payment from which a promise to pay could be inferred. The only payment from which a promise to pay could be inferred was a payment which discharged the debt in part. A mere handing over of money to a third person is not payment of a part of the debt, and is no bar to the Statute of Limitations. I think the Statute of Limitations is a complete answer to the present claim.

*Appeal dismissed.*

Solicitors: *Smith, Fawdon & Low* for *Becke & Green*, Northampton; *Powell & Rogers* for *W. B. & W. R. Bull*, Newport Pagnell.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]



A

Re TAYLOR, STILEMAN AND UNDERWOOD. Ex parte  
PAYNE COLLIER

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), January 24, February 4, 1891]

B

[Reported [1891] 1 Ch. 590; 60 L.J.Ch. 525; 64 L.T. 605;  
39 W.R. 417; 7 T.L.R. 262]

*Solicitor—Lien—Extent of lien—Taxable costs, charges, and expenses—Waiver of lien—Acceptance of security without express reservation of lien.*

C

C. applied for an order that her former solicitors should deliver up documents in their custody belonging to her on payment of her bill of costs amounting to £20 12s. 9d. The solicitors claimed a lien for a sum of £81 14s. 2d. which they said was due from C. and in respect of which they delivered an account showing cash advances and other items besides their taxable costs charges and expenses. The solicitors, without expressly reserving their lien, had taken from C. as security for the amount owing from her a charge on a policy of life assurance and a promissory note from C. and her husband.

D

**Held:** (i) a solicitor's lien on documents extended only to such items as were properly included in a bill of costs, i.e., his taxable costs, charges, and expenses which might be moderated by the master, but not to ordinary advances or loans; and (ii) whether or not a lien was waived depended upon the intention expressed or inferred, on the position of the parties, and on the circumstances of the case; in the absence of contrary evidence, the solicitors must be presumed to have waived their lien by accepting such a security without expressly reserving the lien.

E

Per LINDLEY, L.J.: If a banker asked for a security, I should not understand that he was giving up his lien unless something to that effect was said.

F

*Cowell v. Simpson* (1) (1809), 16 Ves. 275, applied.

**Notes.** The Solicitors Act, 1860, s. 28, has been repealed and is now replaced by the Solicitors Act, 1957, s. 72.

G

Considered: *Re Lumley* (1892), 37 Sol. Jo. 83. Applied: *Bissill v. Bradford and District Tramways Co.* (1893), 9 T.L.R. 337; *Re Hanbury, Whitting and Nicholson* (1896), 75 L.T. 449. Followed: *Re Douglas Norman*, [1898] 1 Ch. 199. Considered: *Re Morris*, [1908] 1 K.B. 473. Referred to: *Re Kingdon and Wilson*, [1902] 2 Ch. 242.

As to a solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 42 DIGEST 271, 272. For the Solicitor's Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116.

H

Cases referred to:

- (1) *Cowell v. Simpson* (1809), 16 Ves. 275; 33 E.R. 989, L.C.; 42 Digest 271, 3051.
- (2) *Robarts v. Jefferys* (1830), 8 L.J.O.S.Ch. 137; 42 Digest 272, 3055.
- (3) *Worrall v. Johnson* (1820), 2 Jas. & W. 214; 37 E.R. 609; 42 Digest 273, 3066.
- (4) *Stevenson v. Blakelock* (1813), 1 M. & S. 535; 105 E.R. 200; 42 Digest 260, 2938.
- (5) *Balch v. Symes* (1823), Turn. & R. 87, 92; 37 E.R. 1028, L.C.; 42 Digest 262, 2960.

I

Also referred to in argument:

- Chase v. Westmore* (1816), 5 M. & S. 180; 105 E.R. 1016; 32 Digest 222, 64.  
*Angus v. McLachlan* (1883), 23 Ch.D. 330; 52 L.J.Ch. 587; 48 L.T. 863; 31 W.R. 641; 32 Digest 236, 208.

*Re Galland* (1885), 31 Ch.D. 296; 55 L.J.Ch. 478; 53 L.T. 921; 34 W.R. 158, A C.A.; 42 Digest 263, 2972.

*Jones v. Peppercorne* (1858), John. 430; 28 L.J.Ch. 158; 32 L.T.O.S. 240; 5 Jur.N.S. 140; 7 W.R. 103; 70 E.R. 490; 42 Digest 818, 282.

*Brandao v. Barnett* (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 32 Digest 227, 111.

**Appeal** by Mrs. Payne Collier from a decision of STIRLING, J., refusing an application by her that she might be at liberty to pay into court the sum of £20 12s. 9d. without prejudice to the taxation of the bill of fees, charges, and disbursements delivered to her by Messrs. Taylor, Stileman, and Underwood, and that they might be ordered to deliver up to her or her solicitors all deeds, books, papers, and writings in their custody or power belonging to her.

Messrs. Taylor, Stileman, and Underwood had, for some time, acted as solicitors for Mrs. Payne Collier in various matters and actions and claimed a lien on certain papers on account of costs. They had delivered an account to her from which there appeared to be a sum of £81 14s. 2d. due from her to them. The account included a bill of costs of £20 12s. 9d., and also cash advances by the firm to Mrs. Collier, and among other things a sum of £11 11s. paid to the sheriff, who had taken possession of furniture in respect of a judgment against her husband. STIRLING, J., refused the application. The applicant appealed. It appeared on the appeal that Messrs. Taylor, Stileman, and Underwood had taken a charge on a policy of assurance on the life of Mrs. Payne Collier to secure the sum of £200 due from her to the firm with interest at 5 per cent.; they also held a promissory note for £200 of Mr. and Mrs. Payne Collier bearing interest at 5 per cent. as security for what was due from her. When taking the charge, the solicitors had not expressly resumed their lien.

*Cozens-Hardy, Q.C.*, and *E. Macnaghten* for Mrs. Payne Collier.

*Graham Hastings, Q.C.*, and *Maidlow* for the solicitors.

**LINDLEY, L.J.**—This is an appeal from a decision of STIRLING, J., refusing to direct or order certain solicitors to hand over their client's papers upon her paying into court the amount due from her to them in respect of their costs, and the controversy which has arisen has assumed rather a serious shape.

We have first of all to consider for what a solicitor has any lien at all. I take it that he has a lien for all his costs, charges, and expenses incurred by him as the solicitor of his client. I take it that he has no lien for ordinary advance or loans. His taxed costs, charges, and expenses, or rather his taxable costs, charges, and expenses, will not exclude advances. He makes advances for his client in the course of the business, such as for counsel's fees and other matters, all of which are taxable by the master in this sense, that they can be moderated. They are subject to the jurisdiction of the taxing master to moderate, and whatever costs, charges, and expenses can be so dealt with, it appears to me that he has a lien for upon his client's papers. It is a general lien upon all papers for all such costs, charges, and expenses; but the lien does not extend to other advances which do not come under the category which I have described. I come to this conclusion not only from the authorities, but upon the express language of the Solicitors Act, 1860, s. 28, which enables a solicitor to obtain a lien on property preserved or recovered, but only for his taxed costs, charges, and expenses, and I think these words express accurately the kind of costs for which he has a lien.

He claims in this case a lien for advances which it is alleged by him come under that category, and I thought at one time that as to the sum £11 11s. it was such an advance, because it was stated to us that there was a judgment against his client, the sheriff was in possession, and he as solicitor paid the sheriff out. If that were so, it strikes me that that would be a charge properly taxable by the taxing master. But it now appears that it is a judgment against his client's husband, and the wife says to him, "Go and pay the sheriff out," he having taken

A possession of the furniture. The sum advanced by the solicitor for such a purpose has nothing to do with costs, charges, or expenses properly taxable as between him and his client. It would be a loan. It would not be taxable by the taxing master, nor open to moderation by him. The eleven guineas, therefore, appear to be under the category of an advance for which there is no lien.

B There is another point, an important one, raised by counsel for Mrs. Payne Collier. He says, that whatever lien these solicitors had was waived by reason of their having taken a security, the security being a promissory note given to them by the solicitors' client, who was a lady, a married woman, and by her husband a promissory note bearing interest at 5 per cent., and also a charge upon a certain policy. He says that taking that security was a waiver of whatever lien the solicitors would otherwise have, and for that proposition he relied mostly C on *Roberts v. Jeffreys* (2), a decision of SIR JOHN LEACH. The precise point which arose in that case appears to be the exact point which arises here. It is a question between a solicitor and client. There was a lien claimed by the solicitor, the client gave a promissory note payable on demand and bearing interest at 5 per cent. SIR JOHN LEACH said that such a security was a waiver of the lien.

D Whether a lien is waived or not depends upon the intention expressed or inferred, upon the position of the parties, and the circumstances of the case. In this particular instance we are dealing with a solicitor and his client, and that appears to me to be very clear and precise. It strikes me, I confess, that if a solicitor takes from his client such a security as this solicitor has taken (a promissory note bearing interest and a charge upon a policy), that *prima facie* in every sense he does waive his lien. It appears to me that this is a right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to his client to explain E clearly the effect of every document. If a banker asked me for a security I should not understand he was giving up his lien, unless something to that effect was said; but, bearing in mind the position of the parties, it appears to me that, having regard to the decision of SIR JOHN LEACH, we are justified in saying that, in the absence of all evidence to the contrary, the lien was waived upon that F ground. It appears to me, therefore, that counsel is right, and that on both points this appeal ought to succeed.

**LOPES, L.J.**—A solicitor has a lien for all his taxed costs, charges, and expenses, and the lien clearly does not extend to any money advanced for any other purposes, that is to say, any purposes for which the solicitor is employed.

G In this case there was a sum of eleven guineas, an amount paid by the firm of solicitors in question in order to release their client's furniture, and for some time I thought that that sum might be brought within the rule that I have laid down; but when that matter came to be more particularly investigated it was found that the judgment was not against the wife but against the husband, and the judgment being against the husband the wife's furniture was taken, and therefore she told her solicitor, and asked him to pay the sheriff out—not, I understand, H at all in his capacity of a solicitor, but in the same way that an ordinary friend might advance money in order to release her furniture. It appears to me that that amount was not a taxable item. It was a voluntary advance made by the solicitor, not as a solicitor but, as I have already stated, in the way that an advance might be made by any friend of the wife. I am of opinion, therefore, that the lien only I applies to taxable costs, charges, and expenses which may be reduced or moderated by the taxing master, and that on that point counsel for Mrs. Payne Collier is right.

There is another point raised in regard to a security taken by the solicitor. It is stated that the lien was lost in this case because he had taken a security. With regard to that matter, it appears to me that regard must be had to the particular circumstances of the case, and whether there are circumstances which are sufficient to raise an inference (an inference which may be rebutted) that the parties intended to abandon the old security. Among other things there is here a



promissory note payable on demand with interest at 5 per cent. running from the time of the advance, and also a security on a policy, and it is not a promissory note merely given by the wife, but by her husband, and this is a security larger, and, in my mind, very different to that which was given by the lien. It is only a fair inference to draw from the facts I have stated that there was an intention between the parties to abandon the lien, and to rely upon the security. On that point, too, counsel is right. With regard to this matter, I may say that we are deciding this point with regard to the security strictly in accordance with the decision of *Roberts v. Jeffreys* (2).

**KAY, L.J.**—There are two very important points raised in this case: one as to the extent of the ordinary lien of a solicitor; and the other as to how far that lien may be destroyed by taking another security. I do not find in any of the cases, nor in any of the books which I have had an opportunity to refer to during the course of this appeal, any exact definition of how far the lien of a solicitor extends. In one of the text-books to which I referred—**MORGAN AND WURTZBURG ON COSTS**—the doctrine stated, at p. 551, is merely this:

“The solicitor has a lien on the papers of his client in his hand for the amount of his costs.”

In another text-book I find “for his professional charges”; and the nearest definition which I can discover is by **SIR THOMAS PLUMER**, in *Worrall v. Johnson* (3), where he says (2 Jac. & W. at p. 218):

“There are two kinds of lien which the solicitor has for his bill of costs; one on funds recovered, and one on papers in his hands. . . . This lien, however, does not extend to general debts, but only to costs due to him in the character of attorney.”

From the words used, “his bill of costs,” I take it as very clearly expressed that the lien extends to all those items which are properly included in the bill of costs; that is, in other and more definite words, to all such charges which the taxing master has a right to consider and moderate. So much for the first point.

The second point is one which has been fully dealt with, and I will only say a word or two about the law. As to the sort of security which will be considered to destroy the lien of a solicitor, we have the judgment of **LORD ELDON** in *Cowell v. Simpson* (1), where the security given was a promissory note, payable in three years. **LORD ELDON** says (16 Ves. at p. 281):

“The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security. If an engagement to deliver the goods without payment is necessary; otherwise from a promissory note, payable in three years, a contract must be implied that the goods are to be retained during that period; destroying the other special contract. So in this instance, if the solicitor says he will not proceed in the business, and will not deliver up the papers, the consequence is that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact that he has taken this security you can imply that he is to keep the papers for three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary that he is to deliver them up, and rely on the other contract.”

**LORD ELDON** there relied on the fact that the promissory note was not payable for three years.

In *Stevenson v. Blakelock* (4) **LORD ELLENBOROUGH** said (1 M. & S. at p. 544):

“It is unnecessary to canvass the doctrine in *Cowell v. Simpson* (1), inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment. Assuming

**A** then the position of the Lord Chancellor to be correct, here there is the further circumstance of the bills being dishonoured, which places this defendant in his original situation as to lien."

In *Balch v. Symes* (5) LORD ELDON said (Turn. & R. at p. 92):

**B** "Notwithstanding the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell v. Simpson* (1), I still entertain the opinion that an attorney who takes a security abandons his lien."

This has been construed as laying down that a solicitor taking a security for his costs always abandons his lien; but LORD ELDON does not say that; he only said that he abode by his former judgment.

**C** I take it the true rule is that stated by LINDLEY, L.J., that in every case where you have to consider whether a lien has been waived or given up, you must weigh all the circumstances of the particular case, and no doubt it is most material that you are dealing with a case between a solicitor and his own client. A solicitor has a duty to his client to represent to his client all the facts and obligations of the case in a clear and intelligible manner, and where you find a solicitor dealing with his client and taking from him such a security as was given in this case, not expressly reserving his right of lien, not explaining to his client that the right of lien would be existing notwithstanding the security taken, I quite agree with what LINDLEY, L.J., says, that the inference ought to be against the solicitor and against the continuance of the lien, as being inconsistent with the sort of security taken. In *Roberts v. Jeffreys* (2) SIR JOHN LEACH held that a promissory note of the same kind as that in the present case took away the lien.

**E** I think, therefore, that counsel for Mrs. Payne Collier is right in his contention on both points, and that the order of STIRLING, J., ought to be dissolved, and an order made according to the terms of the summons, as Mrs. Payne Collier does not desire to withdraw from the offer to pay the £20 12s. 9d. into court.

*Appeal allowed.*

**F** Solicitors: *Mear & Fowler; Taylor, Stileman & Underwood.*

[Reported by A. J. SPENCER, Esq., Barrister-at-Law.]

## GREENWOOD v. SUTCLIFFE AND OTHERS

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), November 10, 11, 1891]

[Reported [1892] 1 Ch. 1; 61 L.J.Ch. 59; 65 L.T. 797;  
40 W.R. 214]*Mortgage—Redemption—Tender—Unconditional tender—Right to dispute amount due reserved when making tender—Right of mortgagor to account.*

A tender was made by the solicitor of a mortgagor to mortgagees in possession of the balance appearing to be due to them for principal, interest, and costs according to an account which had been made out by the mortgagor from documents furnished by the mortgagees. That balance was, however, less than the sum claimed by the mortgagees to be due. The solicitor stated, at that time, that he did not admit the correctness of the mortgagees' accounts, and that he intended to take steps to dispute them and to have the costs taxed. The mortgagees having refused to accept the sum tendered, the mortgagor brought an action for redemption.

**Held:** (i) although the mortgagor's solicitor reserved the right to dispute the amount due when making the tender, the tender was unconditional, and, therefore, valid; and (ii) the mortgagor was entitled to an account to ascertain whether the tender was sufficient, the court reserving further consideration and costs in case it proved to be sufficient, but making the ordinary decree against a mortgagee in possession (giving him the costs of the action) if the tender was found to be insufficient.

*Scott v. Uxbridge and Rickmansworth Rail. Co.* (1) (1866), L.R. 1 C.P. 596, applied.

**Notes.** As to tender generally, see 8 HALSBURY'S LAWS (3rd Edn.) 169-172; as to tender by mortgagors, see 27 HALSBURY'S LAWS (3rd Edn.) 242. For cases see 12 DIGEST (Repl.) 369; 35 DIGEST 364.

Case referred to:

(1) *Scott v. Uxbridge and Rickmansworth Rail. Co.* (1866), L.R. 1 C.P. 596; Har. & Ruth. 620; 35 L.J.C.P. 293; 14 L.T. 596; 12 Jur.N.S. 602; 14 W.R. 893; 12 Digest (Repl.) 369, 2901.

Also referred to in argument:

*Sweny v. Smith* (1869), L.R. 7 Eq. 324; 38 L.J.Ch. 446; 12 Digest (Repl.) 369, 2902.

**Appeal** by the plaintiff, a mortgagor, from a decision of STIRLING, J., by which he refused, when making an order for redemption, to grant the plaintiff a declaration that she had previously made a valid tender to the defendants, as mortgagees, of the moneys owing.

On Aug. 17, 1882, the sum of £4,000 was advanced by the defendants to Charles Roberts on the security of certain copyhold property under an indenture bearing that date and made between C. Roberts of the first part, the plaintiff and her late husband of the second part, and the defendants of the third part. Part of the mortgaged property belonged to C. Roberts, and the remainder to the plaintiff, who joined in the security only as surety for C. Roberts. The mortgaged property was duly surrendered on the same day. On May 13, 1887, C. Roberts was adjudicated a bankrupt. Shortly afterwards some buildings on C. Roberts's part of the mortgaged property were burnt down, and the insurance money was applied by the defendants in part payment of what was due to them. The defendants entered into possession. In January, 1890, the plaintiff's solicitor informed the defendants' solicitors that the plaintiff was prepared to pay all interest to the end of 1889. The defendants accordingly made out an account, showing that on Dec. 31, 1889, there was due to the defendants the sum of £1,975 10s. 4d. for principal, and the sum of £330 9s. 9d. for interest. On April 3, 1890, C. Roberts's trustee



A in bankruptcy sold and conveyed to the plaintiff C. Roberts's equity of redemption in his part of the mortgaged property. The defendants alleged that, owing to a mistake of their accountant, a sum of £59 3s. 4d. due for interest up to February, 1887, was omitted, and they also claimed to add a sum of £20 6s. 6d. to the amount of capital. On May 9, 1890, the plaintiff paid the defendants the sum of £330 9s. 9d. for interest, and the defendants gave a receipt for it as received on account of interest. In July, 1890, the plaintiff expressed her readiness to pay off what was due on the mortgage. In September, 1890, the defendants sent in an account showing the sum of £2,473 7s. 8d. to be due to them on the 26th of that month. The plaintiff's solicitor objected to it, and the defendants sent in another account, but no agreement was come to.

C The plaintiff alleged that the account sent in by the defendants, in which the item of £59 3s. 4d. was omitted, amounted to a representation, on the faith of which the plaintiff had acted in the arrangements with C. Roberts's trustee in bankruptcy, and that the defendants were bound by it not to claim the omitted sum. Ultimately, at the hearing before STIRLING, J., the plaintiff abandoned this point. The plaintiff also complained of the amount of costs, alleging that many of the expenses were unnecessary. On Sept. 30, 1890, the plaintiff's solicitor D called on the defendants' solicitors with the following account:

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The plaintiff's solicitor tendered the sum of £2,136 2s. 7d. The defendants' solicitors refused to receive it, but wrote at the foot of the account, and signed, the following memorandum:

G "Without admitting the correctness of this account, we admit tender and refusal of £2,136 2s. 7d.

W. and G. BURR & Co."

H The plaintiff took out an originating summons, asking for an order that an account might be taken of what, if anything, was due on the mortgage for principal, interest, and costs, other than the costs of this action, and to redeem the property; and that the defendants might be ordered to pay the costs of the action. The summons was adjourned to be heard in court by STIRLING, J., on May 7, 1891. Mr. Burr, one of the defendants, whose evidence was accepted by STIRLING, J., said:

I "Mr. Creeke [the plaintiff's solicitor] produced this account, at the same time taking from his pocket a small bag. He stated that he wished to make a tender. These were his words to the best of my recollection, 'I wish to make a tender.' He produced two copies of account and he asked me to sign a memorandum acknowledging the tender. I looked at the account, which I had not previously seen. I said, 'Am I to understand that if I take this sum of £2,136 2s. 7d. it settles the matter?' He said 'No'; he reserved his right of taxing the costs and of reviewing the figures. I then signed the memorandum, and I said I would mention the matter to my co-defendant."

He did not admit that Mr. Creeke had said anything about the tender being

unreserved and unconditional. The common decree for redemption against a mortgagee in possession was made, giving the defendants their costs of the action. STIRLING, J., refused to grant the plaintiff a declaration that a valid tender had been made. A

The plaintiff gave notice of appeal from that order, asking that it should be varied by inserting a declaration that on Sept. 30, 1890, a good tender of £2,136 2s. 7d. for principal, interest, and costs was made by the plaintiffs to the defendants; and that accounts should be taken (i) of what, on Sept. 30, 1890, was due to the defendants for principal and interest in respect of their mortgage and for such (if any) costs, charges, and expenses as were secured thereby or as they were entitled to under their mortgage (such costs, charges and expenses to be taxed by the taxing master) after deducting therefrom the amount found to have been received by the defendants under the next-mentioned account; and (ii) of the rents and profits received by the defendants or which, but for their wilful neglect or default, might have been received up to Sept. 30, 1890. And, in case it should appear that the amount due to the defendants on Sept. 30, 1890, after deducting the rents and profits, did not exceed £2,136 2s. 7d., then adjourn further consideration and the costs of the action. But if it should appear that the amount due to the defendants on Sept. 30, 1890, on the said account, after deducting the rents and profits, exceeded £2,136 2s. 7d., then that the account directed by the order under appeal might be proceeded with. The appeal now came on for hearing. B C D

*Wheeler, Q.C.*, and *E. S. Ford* for the plaintiff.

*Graham Hastings, Q.C.*, and *Butcher* for the defendants. E

**LINDLEY, L.J.**—In this case the appeal is by a mortgagor, who has brought an action to redeem. STIRLING, J., has pronounced the ordinary judgment for redemption. The plaintiff asks for the insertion of words to the effect that she made a valid tender to the mortgagees on Sept. 30, 1890, and for some other consequential additions to the judgment. Her object, of course, is this: that if she is right, and if she tendered enough, the interest will stop, and the fact of her having made such a tender will have a very serious bearing on the costs of the suit, although I do not say that it will determine the question of costs, because there may be other matters which the learned judge may have to take into account. F

The controversy in this appeal is whether there was, or was not, on Sept. 30, 1890, a valid tender of £2,136 2s. 7d. The learned judge has declined to insert in the judgment any declaration to the effect that there was a valid tender; and, as I understand his judgment, it proceeds upon the ground that, although there was a tender, it was a tender reserving to the person who made it the right to tax the mortgagees' costs, and also to review their account, they having been mortgagees in possession. The learned judge thought that this was not a valid tender in point of law, and there I think he made a mistake. I do not see the difference between the tender of that kind and such a tender as was made in *Scott v. Uxbridge and Rickmansworth Rail. Co.* (1), where the tender was in this form: G H

"If you insist on being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a cheque this morning for the amount £1,596 3s. 6d.; but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards." I

That tender was held to be sufficient.

What is the object of a tender? It is not necessarily to put an end to all controversy. It may have that effect, and very often has; but its main object is to throw the risks of further controversy upon the other party. There being controversies between the plaintiff and the defendants, the plaintiff made this tender in order to throw upon the defendants the risk of refusing to accept that sum as sufficient to cover their demands. The plaintiff was quite right in making

A that tender. She did make it, not conditionally, not throwing any burden upon her opponents, but as a fair and valid legal tender, and that is in fact admitted by the gentleman, not a layman, but a solicitor knowing what a tender means, who signed the following memorandum: "Without admitting the correctness of this account, we admit the tender and refusal of £2.136 2s. 7d." I think, therefore, that the plaintiff is right, and is entitled to have the judgment varied in the way

B asked by the notice of appeal. As the plaintiff is right, the proper order will be to give her her costs of the appeal in any event.

**BOWEN, L.J.**—I am entirely of the same opinion, and I should regard it as remarkable if the law was supposed to be unsettled on the question of tenders. A conditional tender is not an effectual tender in law; but a tender under protest

C is quite right. A man has a right to tender money reserving all his rights, and such a tender is good, provided he does not seek to impose conditions. I agree with the judgment of the lord justice.

**KAY, L.J.**, concurred.

*Appeal allowed.*

D Solicitors: *Godden & Creeke for Creeke & Son, Burnley; Ullithorne, Currey & Villiers for W. & G. Burr & Co., Keighley.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

E

## THORN v. NINE REEFS, LTD.

F

[COURT OF APPEAL (Lindley, Bowen and Kay, L.JJ.), April 6, 1892]

[*Reported 67 L.T. 93; 8 T.L.R. 490*]

*Company—Debenture holder's action—Receiver and manager—Security not in jeopardy—Principal not immediately payable—Interest not in arrear.*

G

On an application by a debenture holder entitled to a floating charge on the assets of a company for the appointment of a receiver, the court will only appoint a receiver if the security is in jeopardy.

**Per Curiam:** If it could be shown that the security was in jeopardy, the court would appoint a receiver even though the principal was not immediately payable and the interest was not in arrear for the period prescribed by the debenture.

H

**Notes.** Referred to: *Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576.

As to the appointment of a receiver of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 508 et seq.; and as to appointment of a receiver by the court, see generally 32 HALSBURY'S LAWS (3rd Edn.) 386 et seq. For cases see 10 DIGEST (Repl.) 818.

I

Cases referred to in argument:

*McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148; 60 L.J.Ch. 372; 64 L.T. 317; 39 W.R. 349; 7 T.L.R. 303; 35 Sol. Jo. 298; 10 Digest (Repl.) 818, 5332.

*Bissill v. Bradford Tramways Co., Ltd.*, [1891] W.N. 51; 10 Digest (Repl.) 818, 5331.

**Appeal** by the plaintiff from a decision of KEKEWICH, J., refusing to appoint a receiver of the defendant company.



The Nine Reefs, Ltd., was established in 1889 for the purpose of acquiring and working certain gold mines in Mysore, India. By a debenture trust deed, dated Jan. 3, 1890, and made between the company and two trustees, the company assigned to the trustees its leasehold interest in the mines, and also "all and singular the machinery, tools, implements, stores, plant, and effects situate and being on or appertaining to" the hereditaments (in India) described in the 1st schedule to the deed (the machinery, etc., being described in the 2nd schedule), and all other the machinery, etc., which during the continuance of the security should be on or appertain to the same hereditaments; and it was thereby agreed and declared (inter alia) that the trustees should stand possessed of the mortgaged premises as a security for the payment of the principal moneys and interests specified in the debentures intended to be issued by the company (which debentures were to be in number 4,000, of £5 each, and in the form set forth in the 4th schedule to the deed), and to the intent that the debentures should be a floating security on the mortgaged premises, and, accordingly, upon trust that the trustees should permit the company and their assigns to hold and enjoy all the same premises until default should be made in payment of some principal moneys secured by the debentures, or any of them, or in the payment of some interest on the same for the period of six calendar months after such principal moneys and interest respectively should become due according to the tenour of the debentures and of the covenant in that behalf thereafter contained, or until an order of some court of competent jurisdiction should be made, or an effective resolution of the company should be duly passed for the winding-up of the company, or until a breach of some covenant by the company thereafter contained should have been committed, and from and after such default, or the making of any such order, or the passing of any such resolution, or the commission of any such breach of covenant as aforesaid, upon trust that the trustees might as therein mentioned enter upon and take possession of the mortgaged premises and sell the same, and the trustees were to hold the moneys arising from any sale upon trust (after payment of costs and expenses) to pay first the interest and then the principal due in respect of the debentures *pari passu* as between the different debenture-holders. There was a covenant by the company with the trustees for payment of the principal moneys, bonuses, and interest secured by the debentures, in accordance with the tenour thereof respectively, and for the observance and performance of the several conditions endorsed thereon respectively; and also that the principal moneys and interest intended to be secured by the debentures should be a first charge by way of floating security on the mortgaged premises.

The form of debenture set forth in the 4th schedule provided that the company would

"on the            day of           , or on such earlier day as the principal moneys hereby secured became payable, in accordance with the conditions endorsed hereon, pay to            of           , or other the registered holder for the time being hereof, the sum of £5, together with a bonus of 10s. The company will in the meantime pay to such registered holder interest thereon at the rate of 10 per cent. per annum by half-yearly payments on June 30 and Dec. 31 in each year. The company hereby charges with such payment its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. This debenture is issued subject to the conditions endorsed hereon."

Among the conditions endorsed were the following:

"(9) The registered holder hereof may at any time after Nov. 1, 1892, require the company to pay to him the sum of £5 hereby secured, together with a bonus of 10s., and together with the interest for the fraction (if any) of the current half-year up to the day of payment. (10) The principal moneys hereby secured shall immediately become payable (a) if the company makes default for a period of six calendar months in the payment of any interest

A hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company calls in such principal moneys; or (b) if an order is made or an effective resolution is passed for the winding-up of the company."

B The plaintiff applied for fifty of the debentures, and paid £250 for them, and there was issued to him a document, under the seal of the company, called a "provisional debenture scrip certificate." This document was signed by two of the directors and the secretary, and was expressed as follows:

C "This is to certify that , of , is entitled to debenture of the above issue for £5 each, bearing interest at the rate of 10 per cent. per annum, payable half-yearly. Each debenture-holder is and will be entitled (pari passu with the other debenture-holders of this issue) to the benefit of, and subject to the provisions contained in, an indenture dated Jan. 3, 1890, and made between... whereby certain property of the company was made security for the payment of the principal moneys, bonus, and interest payable in respect of each debenture."

At the foot was the following note:

D "This provisional scrip will be exchanged for the debentures when the above-mentioned deed has been registered in India, so as to form a valid charge upon the property of the company as comprised therein."

E The interest on the plaintiff's debentures had been in arrear for more than three months, but not for six months, and in February, 1892, he commenced this action, on behalf of himself and all other the debenture-holders, to enforce the security. At the time when the writ was issued, the trust deed had not been registered in India, but the registration had since been effected. The company had no property of any value beyond that which was comprised in the trust deed.

F On Mar. 19, 1892, the plaintiff applied by motion to KEKEWICH, J., for the appointment of a receiver and manager of the mines and other assets, property, or rights of the company subject to the security created by the trust deed. The motion was refused. The plaintiff appealed.

*C. E. E. Jenkins* for the plaintiff.

*Marten, Q.C.*, and *Swinfen Eady* for the company.

*Renshaw, Q.C.*, and *Eve* for the trustees of the deed.

G LINDLEY, L.J.—I think that in this case the application is premature. The plaintiff has advanced his money to the company upon the terms of the contract contained in the provisional debenture scrip certificate, which provides that each debenture-holder is and will be entitled to the benefit of, and subject to the provisions contained in, the trust deed. The scrip is to be exchanged for debentures when the trust deed has been registered in India. What, therefore, are the H plaintiff's rights under his contract with the company? They are to have debentures issued to him, but not to ignore the condition in his contract that the debentures are to be subject to the provisions of the trust deed.

I The trust deed comes to this. The plaintiff is not yet entitled to have the benefit of that deed as to payment of his interest, because six months have not yet elapsed since it became due, but only three months. Nor have the principal moneys belonging to the plaintiff yet become due under his contract with the company. The plaintiff is entitled to have debentures in the form set forth in the schedule, but subject always to the terms of the trust deed. He is entitled to the benefit of that deed which gives him a charge on the property and assets of the company which are comprised in that deed. The form of the debenture gives the debenture-holder a more extensive charge than is given by the trust deed, but the principal moneys have not yet become due under condition 10 endorsed on the debenture. Suppose the plaintiff had got his debenture. He would have a charge on any assets of the company (if there were any such) not comprised in the deed,

and if there were any such assets, he would stand in a better position, for he would now be entitled to a receiver as regards them, because his interest is in arrear, although he cannot yet enforce his charge upon the assets comprised in the deed. But there being in fact no other assets than those comprised in the trust deed, can the appellant come to the court and ask for the appointment of a receiver and manager, and thus override the terms of the trust deed, although he cannot yet enforce his charge upon the assets comprised in it? That would be not only in accordance with the contract, but against the contract. A

The plaintiff cannot under these circumstances be entitled to have a receiver appointed unless he can show that the assets of the company are in immediate danger. If it were proved that the assets of the company, subject to the plaintiff's security, were in danger of being lost, a case might have arisen for having the assets protected by the appointment of a receiver, even although he cannot yet enforce his security against them. I do not say that he could, but he might have that right. But upon the evidence I am not satisfied that any immediate danger threatens the assets. I do not think it plain on the face of it. I do not believe that there is any such immediate danger to the assets as would justify the court in appointing a receiver when the plaintiff is not entitled to it by his contract. That appears to me to dispose of the case, and the appeal must, therefore, be dismissed with costs. B

**BOWEN, L.J.**—I am of the same opinion. I think that counsel for the plaintiff has made it clear that, if the plaintiff could show that the assets of the company were in jeopardy, he would be entitled to have a receiver appointed of those assets. The case turns mainly upon the construction of certain documents. There has been a payment of money on the one side entitling the person who paid it to debentures of the company, and entitling him to the benefit of those debentures if not to the manual delivery of them. That gives him the actual right to be placed in the position of a debenture-holder. He will be clothed in equity with all the rights of a debenture-holder. Moreover, he is entitled to the benefit of the trust deed under which the debentures are issued, and his rights are subject to all its provisions. [His LORDSHIP discussed the provisions of the trust deed, and continued:] No right to payment of principal has yet accrued. As to interest, his interest has not yet been in arrear for six months. It becomes, therefore, a question of discretion. If this were a case of jeopardy to the assets comprised in the appellant's security, it seems to me that he would have the right to have a receiver appointed. But that is not made out. I think that, jeopardy not being made out, the court ought not to interfere. C

**KAY, L.J.**—In this case the plaintiff has taken debentures subject to a trust deed, which provides that the security is to be a floating security. The meaning of that is quite obvious to anyone acquainted with company law. The object of a floating security is that debenture-holders shall not be entitled to interfere with the property comprised in their security, until the events happen which are expressed in the deed. E

In the present case the interest has to be in arrear for six months to entitle the debenture-holders to enforce their security. The arrears in the present case are only for four months. The question is whether, under the circumstances, the court has power to put an end to the floating security. F

I come to the conclusion that, under certain circumstances, the court has that power, even although the six months have not yet expired, for the charge is an existing charge, and by means of the debentures he obtains the charge. If he came to the court and said, "it is true that the six months have not expired, but the company is dealing with its property in such a way as to practically jeopardise my security," the court might think proper to appoint a receiver. If a strong case of danger of that kind were made out, I think the court would have power to appoint a receiver. But the plaintiff has come to the court, not pledging his G



**A** belief that there is danger. He does not say that the property is in jeopardy; and the court does not infer danger. It seems to me that the decision of the court below was perfectly right. I think the application was premature, and that the appeal ought to be dismissed with costs.

*Appeal dismissed.*

**B** Solicitors: *Saunders, Hawksford, Bennett & Co.; Francis & Johnson.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

**C**

## BONNARD AND ANOTHER v. PERRYMAN

**D** [COURT OF APPEAL (Lord Coleridge, C.J., Lord Esher, M.R., Lindley, Bowen, Lopes and Kay, L.J.J.), April 9, 10, 21, 1891]

[Reported [1891] 2 Ch. 269; 60 L.J.Ch. 617; 65 L.T. 506;  
39 W.R. 435; 7 T.L.R. 453]

*Libel—Injunction—Interlocutory injunction—Restraint of publication of words complained of pending trial—Plea of justification.*

**E** The court has jurisdiction in an action of libel to grant an injunction at any stage of the cause restraining the publication of the libel, but this jurisdiction should be exercised with great caution. Although the publication, if untrue, would clearly be libellous, an interlocutory injunction will not be granted where the defendant pleads justification unless the court can be sure that his defence cannot be sustained at the trial and that the plaintiff will receive more than nominal damages.

**F**

**Notes.** Section 25 (8) of the Supreme Court of Judicature Act, 1873, has been replaced by s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925: see 18 HALSBURY'S STATUTES (2nd Edn.) 482. R.S.C., 1883, Ord. 38, r. 3, has been amended: see ANNUAL PRACTICE (1963) 922.

**G** Considered: *Collard v. Marshall*, [1892] 1 Ch. 571. Followed: *Champion v. Birmingham Vinegar Brewery Co.* (1893), 10 T.L.R. 164; *Monson v. Tussauds*, *Monson v. Tussaud*, post p. 1051; *Leslie v. Tucker* (1896), 40 Sol. Jo. 780; *Newton v. Amalgamated Musicians' Union* (1896), 12 T.L.R. 623. Distinguished: *London and Northern Bank v. Newnes* (1899), 16 T.L.R. 76. Considered: *Corelli v. Wall* (1906), 22 T.L.R. 532. Referred to: *Salomons v. Knight*, [1891] 2 Ch. 294; *Lee v. Gibbings* (1892), 67 L.T. 263; *Re Evelyn, Ex parte General Public Works and Assets Co.* (1894), 1 Mans. 195; *White v. Mellin*, [1895] A.C. 154; *Lyons v. Wilkins*, [1896] 1 Ch. 811; *Ellis v. National Union of Conservative and Constitutional Associations Middleton and Southall* (1900), 44 Sol. Jo. 750; *Watson v. Daily Record (Glasgow)*, [1907] 1 K.B. 853; *R. v. Blumenfeld, Ex parte Tupper* (1912), 28 T.L.R. 308; *Sim v. H. J. Heinz Co., Ltd.*, [1959] 1 All E.R. 547.

**I** As to power to grant injunctions to restrain publication of libel, see 24 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 32 DIGEST 180 et seq. For s. 79, s. 80 and s. 81 (repealed) of the Common Law Procedure Act, 1854, see 18 HALSBURY'S STATUTES (2nd Edn.) 447.

Cases referred to:

- (1) *Sazby v. Easterbrook and Hannaford* (1878), 3 C.P.D. 339; 27 W.R. 188; 32 Digest 181, 2225.
- (2) *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch.D. 501; 51 L.J.Ch. 874; 46 L.T. 476; 30 W.R. 583, C.A.; 32 Digest 182, 2242.

- (3) *Liverpool Household Stores Association v. Smith* (1887), 37 Ch.D. 170; 57 L.J.Ch. 85; 58 L.T. 204; 36 W.R. 485; 4 T.L.R. 93, C.A.; 32 Digest 183, 2254. **A**
- (4) *William Coulson & Sons v. James Coulson & Co.* (1887), 3 T.L.R. 846, C.A.; 32 Digest 181, 2232.
- (5) *Bidder v. Bridges* (1884), 26 Ch.D. 1; 53 L.J.Ch. 479; 50 L.T. 287; 32 W.R. 445, C.A.; 22 Digest (Repl.) 574, 6558. **B**

**Appeal** by the defendant, Perryman, one of two defendants in an action for libel, from an order of NORTH, J., granting a motion of the plaintiffs in the action for an interlocutory injunction, till trial of action, to restrain publication of the alleged libel.

On Jan. 10, 1891, the following paragraph appeared in the "Financial Observer":

"By the way, there appears a very peculiar connection between Marks Campbell and the gorgeous Mercantile and General Trust and Finance Company Unlimited, located in the sumptuous offices in Broad Street Avenue where the lovely Engel is on guard. We shall have a rare budget to say about this curious concern and those who are working the oracle." **C**

On Feb. 7, 1891, the article complained of by the plaintiffs as a libel appeared. It was headed **D**

"The Fletcher Mills of Providence, Rhode Island. The Providence and National Worsted Mills, Ltd. A Jews' Den. Marks' Promoting Vehicle."

The article stated that, in 1889, offices were taken by two Jews (the plaintiffs), who called themselves the Mercantile and General Trust, and had not a sixpence in the world, and got their office furniture on the hire system; that they managed to ingratiate themselves with the great H. H. Marks; that they had floated a company called the City of Baltimore United Breweries; that there was some very shady work in this transaction, and the plunder amounted to no less than £58,000; that in these concerns they were greatly assisted by a Bernard Engel, a brother of a moneylender in Great Marlborough Street, who knew the corners into which shares could be pushed, and had a large Jewish connection; that this Bernard Engel figured in Broad Street Avenue as D. Engel, and at times had varied his name into Engle, Angle, and Eagle, to meet different phases of promoting. The article proceeded: **E**

"Success has so far crowned their shady deeds, and having such a wonderful engine as the 'Financial News' at their disposal on terms, we next find them at work all together at Broad Street Avenue, where they flourish as the Mercantile and General Trust and Finance Co. This concern is composed of the following Jews—Bernard Engel, Gustave Richard Bonnard, Arthur H. Deakin, Edmund Campbell (alias Calischer, a member of the Stock Exchange), Harry Hananel Marks. The next bit of company promoting to come before the public is the Providence and National Worsted Mills, Ltd." **F**

The article then stated the prospectus of this company, described it as a gross fraud, and stated: **G**

"When our readers have carefully considered what a halo of picking and stealing surrounds the den in Broad Street Avenue, they will think twice before putting their hard earned savings into the pocket of these gentry." **H**

On Feb. 11, 1891, the writ in the action for libel was issued by the plaintiffs, Gustave Richard Bonnard and Arthur Henry Deakin, who carried on business as financial agents in Broad Street Avenue, under the name of the Mercantile and General Trust and Finance Co., against the defendants, Perryman, the publisher, and Allen, the printer, of the newspaper, the "Financial Observer and Mining Herald." The plaintiffs claimed an injunction restraining the defendants from selling, circulating, or communicating to any person any copy of the "Financial Observer and Mining Herald" of Feb. 7, 1891, or the article in any form, and **I**

- A from printing or publishing in that newspaper or otherwise any statement imputing to the plaintiffs or either of them in connection with the promotion or floating of Sykes Brewery or the City of Baltimore United Breweries as limited companies, or the promotion of the proposed Providence and National Worsted Mills, Ltd., or imputing or suggesting that the plaintiffs or either of them had bribed, suborned, or conspired with the proprietor or editor of the "Financial News" or any other newspaper, or any other person, or that they or either of them had been guilty of stealing or any other dishonest conduct. The plaintiffs claimed £5,000 damages.

On Feb. 13, 1891, the plaintiffs gave notice of motion for an interlocutory injunction, till trial of the action, in terms of the injunction asked for in the action.

- C In support of the motion the plaintiffs filed an affidavit stating categorically that they were not Jews, that their furniture was not procured on the hire system, that they had never had any communication whatever with H. H. Marks. They further denied all the other allegations in the article. The defendant, Perryman, in his affidavit swore that

- D "the whole of the allegations in the article complained of are true in substance and in fact and I shall be able to prove the same at the trial of the action by subpœnaing witnesses and cross-examination of the plaintiff, and by other evidence which I cannot, and which I submit I ought not to have to, produce on an interlocutory motion."

There was evidence that the defendant, Perryman, was in the habit of reprinting articles in the "Financial Observer" several times over, and that the number of Feb. 7, 1891, could be purchased at the office. The defendant, Allen, was proved to have printed the number of Feb. 7, 1891, though the defendant, Perryman, was described as printer and publisher on the back of the newspaper.

- E On the motion NORTH, J., made an interlocutory injunction against the defendant Perryman, the form of order being: to restrain, not the defendants and each of them, but the defendant Perryman, his servants and agents, until trial or further order, from selling, circulating, or delivering or communicating to any person or persons, or permitting to be sold or circulated, or delivered or communicated to any person or persons, any copy of the "Financial Observer and Mining Herald" of Feb. 7, 1891, containing an article headed "Fletcher Mills, Providence, Rhode Island," and from printing or publishing, or selling—repeating the previous words used—any copy of the said article, or any extract thereof, or material portion thereof, so far as such extract or portion affects the plaintiffs, or either of them.
- G The defendant Perryman appealed.

*Cozens-Hardy, Q.C.*, and *W. E. Vernon* for the defendant.

*Napier Higgins, Q.C.*, and *Dunham* for the plaintiffs.

- H April 21, 1891. LORD COLERIDGE, C.J., read the following judgment in which LORD ESHER, M.R., and LINDLEY, BOWEN and LOPES, L.JJ., concurred: The plaintiffs in this case are two gentlemen carrying on business as financial agents under the title of the Mercantile and General Trust. The defendant Perryman is the printer and publisher of a paper called the "Financial Observer and Mining Herald." The defendant Allen is in some way (not material to ascertain) connected with the paper, and he appears to have printed the particular number which contains the matter of which the plaintiffs complain. In the number of Feb. 7, 1891, appeared the article which the plaintiffs assert to be a libel upon them, and in respect of which, having issued a writ in the Chancery Division, they applied for and have obtained from NORTH, J., the injunction which we are asked upon appeal to dissolve.

Two questions only is it really necessary to decide: (i) is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all, or before the libel has been adjudged to be such; and (ii) is this a case in which, as matter of discretion, the jurisdiction should be exercised, if it



exists? The decision of the first question is, it is manifest, independent of the circumstances of any particular case; the decision of the second entirely depends upon them. As to the first, we are unable to entertain any doubt; the point is clear, and is settled by authority. The authorities, indeed, are few and recent, for very obvious reasons; but they are uniform, and they are clear. Prior to the Common Law Procedure Act, 1854, neither courts of law nor courts of equity could issue injunctions in such a case as this: not courts of equity, because cases of libel could not come before them; nor courts of law, because prior to 1854 they could not issue injunctions at all. But s. 79 and s. 82 of the Common Law Procedure Act, 1854, undoubtedly conferred on the courts of common law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the Supreme Court of Judicature Act, 1873, conferred upon the Chancery Division of the High Court, representing the old courts of equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a court of common law till *Sarby v. Easterbrook and Hannaford* (1), which was decided in 1878.

In that case the injunction was not applied for, nor, of course, granted, till after a verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel. SIR GEORGE JESSEL, M.R., in *Quartz Hill Consolidated Gold Mining Co. v. Beall* (2) distinctly asserted the jurisdiction; and it was considered and established in an elaborate judgment of this court in *Liverpool Household Stores Association v. Smith* (3), in which CORRON, L.J., affirming indeed the refusal of KEKEWICH, J., to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient: and we do not doubt, upon the true construction of the statutes and upon authority, that, as matter of jurisdiction, NORTH, J.'s order might lawfully be made. But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of LORD ESHER, M.R., in *William Coulson & Sons v. James Coulson & Co.* (4) (3 T.L.R. at p. 846):

"To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable."

In the particular case before us, indeed, the libellous character of the publication is beyond dispute; but the effect of it upon the defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the

**A** decision at the hearing may turn upon the question of the general character of the plaintiff; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial—on which further it is not desirable that the court should express an opinion before the trial. Otherwise, an injunction might be granted before the trial in a case in which at the trial nothing but nominal damages, if so much, could be obtained.

**B** Upon the whole we think, with great deference to NORTH, J., that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification. The appeal, therefore, must be allowed, and the order discharged; the costs in this court and in the court below to be costs in the cause.

**C** **KAY, L.J.**—I agree with all the members of the court that, since the passing of the Common Law Procedure Act, 1854, by s. 79, s. 81, and s. 82 of that Act, the courts of common law had, and by s. 16 and s. 25 (8), of the Supreme Court of Judicature Act, 1873, the High Court of Justice now has, undoubted jurisdiction to grant injunctions at or before the trial in actions of libel. I also agree that in such actions this jurisdiction should before trial be very cautiously exercised, especially because the questions of libel or no libel, and of the validity of a justification, if pleaded, are eminently matters to be determined by the verdict of a jury. The only point on which I have felt any difficulty is, whether it is expedient or right altogether to discharge the interlocutory injunction which has been granted.

[His LORDSHIP reviewed the evidence in the plaintiffs' affidavits and the mode in which the defendant answered these affidavits, and continued:] By R.S.C., **E** 1883, Ord. 38, r. 3, it is provided that

"affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

LORD SELBORNE, L.C., in *Bidder v. Bridges* (5) said (26 Ch.D. at p. 8):

**F** "I do not think this court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That Order requires, in effect, that affidavit evidence as to matters of fact by a person who is not able strictly to prove them, must show not only the fact but also the grounds of his belief."

**G** To the same effect is the judgment of SIR GEORGE JESSEL, M.R., in the Court of Appeal, in *Quartz Hill Consolidated Gold Mining Co. v. Beall* (2), where the injunction in a libel case was dissolved partly on the ground that the plaintiffs' affidavit did not comply with this order. Speaking for myself, I entirely agree with this view of the meaning and effect of the order, and think it essential to the

**H** ends of justice that it should be strictly observed.

In the case now before us the defendant's answer to the express and categorical denial by the plaintiffs of any kind of association with the person in question is only met by these statements as to the defendant's belief, which do not attempt to show the grounds of his belief otherwise than by stating that the association is through Engel or Campbell, and there is no other evidence in support of the defendant's case on this point. I agree that, in order to justify the court in granting an interlocutory injunction in such a case, there must be strong *prima facie* evidence that the statement is untrue. In my opinion, in this state of the affidavits, there is that strong *prima facie* evidence. If that is so, according to the ordinary practice, the court will be actuated in granting or refusing the injunction by the consideration of what is commonly termed the balance of convenience and inconvenience. To which side in this case does that balance incline? If this injunction be continued in the whole or in part, it will not prevent the defendant from protecting the public by any other statements he can legitimately make against the

plaintiff; it will only prevent him from repeating this particular allegation. Even if at the trial the defendant should be able to adduce evidence showing that the plaintiffs' denial of their association with the person described as a swindler is untrue, it is impossible to conceive that the defendant can be damnified by being restrained meanwhile from repeating it. On the other hand, I can easily believe that this statement, if repeated, as the defendant admits he intends to do in the interval before the trial, may occasion very great injury, if not ruin, to the plaintiffs. If it should turn out at the trial of the action that the plaintiffs' denial on this point is true, and that the defendant's allegation is false, an irreparable injury may have been done to the plaintiffs by denying them this relief by interim injunction.

I think the true result of the affidavit evidence is, that the defendant has a suspicion of the plaintiffs' connection with the person whom he so defames, for which he is not able to allege any substantial foundation. For these reasons I should have granted the injunction, at least as to this part of the libel, and I should have been glad if the Court of Appeal had been prepared to sustain it.

*Appeal allowed.*

Solicitors: *Watson & Watson; John Vernon, Son & Co.*

[*Reported by H. BITTLESTON, Esq., Barrister-at-Law.*]

## DOBSON AND ANOTHER v. FESTI, RASINI & CO.

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), May 13, 14, 1891]

[Reported [1891] 2 Q.B. 92; 60 L.J.Q.B. 481; 64 L.T. 551;  
39 W.R. 481; 7 T.L.R. 538]

*Conflict of Laws—Contract—Performance in England—Contract between English firm and foreign partnership—Enforcement—Service on one partner of notice of writ out of jurisdiction—No appearance by partnership—Jurisdiction to enter judgment by default.*

A partnership, all the partners of which were domiciled abroad, had no property, no place of business, and no manager, in England. The plaintiffs, machine manufacturers, were resident in England, and had supplied the partnership with machinery, the contract being one to be performed within the jurisdiction. The plaintiffs sued the partners in the firm name to recover an instalment due under the contract, and, having obtained leave to serve notice of the writ out of the jurisdiction, served the notice on one of the managing partners abroad. No appearance having been entered at the expiration of the time limited for such requirement, the plaintiffs applied for leave to enter judgment in default of appearance.

**Held:** even though the cause of action was one to be performed within the jurisdiction within R.S.C., Ord. 11, r. 1 (e), and the plaintiffs had obtained leave to serve notice of the writ out of the jurisdiction and such notice had been served on one of the partners, the partnership was a foreign firm which had been sued in the firm name, the rules of court as to suing partners did not apply, and the court had no jurisdiction to allow judgment to be entered in default of appearance.

**Notes.** R.S.C., Ord. 9, r. 6, has been cancelled and R.S.C., Ord. 48A now deals with actions by and against a firm; see ANNUAL PRACTICE (1963) 1151 et seq.



- A** For R.S.C., Ord. 11, r. 1 (e) and r. 7 as amended, see ANNUAL PRACTICE (1963) 141, 155.

Considered: *Von Hellfeld v. Rechnitzer and Mayer*, [1914] 1 Ch. 748; *Hobbs v. Australian Press Association* (1932), 48 T.L.R. 586. Referred to: *De Bernaldes v. New York Herald* (1893), 68 L.T. 658.

- B** As to actions against partners and service of writ, see 28 HALSBURY'S LAWS (3rd Edn.) 519 et seq.; and for cases see 36 DIGEST (Repl.) 514 et seq.

Cases referred to:

- (1) *Russell v. Cambefort* (1889), 23 Q.B.D. 526; 58 L.J.Q.B. 498; 61 L.T. 751; 37 W.R. 701, C.A.; 36 Digest (Repl.) 519, 827.  
 (2) *Western National Bank of City of New York v. Perez, Triana & Co.*, [1891] 1 Q.B. 304; 60 L.J.Q.B. 272; 64 L.T. 543; 39 W.R. 245; 7 T.L.R. 177, C.A.; 36 Digest (Repl.) 520, 835.  
**C** (3) *Cookney v. Anderson* (1863), 1 De G.J. & Sm. 365; 2 New Rep. 140; 32 L.J.Ch. 427; 8 L.T. 295; 9 Jur.N.S. 736; 11 W.R. 628; 46 E.R. 146, L.C.; 11 Digest (Repl.) 373, 382.  
 (4) *Foley v. Maillardet* (1864), 1 De G.J. & Sm. 389.  
**D** (5) *Drummond v. Drummond* (1866), 2 Ch. App. 32; 36 L.J.Ch. 153; 15 L.T. 337; 15 W.R. 267, L.C. & L.J.J.; 16 Digest (Repl.) 121, 51.

Also referred to in argument:

- Robey v. Snaefell Mining Co.* (1887), 20 Q.B.D. 152; 57 L.J.Q.B. 134; 36 W.R. 224; 4 T.L.R. 148, D.C.; 12 Digest (Repl.) 512, 3842.  
*Swansea Shipping Co., Ltd. v. Duncan* (1876), 1 Q.B.D. 644; 45 L.J.Q.B. 638; 35 L.T. 879; 25 W.R. 233; 3 Asp.M.L.C. 345, C.A.; Digest (Practice) 338, 561.  
**E** *Dubout & Co. v. Macpherson* (1889), 23 Q.B.D. 340; 58 L.J.Q.B. 496; 61 L.T. 689; 38 W.R. 62; Digest (Practice) 338, 565.  
*Scott v. Royal Wax Candle Co.* (1876), 1 Q.B.D. 404; 45 L.J.Q.B. 586; 34 L.T. 683; 24 W.R. 668; 2 Char. Pr. Cas. 179; 13 Digest (Repl.) 354, 1614.

- F** **Appeal** by the plaintiffs from an order of the Divisional Court (CAVE and GRANTHAM, JJ.) refusing to allow the plaintiffs to enter judgment in default of appearance against the defendants who had, by leave, been served out of the jurisdiction.

- The plaintiffs were machine manufacturers residing in Lancashire, and the defendants were an Italian firm consisting of ten partners, all of whom were foreigners residing and domiciled abroad, and the defendant firm had no place of business, no property and no manager in England. Two of the partners, Giovanni Festi and Cesare Rasini were, by the deed creating the defendant partnership, appointed managing partners, with unlimited liability, and each of them was authorised separately to represent and bind the firm. The other eight partners, one of whom was the firm of Francesco Turati, and another the Banca Generale of Rome, were in the position of sleeping partners with limited liability, and could in no way represent or bind the defendant firm. The plaintiffs had supplied the defendant firm with machinery, and the defendant firm had failed to pay an instalment amounting to £3,151, being part of the price payable for the machinery delivered to them.

- I** The plaintiffs in consequence brought this action against the defendants, who were sued in their firm name, to recover the £3,151 for goods sold and delivered, and the plaintiffs obtained leave from A. L. SMITH, J., under R.S.C., Ord. 2, r. 4, to issue notice of the writ of summons out of the jurisdiction, and to serve such notice on the defendant firm in Italy, the defendant firm being required to enter an appearance within sixteen days after service thereof. Nothing was said in this order as to how the service was to be effected. The plaintiffs served the notice of the writ in Italy on Cesare Rasini, one of the managing partners in the defendant firm. No appearance of any kind having been entered, the plaintiffs, on the expiration of the sixteen days after service, applied ex parte to the master at the

Central Office to enter judgment in default of appearance. The master refused to do so, and an application by the plaintiffs that the master might be directed to enter judgment was refused by DENMAN, J., and subsequently by the Divisional Court. The plaintiffs appealed. A

*Loehnis* for the plaintiffs.

The defendants did not appear.

*Cur. adv. vult.* B

May 14, 1891. The following judgments were read.

**LINDLEY, L.J.**—This is an appeal from the refusal of a Divisional Court to give directions to the proper officer to allow the plaintiffs to sign judgment against the defendants upon default of appearance. The action, which was brought against the defendants in the name of the defendant firm, was for breach of a personal contract for goods sold and delivered. The members of the defendant firm are all Italian subjects resident abroad, and the defendant firm has no property, no place of business, and no manager in England. Nevertheless, leave was given to serve notice of the writ upon the defendant firm abroad. I do not say that that was irregular, as the defendants might have appeared, and I do not say if they had appeared that judgment might not have been signed against them. I think, however, that R.S.C., Ord. 9, r. 6, has no application unless the foreign firm choose to appear. That was the interpretation put on that rule by this court in *Russell v. Cambefort* (1), and by the majority of the Court of Appeal in *Western National Bank of City of New York v. Perez, Triana & Co.* (2). C

It has been ably and skilfully contended by counsel for the plaintiffs that the present case is different from those cases, because, in the present case, leave has been obtained under Ord. 11, r. 7, to serve notice of the writ abroad. That is very true, but it does not assist the plaintiffs unless the defendant firm chose to appear. Before the Judicature Acts there was no jurisdiction to allow a foreign firm to be sued in the firm name. Have the rules of the Supreme Court enlarged or extended the jurisdiction in that respect? In my opinion, they have done nothing of the kind. What the jurisdiction of the English court was with respect to the service of its process abroad, and the very circumscribed limit of that jurisdiction when permitted, is shown by *Cookney v. Anderson* (3) and *Foley v. Maillardet* (4), before LORD WESTBURY, L.C., and *Drummond v. Drummond* (5). Bearing in mind that the jurisdiction now contended for did not exist before the Judicature Acts, if we were to allow this appeal we should be putting a construction on the rules which, though verbally admissible, would be contrary to the general principles of international law. I think that was the ratio decidendi in *Russell v. Cambefort* (1), and, in my opinion, the reasoning there was correct, and was based on general principles of law. D

I think it would be a monstrous thing to allow a plaintiff in this country to obtain judgment in default of appearance against a foreign firm having no manager, no place of business, and no property in this country, by serving one of the partners of the foreign firm the other members of which might perhaps be in another part of the world altogether. It is nothing to the purpose to say that, according to Italian law, the process of the Italian courts could be so served. Counsel for the plaintiffs has, no doubt, the advantage of the wording of the rules in his favour, but one cannot on that account disregard the general principles of international law. In my opinion there is no jurisdiction to allow judgment to be signed in this case, and the appeal must be dismissed. E

**LOPES, L.J.**—In my opinion Ord. 9, r. 6, does not apply to a foreign firm none of the members of which are domiciled or resident here, unless the firm chooses to appear. In the present case the defendant firm is not domiciled or resident here, has no property here, and has not appeared. I am clearly of opinion that Ord. 9, r. 6, does not apply to this case, and that view is in accordance with *Russell v.* F

- A *Cambefort* (1) and *Western National Bank of City of New York v. Perez, Triana & Co.* (2). Counsel for the plaintiffs argued that the present case was distinguishable from those cases, because in the present case leave had been obtained to issue and serve notice of the writ abroad. But that does not assist the plaintiffs unless the defendant firm has appeared. I have only one further observation to make. Before the Judicature Acts it is clear there was no jurisdiction in a case like this, and jurisdiction cannot be said to be increased by the rules made under the Judicature Acts. These rules do not, and cannot, give the jurisdiction contended for.

- KAY, L.J.—I agree. How far the *lex fori* applies to foreigners is an important question. No doubt, if a foreigner sues in this country he must conform, and be taken to submit, to the *lex fori*. But the matter is altogether different when he is sued. Before the Judicature Acts, if a foreigner was sued as to certain kinds of property here, or land here, no doubt then, if he appeared, no difficulty would arise in proceeding against him. But there should have been personal service upon him, and he should have appeared. Here what has been attempted is this. A firm consisting entirely of foreign subjects, having no place of business, no manager, and no property here, have committed a breach of contract here, on account of which it is said they are brought within Ord. 11, r. 1 (e). It is said, there being jurisdiction (which is assumed), Ord. 11, r. 7, provides that notice in lieu of service shall be given in the manner in which writs of summons are served, and that you must, therefore, look back to the earlier rules and Orders as to that.

- So far, on the face of the rules, there is a great deal apparently in favour of the plaintiffs' contention. The foreign firm, however, is sued in their firm name—not as individuals—and leave has been obtained to issue and serve notice of the writ abroad on the foreign firm. One of the partners of the foreign firm has been found abroad, and notice of the writ has been served on him there, and Ord. 9, r. 6, has been relied upon as authorising this. The whole question is whether that rule applies to the case of an altogether foreign firm. In *Russell v. Cambefort* (1) the defendants were a foreign firm, which had a place of business here and a manager here. There had, however, been no breach of a contract to be performed within the jurisdiction, and, therefore, there was no jurisdiction under Ord. 11, by reason of the actual cause of action. But an action was nevertheless brought, and the writ was served on the manager of the defendants' place of business here. The Court of Appeal had, therefore, to consider Ord. 11, r. 6, and COTTON, L.J., held that it did not apply to a foreign firm at all and said (23 Q.B.D. at p. 528):

- “No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the court against British subjects, as to foreigners Parliament has not, and does not assume to have, jurisdiction against those who are residing abroad and have not submitted to the jurisdiction of the English courts. Therefore, in construing the rule, we must have regard to what Parliament has the power to do, and in my opinion we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament; and although the rule does authorise service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships the members of which, either by their nationality or residence, have become subject to English law and to the power of Parliament. Looking at it in that view I do not think the rule applies to firms consisting of foreigners who have in no way become subject to the English Parliament.”

If those words have any meaning at all they must mean that the thing there was wrongly done, not because the actual cause of action did not give jurisdiction, but because Ord. 9, r. 6, does not apply at all to a firm consisting of foreigners, even though having a place of business and a manager here.



In *Western National Bank of City of New York v. Perez, Triana & Co.* (2), **A**  
BOWEN, L.J., referring to *Russell v. Cambefort* (1), said ([1891] 1 Q.B. at p. 316):

"The judgment of the Court of Appeal was, however, based expressly on the view that Ord. 9, r. 6, was not intended to govern writs directed against foreign firms none of whose partners were resident or domiciled in England";

in other words, he adopts what I think is the exact meaning of what was said by **B**  
COTTON, L.J., in *Russell v. Cambefort* (1). Unless, therefore, we are to overrule both these cases we must hold that Ord. 9, r. 6, does not apply at all to the present case, and if that be so, then Ord. 11 cannot give Ord. 9, r. 6, a different effect. I agree with LINDLEY, L.J., that it would be a strong thing that this rule as to service on partnership firms should apply to a foreign firm all of whose members are domiciled and resident abroad, and enable a plaintiff to sign judgment in default, after serving one of the partners of the foreign firm. I should be most **C**  
reluctant to give such a meaning to that rule, and, in my opinion, the matter is really decided by *Russell v. Cambefort* (1) and *Western National Bank of City of New York v. Perez, Triana & Co.* (2).

*Appeal dismissed.*

Solicitors: Rowcliffes & Co. for Fullagar & Hulton, Bolton.

[Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.] **D**

## KELLY v. ROGERS **E**

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), May 9, 1892] **F**

[Reported [1892] 1 Q.B. 910; 61 L.J.Q.B. 604; 66 L.T. 582;  
56 J.P. 789; 40 W.R. 516; 8 T.L.R. 554; 36 Sol. Jo. 485]

*Landlord and Tenant—Covenant—Quiet enjoyment—Sub-lease—Covenant against interruption from sub-lessor and "any person . . . lawfully claiming by, through, or under him"—Breach by sub-lessor of covenant in original lease—Re-entry by superior landlord—Liability of sub-lessor to sub-lessee for breach of covenant.* **G**

A sub-lease contained a covenant by the sub-lessor for quiet enjoyment of the premises by the sub-lessee without any interruption from or by the sub-lessor, and "any person . . . lawfully claiming by, through, or under him." The superior landlord obtained possession under the original lease which contained a covenant by the sub-lessor to repair and a proviso for re-entry on breach. The sub-lessee, who had performed all his covenants under the sub-lease, brought an action against the sub-lessor for breach of the covenant for quiet enjoyment in the sub-lease. **H**

**Held:** the interruption was caused by the superior landlord and not by the sub-lessor, or any person claiming by, through, or under him, within the meaning of the covenant, and, therefore, the action failed. **I**

**Notes.** Distinguished: *Cohen v. Tannar*, [1900] 2 Q.B. 609.

As to covenant for quiet possession, see 23 HALSBURY'S LAWS (3rd Edn.) 601 et seq.; and for cases see 31 DIGEST (Repl.) 128 et seq.

Cases referred to:

(1) *Stanley v. Hayes* (1842), 3 Q.B. 105; 2 Gal. & Dav. 411; 11 L.J.Q.B. 176; 6 Jur. 781; 114 E.R. 447; 31 Digest (Repl.) 137, 2760.

- A (2) *Harrison, Ainslie & Co. v. Muncaster*, [1891] 2 Q.B. 680; 61 L.J.Q.B. 102; 65 L.T. 481; 56 J.P. 69; 40 W.R. 102; 7 T.L.R. 688, C.A.; 31 Digest (Repl.) 137, 2754.

Also referred to in argument:

- Anderson v. Oppenheimer* (1880), 5 Q.B.D. 602; 49 L.J.Q.B. 708, C.A.; 31 Digest (Repl.) 144, 2823.  
 B *Spencer v. Marriott* (1823), 1 B. & C. 457; 2 Dow. & Ry. K.B. 665; 1 L.J.O.S.K.B. 134; 107 E.R. 170; 31 Digest (Repl.) 135, 2741.  
*Stevenson v. Powell* (1612), 1 Bulst. 182; 80 E.R. 871; 31 Digest (Repl.) 135, 2739.

**Appeal** by the defendant from the judgment of GRANTHAM, J., refusing to non-suit the plaintiff, in an action for breach of covenant in which the plaintiff recovered judgment for £500 damages at the trial of the action with a jury in Middlesex.

The defendant was the assignee of a lease of two houses, which contained a covenant to repair and a proviso for re-entry upon breach of that covenant. The plaintiff was the assignee of a sub-lease of one of the two houses granted by the predecessor of the defendant. The sub-lease contained a covenant by the sub-  
 D lessor for quiet enjoyment in the following terms:

"That . . . the lessee or they paying the rent hereby reserved and observing and performing all the covenants, conditions, and agreements therein on his and their parts contained, shall and may peaceably possess and enjoy the . . . premises for the term hereby granted without any interruption from or by . . . the . . . lessor, his executors, administrators, or assigns, and any person  
 E or persons whomsoever lawfully claiming by, through, or under him."

The defendant failed to perform the covenant to repair as to the house which was not demised to the plaintiff, and did not remedy the breach within a reasonable time after receiving notice from the superior landlord. The superior landlord thereupon brought an action against the plaintiff claiming to recover possession of the premises leased to him by the sub-lease, and recovered judgment and entered into possession. The plaintiff had observed and performed all the covenants in the sub-lease.  
 F

The plaintiff thereupon brought the present action against the defendant to recover damages for breach of the covenant for quiet enjoyment, and the plaintiff recovered a verdict and judgment for £500. The defendant appealed on the ground of misdirection and applied for judgment or for a new trial.  
 G

*Crump, Q.C.*, and *H. E. Duke* for the defendant.  
*Herbert Reed* for the plaintiff.

**LORD ESHER, M.R.**—I think that, even without any authority to that effect, no other meaning can possibly be given to the words of this covenant, according to the ordinary meaning of the English language, than a meaning which does not make the defendant liable. The words "interruption by him" do not mean an interruption which has been caused because he has, by his conduct, given somebody else a right to turn the tenant out, and that is what has happened in the present case. The defendant, by his breach of covenant, gave the superior landlord the legal power to enter, and the superior landlord did enter. The actual interruption, therefore, was made by the superior landlord and not by the defendant. That being so, let us see if the words used in this covenant can include an interruption by the superior landlord.  
 H  
 I

These very words, or words as nearly like them as possible, were interpreted, in *Stanley v. Hayes* (1), many years ago, and it was held in that case that the words did not include an interruption, such as this, by the superior landlord. Even if we thought that case wrongly decided, as I do not, yet all leases since the year 1844 when it was decided have been drawn on the faith of that decision, and it ought not to be upset. It seems to me perfectly clear that the interruption in

the present case does not come within any of the words of this covenant. The superior landlord is not a person claiming by, through, or under the lessor of the plaintiff. The proper interpretation of this covenant was legally settled long ago, and the plaintiff ought to have been nonsuited at the trial. This appeal must be allowed, and judgment entered for the defendant. A

**FRY, L.J.**—I am of the same opinion. On the question whether an interruption by the superior landlord is an interruption by his lessee, or whether the superior landlord can be described as a person claiming by, through, or under his lessee, I think that, according to the ordinary meaning of the English language, only one answer is possible, and that in the negative. It is quite true that the lessor's superior landlord did enter by reason of the default of the lessor, but that default does not make the superior landlord claim by, through, or under the lessor of the plaintiff. The only shadow of an authority in favour of the plaintiff is the passage in the judgment of **BOWEN, L.J.**, in *Harrison, Ainslie & Co. v. Muncaster* (2), where he says ([1891] 1 Q.B. at p. 689): B

"I think that an interruption under such a covenant is not caused by the lessor or by those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it either was foreseen or ought by reasonable care to have been foreseen that the consequence in the particular case would be an interruption." C

I am not inclined to go so far as that definition goes, if it is to be considered as an affirmative definition. I do not, however, think that **BOWEN, L.J.**, there meant to state affirmatively that everything which comes within that definition is an interruption, but only that nothing is an interruption which does not come within such a definition. In any case that which is said to be an interruption in the present case does not even come within that definition, because it could not necessarily have been foreseen that the superior landlord would enter. The plaintiff, therefore, ought to have been nonsuited at the trial, and this appeal must be allowed and judgment be entered for the defendant. D

**LOPES, L.J.**—I agree. In order to maintain an action upon a covenant for quiet enjoyment, drawn in a form like this covenant, an act done by the lessor himself or a person claiming under him must be proved. In this case that has not been proved. The only interruption proved was an interruption by the superior landlord. It is clear, therefore, that this interruption is not within the terms of the covenant in the plaintiff's lease. With regard to the passage cited from the judgment of **BOWEN, L.J.**, in *Harrison, Ainslie & Co. v. Muncaster* (2) ([1891] 1 Q.B. at p. 689), I do not think that that definition, if pressed to the uttermost, will help the plaintiff in this case. The plaintiff ought to have been nonsuited, and this appeal must succeed. E

*Appeal allowed.* F

Solicitors: *Francis Miller & Co.*; *J. H. R. Kelly.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.] G



A

## HIBBERT AND ANOTHER v. LLOYD AND ANOTHER

[COURT OF APPEAL (Lindley, Bowen and A. L. Smith, L.J.J.), November 16, 1892]

B

[Reported [1893] 1 Ch. 129; 62 L.J.Ch. 14; 68 L.T. 128; 41 W.R. 49; 9 T.L.R. 77; 37 Sol. Jo. 49; 2 R. 166]

*Mortgage—Costs—Mortgagee's costs—Solicitor mortgagee—One of two mortgagees—Disallowance of profit costs.*

*Solicitor—Mortgagee—One of two mortgagees—Disallowance of profit costs.*

C

Where one of two mortgagees is a solicitor and represents both himself and his co-mortgagee in a foreclosure action in which a foreclosure order is made, he is not entitled to charge any profit costs against the mortgagor, either in respect of the action or in respect of business done relating to the mortgage.

**Notes.** Applied: *Wellby v. Still* (1893), 37 Sol. Jo. 481; *Eyre v. Wynn-Mackenzie*, [1894] 1 Ch. 218. Considered: *Re Hill's Trusts*, *Claremont v. Hill*, [1934] Ch. 623. Referred to: *Re Gates*, *Arnold v. Gates*, [1933] Ch. 913.

D

As to fees where solicitor is a mortgagee, see 36 HALSBURY'S LAWS (3rd Edn.) 113; and for cases see 24 DIGEST (Repl.) 656 et seq.

Cases referred to:

(1) *Re Donaldson* (1884), 27 Ch.D. 544; 54 L.J.Ch. 151; 51 L.T. 622; 35 Digest 695, 4381.

E

(2) *Slater v. Cottam* (1857), 29 L.T.O.S. 309; 3 Jur.N.S. 630; 5 W.R. 744; 35 Digest 689, 4319.

(3) *Re Wallis, Ex parte Lickorish* (1890), 25 Q.B.D. 176; 59 L.J.Q.B. 500; 62 L.T. 674; 38 W.R. 482; 6 T.L.R. 291; 7 Morr. 148, C.A.; 35 Digest 636, 3678.

F

(4) *Craddock v. Piper* (1850), 17 Sim. 41; 1 Mac. & G. 664; 1 H. & Tw. 617; 19 L.J.Ch. 107; 15 L.T.O.S. 61; 14 Jur. 97; 41 E.R. 1422; 24 Digest (Repl.) 659, 6471.

(5) *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch.D. 675; 56 L.J.Ch. 294; 56 L.T. 411; 51 J.P. 597; 35 W.R. 309; 3 T.L.R. 355, C.A.; 24 Digest (Repl.) 659, 6477.

G

**Appeal** by the plaintiffs on a summons to review taxation of their costs from a decision of STIRLING, J., upholding the taxing master's order, disallowing all profit costs on the ground that the plaintiffs had been represented in a foreclosure action by a solicitor who was one of themselves.

H

The plaintiffs in the foreclosure action, Leicester Hibbert and Thomas Dolling Bolton, were the mortgagees and had been represented by Bolton who was a solicitor. The defendants were the mortgagors and a foreclosure order had been made against them. On a summons to review taxation, the plaintiffs had been disallowed all profit costs. The plaintiffs appealed.

*Hastings, Q.C.*, and *Newbold* for the plaintiffs.

*Challis and Birrell* for the defendants.

I

**LINDLEY, L.J.**—This case raises a question of some importance. A foreclosure decree was made in an action brought by two mortgagees, one of whom, being a solicitor, acted as such in the action for himself and his co-mortgagee. It is conceded that he is entitled to costs out of pocket, but he asks also for his profit costs. Is he right in that?

I will begin by taking the simplest case, that of a solicitor being sole mortgagee and acting as solicitor on his own behalf. What costs can he get? Only costs out of pocket, not because he is a trustee, but because the bargain is that the mortgagor may redeem on payment of principal, interest, and costs, i.e., costs incurred by the mortgagee which do not include remuneration for his own personal trouble. We

arrive then in that case at the same result and rule as in the case of a trustee. A  
Then comes a more complicated question. Does the rule apply where the solicitor  
acts not only for himself but also for his co-mortgagee? Unless the rule applies  
one of the mortgagees will be charging against the mortgagor a remuneration for  
his own personal trouble, and this ought not to be allowed.

There is no authority in favour of the plaintiffs except *Re Donaldson* (1), and  
there is a long course of practice against them. I do not think that the practice B  
has been so universal as I had supposed, but no doubt in many cases the point  
escaped attention. When, however, attention was called to it, as in *Sclater v.*  
*Cottam* (2), the rule was recognised. *Re Wallis* (3) shows that the principle is  
settled that a mortgagee cannot charge a mortgagor for his own personal services  
about the security. As to *Re Donaldson* (1) it goes a great deal too far, and is  
inconsistent with the decision in *Sclater v. Cottam* (2). As to *Craddock v. Piper* C  
(4), LORD COTTENHAM decided that, where two trustees were parties to a litigation,  
and one of them being a solicitor acted for both, he was entitled to full costs.  
But when we look at the judgment we find that his Lordship does not meet the  
difficulty arising from the double position of trustee and solicitor. The courts  
have repeatedly expressed doubts of the soundness of that decision. It came before  
us in *Re Corsellis* (5)—we did not overrule it, but we showed that we did not D  
approve of it. It stands, but it does not cover the present case. If we thought  
it sound in principle we ought to extend it to cases which, although different, fall  
within its principle; but the better opinion being that the decision is unsound, it  
ought not to be extended to any case not coming clearly within it.

**BOWEN, L.J.**—I agree. I cannot follow the reasoning in *Craddock v. Piper* E  
(4), and do not think it ought to be extended.

**A. L. SMITH, L.J.**—It was decided in *Re Wallis* (3), if it had never been  
decided before, that a solicitor who is sole mortgagee cannot get profit costs. Why,  
then, should he get profit costs if a layman is joined with him? Hibbert, who is  
joined with him, is not liable to him for any part of the costs, so the hardship F  
suggested by the plaintiffs does not arise. *Craddock v. Piper* (4), being a case of  
trustees, does not govern the present case, and I agree that it ought not to be  
extended.

*Appeal dismissed.*

Solicitors: *Bolton & Co.; Cheston & Sons.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.] G

## FITZGERALD'S TRUSTEE v. MELLERSH

[CHANCERY DIVISION (Chitty, J.), January 12, 13, 21, 1892]

[Reported [1892] 1 Ch. 385; 61 L.J.Ch. 231; 66 L.T. 178;  
40 W.R. 251; 8 T.L.R. 237; 36 Sol. Jo. 216]

**B** *Mortgage—Redemption—Notice—Mortgage by deposit of deeds—No time limited for repayment—Right of mortgagee to six months' notice.*

An equitable mortgagee by deposit of title deeds of land accompanied by a memorandum of deposit limiting no time for repayment is not entitled to six months' notice before accepting a tender of the amount due on the mortgage nor to six months' interest in lieu of notice.

**C** Where there is a regular mortgage deed with a proviso for redemption, the just inference from the transaction is that the loan on mortgage is intended to be of a permanent character, and it is reasonable to infer that the parties intended that, after default, the mortgagee should be entitled to a six months' notice; but where the just inference from the transaction is that the mortgage is merely temporary, as is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended so long a notice should be given.

**D** **Notes.** Considered: *London County and Westminster Bank v. Tomkins*, [1918] 1 K.B. 515. Referred to: *Cromwell Property Investment Co., Ltd. v. Western*, [1933] All E.R.Rep. 440.

**E** As to enforcement of equity of redemption, see 27 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 35 DIGEST 360 et seq.

Cases referred to:

(1) *Browne v. Lockhart* (1840), 10 Sim. 420; 9 L.J.Ch. 167; 4 Jur. 167; 59 E.R. 678; 35 Digest 361, 1036.

**F** (2) *Smith v. Smith*, [1891] 3 Ch. 550; 60 L.J.Ch. 694; 65 L.T. 334; 40 W.R. 32; 35 Digest 362, 1044.

(3) *Bartlett v. Franklin* (1867), 36 L.J.Ch. 671; 17 L.T. 100; 15 W.R. 1077; 35 Digest 362, 1039.

(4) *Toms v. Wilson* (1863), 4 B. & S. 442, 455; 2 New Rep. 454; 32 L.J.Q.B. 382; 8 L.T. 799; 10 Jur.N.S. 201; 11 W.R. 952; 122 E.R. 524, 529, Ex. Ch.; 12 Digest (Repl.) 488, 3663.

**G** (5) *Brigby v. Norton* (1862), 3 B. & S. 305; 1 New Rep. 93; 32 L.J.Q.B. 38; 7 L.T. 422; 9 Jur.N.S. 495; 11 W.R. 167; 122 E.R. 116; 12 Digest (Repl.) 488, 3662.

Also referred to in argument:

*Letts v. Hutchins* (1871), L.R. 13 Eq. 176; 35 Digest 363, 1050.

**H** *James v. James* (1873), L.R. 16 Eq. 153; 42 L.J.Ch. 386; 21 W.R. 522; 35 Digest 556, 2866.

*Walsh v. Lonsdale* (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 30 Digest (Repl.) 415, 590.

*Day v. Day* (1862), 31 Beav. 270; 31 L.J.Ch. 806; 7 L.T. 122; 8 Jur.N.S. 1166; 10 W.R. 728; 54 E.R. 1142; 35 Digest 363, 1048.

**I** *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273; 58 L.J.P.C. 82; 60 L.T. 467; 38 W.R. 465; 5 T.L.R. 342, P.C.; 35 Digest 257, 162.

**Summons.**

Fitzgerald, in order to secure an advance to him by the defendants, a firm of bankers at Godalming, deposited with them the title deeds of certain freehold property belonging to him, accompanied by a memorandum containing an undertaking to execute a legal mortgage on request. No time for repayment was limited by the memorandum, and no request was ever made for a legal mortgage in pursuance of it. The property was subsequently sold by arrangement between the



mortgagor and mortgagees. The mortgagor became bankrupt, and the question arose as to what amount the bank was entitled to in respect of the advance to him, the bank claiming to be entitled to six months' interest on the amount of the loan in lieu of six months' notice before the tender of the borrowed sum. A

*Byrne, Q.C., and Upjohn* for the plaintiff.

*Levett, Q.C., and Manby* for the defendants.

*Cur. adv. vult.* B

Jan. 21, 1892. **CHITTY, J.**, read the following judgment.—The amount in dispute is small, but the question involves a matter of considerable importance. The question is whether an equitable mortgagee, by deposit of title deeds of land accompanied by a memorandum of deposit, is entitled to six months' notice before he is bound to accept a tender of the amount due, or six months' interest in lieu of notice. The memorandum in this case contains an undertaking by the mortgagor to execute a legal mortgage on request; but no request has been made, nor can any now be made, as the land has been sold pursuant to an arrangement between the mortgagor and the mortgagee. The undertaking, therefore, may be disregarded. The memorandum limits no time for repayment. The mortgagee has not called in the money, nor taken any steps to enforce his security. The mortgagee is willing to accept three months' interest only, but this is by way of concession. His claim is founded on his supposed right to six months' notice. C D

There are two authorities on the question of the right of a mortgagee to six months' notice or interest in lieu of notice. The first is *Browne v. Lockhart* (1). From the report, I gather that that case was one of a regular mortgage carrying the legal estate, with a proviso for redemption. In that case, **SHADWELL, V.-C.**, after stating that it was the usual practice for a mortgagor when he intends paying off a mortgage to give a proper notice of his intention so to do, said (10 Sm. at p. 424) that he apprehended that there was no law of the Court of Chancery or any other court which required that to be done; that it rested entirely on custom; and that the custom was founded on this—namely, that it is but fair that the party who has lent his money on the security should have a reasonable opportunity before the transaction is put an end to of finding some other security on which he may lay out his money when it has been repaid to him. The observations of the Vice-Chancellor were, as I apprehend, addressed to the case which was before him of a regular legal mortgage, and I understand that he intended to affirm the right of the mortgagee in such a case to the usual six months' notice. The other authority is *Smith v. Smith* (2). In that case, the mortgage was of a reversionary interest in a trust fund, and it appears to have been made by a formal deed with the usual proviso for redemption. It was there held that the mortgagee was not bound to accept the money except on a six months' notice or payment of interest in lieu of notice. E F G

There is also the decision of **MALINS, V.-C.**, in *Bartlett v. Franklin* (3), which, I understand, was also the case of a regular mortgage of a fund in court. It was there held that the mortgagee was entitled to six months' notice or interest in lieu of notice. There is no express authority, so far as I am aware, that the rule as to six months' notice or interest applies to the simple case of a mortgage by deposit of deeds. This form of security is now in very common use between bankers and their customers, and among commercial men and others where a temporary loan is required. It was admitted by counsel for the mortgagee that it is not the practice among bankers or commercial men to require six months' notice or interest; and, so far as my experience goes, this admission is in accordance with the fact. It was argued, however, for the mortgagee, that the rule existed although it was not insisted on. There was no evidence one way or the other as to the practice. I

The text writers state the rule, but not one of them intimates that it applies to a mortgage by deposit. I have referred to **COOTE ON MORTGAGE, POWELL ON**

**A** MORTGAGES, by COVENTRY, and FISHER ON MORTGAGES. In the first edition of COOTE, the rule is thus stated (p. 553):

"It has become a settled rule in equity that a mortgagor must, after default made by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage unless the mortgagee has demanded or taken any steps to compel payment; in which latter case, not any notice is requisite; and it has been considered that if the mortgagor be willing to pay six months' interest in advance, notice will be unnecessary."

The passage in POWELL and the note by COVENTRY are substantially to the same effect. FISHER states the rule thus (p. 1226):

**C** "After default, the mortgagee is generally entitled to notice before his security is discharged by payment, the reason of which is said to be that the mortgagor, having lost his estate at law, and being only entitled to redeem in equity, must do equity by allowing a reasonable opportunity for the mortgagee to find a new security for his money; for which six months is treated as the proper time. By a rule of practice the mortgagee is entitled to six months' interest in lieu of notice."

**D** One of the reasons given by FISHER and COVENTRY—viz., that the estate of the mortgagee has become absolute at law—applies only to a mortgage conveying the legal estate; the other given by the text writers—viz., that the mortgagee ought to have a reasonable time to find a fresh mortgage—would apply to a mortgage by deposit. But they all speak of the mortgagee's right after default. Where no time is limited for the repayment of the debt, as is almost universally the case **E** where the mortgage is by deposit, there is nothing to prevent the mortgagee from calling in his money at once, and it is inappropriate language, to say the least of it, to speak of the mortgagor being in default because he does not pay on the next day after the loan is made.

There being, then, no authority on the point, I must decide this question on principle; and, on principle, I think that an equitable mortgagee by deposit is not entitled to six months' notice. The true ground for the rule, where it applies, appears to me to be that it is equitable or, what is the same thing, reasonable to apply it. If I applied the rule to the case before me, I should be inflicting great hardship on persons who give such securities. Money is generally borrowed on them for a short time only, and often at a higher rate of interest, because it is **G** expected that the loan will shortly be paid off. Having regard to what has been and what has not been decided, I venture to express the rule thus:—Where the just inference from the transaction is that the loan on mortgage is intended to be of a permanent character, it is reasonable to infer that the parties intended that, after default, the mortgagee should be entitled to a six months' notice. That appears to be the just inference whenever there is a regular mortgage deed with **H** a proviso for redemption.

This point is covered by the authorities. But where the just inference from the transaction is that the mortgage is merely temporary, as I think is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that so long a notice should be given. I do not say that the mortgagor may suddenly pounce down on the mortgagee without **I** any notice at all with the money, and demand back his deeds. He must not act unreasonably or vexatiously; he must at least give the mortgagee a reasonable time, though it may be short, to look up the deeds. Even the mortgagee, when the loan is payable on demand, must give a reasonable notice to the mortgagor to enable him to find the money: see *Toms v. Wilson* (4); and *Brighty v. Norton* (5). The circumstance that six months is always allowed to the mortgagor on a judgment, whether of redemption or foreclosure, has nothing to do with the question. The six months is allowed to the mortgagor as a reasonable time in which to find the money before his right to redeem is barred, whether by the dismissal of the

action to redeem, or by the order making the foreclosure absolute. The rule, where it applies, does not seem to be founded on the length of time allowed for redemption by the proviso, which may be less than six months or may be more; sometimes the money is lent for a term of years. The period of six months is adopted as being generally reasonable, just as in the case of a tenancy from year to year, where the notice to determine the tenancy must be reasonable, and six months has long ago been established at common law to be the reasonable period. I will allow interest on the debt up to the date of actual payment, but no further interest in lieu of notice.

Solicitors: *Wards, Perks & McKay; John Patrick Murrough for R. E. & T. B. Mellersh, Godalming.*

[*Reported by H. M. C. MACPHERSON, Esq., Barrister-at-Law.*]

## BALKIS CONSOLIDATED CO. v. TOMKINSON

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Macnaghten and Lord Field),  
March 14, 17, 20, July 20, 1893]

[Reported [1893] A.C. 396; 63 L.J.Q.B. 134; 69 L.T. 598;  
42 W.R. 204; 9 T.L.R. 597; 37 Sol. Jo. 729; 1 R. 178]

*Company—Estoppel—Share certificate—False statement as to owner of shares—  
Liability of company to person acting on faith of certificate.*

A transferee of shares in a company who has parted with the consideration money for the transfer on the faith of and in exchange for a certificate of proprietorship issued by the company under their seal is entitled to rely on the truth of the statement contained in it, and the company are estopped, in any action brought by the transferee in which that statement is material, from denying the truth of it and setting up a want of title in the person whom they have certified as owner. A transferor who has entered into a contract to deliver valid shares on the faith of a certificate of his ownership issued to him by the company is in the same position. There may, however, be cases in which the untruth of the statement in the certificate does not depend on any fact within the knowledge of the company as to which they have means of knowledge to which they reasonably ought to have recourse, and the person setting up the estoppel has equal means of knowledge, and in such a case no estoppel would exist.

**Notes.** Applied: *Dixon v. Kennaway*, [1900] 1 Ch. 833. Distinguished: *Malcolm, Brunner v. Waterhouse* (1908), 24 T.L.R. 854. Referred to: *Re Concessions Trust, McKay's Case* (1896), 65 L.J.Ch. 909; *Sheffield Corpn. v. Barclay*, [1903] 2 K.B. 580; *Ruben and Landenburg v. Great Fingall Consolidated*, [1904-7] All E.R.Rep. 460; *Lloyd v. Grace, Smith & Co.*, [1911] 2 K.B. 489; *South London Greyhound Racecourses, Ltd. v. Wake*, [1930] All E.R.Rep. 496.

As to the estoppel of a company from disputing the truth of a statement in a share certificate, see 6 HALSBURY'S LAWS (3rd Edn.) 247, 248; and for cases see 9 DIGEST (Repl.) 297-300.

Cases referred to:

(1) *Re Bahia and San Francisco Rail. Co.* (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 297, 1871.



- A** (2) *Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest (Repl.) 366, 1090.
- (3) *Hart v. Frontino and Bolivia South American Gold Mining Co., Ltd.* (1870), L.R. 5 Exch. 111; 39 L.J.Ex. 93; 22 L.T. 30; 9 Digest (Repl.) 297, 1872.
- (4) *Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q.B.D. 188; 49 L.J.Q.B. 392; 42 L.T. 37; 44 J.P. 280; 28 W.R. 290, C.A.; 9 Digest (Repl.) 297, 1874.
- B** (5) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 29, 6.
- (6) *Jorden v. Money* (1854), 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 21 Digest (Repl.) 372, 1114.

Also referred to in argument:

- C** *Bishop v. Balkis Consolidated Co., Ltd.* (1890), 25 Q.B.D. 512; 59 L.J.Q.B. 565; 63 L.T. 601; 39 W.R. 99; 6 T.L.R. 450; 2 Meg. 292, C.A.; 9 Digest (Repl.) 395, 2537.
- Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, 1103.
- Cunnam v. Farmer* (1849), 3 Exch. 698; 154 E.R. 1026; 21 Digest (Repl.) 407, 1303.
- D** *Shaw v. Port Phillip Gold Mining Co.* (1884), 13 Q.B.D. 103; 53 L.J.Q.B. 369; 50 L.T. 685; 32 W.R. 771, D.C.; 9 Digest (Repl.) 298, 1880.
- British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590, C.A.; 9 Digest (Repl.) 263, 1662.
- E** *Mechanics Bank v. New York and New Haven Railroad Co.*, 4 Duer. (11 N.Y. Sup. Ct.) 480.
- Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 9 Digest (Repl.) 127, 685.
- Scarf v. Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 21 Digest (Repl.) 299, 633.
- F** *Skinner v. City of London Marine Insurance Corpn.* (1885), 14 Q.B.D. 882; 54 L.J.Q.B. 437; 53 L.T. 191; 33 W.R. 628; 1 T.L.R. 426, C.A.; 9 Digest (Repl.) 362, 2318.
- London Founders Association v. Clarke* (1888), 20 Q.B.D. 576; 57 L.J.Q.B. 291; 59 L.T. 93; 36 W.R. 489; 4 T.L.R. 377, C.A.; 9 Digest (Repl.) 365, 2337.
- Fairtitle d. Mytton v. Gilbert* (1787), 2 Term Rep. 169; 100 E.R. 91; 21 Digest (Repl.) 352, 980.
- G** *Re Companies Acts, Ex parte Watson* (1888), 21 Q.B.D. 301; 57 L.J.Q.B. 609; 52 J.P. 742; sub nom. *Re Sheffield Permanent Building Society, Ex parte Watson*, 59 L.T. 401; 36 W.R. 829, D.C.; 21 Digest (Repl.) 378, 1141.
- Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354; 54 L.J.Q.B. 577; 53 L.T. 62; 49 J.P. 773; 1 T.L.R. 477, H.L.; 13 Digest (Repl.) 275, 984.
- H** *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; 55 L.J.Q.B. 169; 54 L.T. 389; 34 W.R. 662; 2 T.L.R. 200, H.L.; 9 Digest (Repl.) 378, 2438.
- Shropshire Union Railways and Canal Co. v. R.* (1875), L.R. 7 H.L. 496; 45 L.J.Q.B. 31; 32 L.T. 283; 23 W.R. 709, H.L.; 9 Digest (Repl.) 395, 2532.
- Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; 48 L.J.Ch. 179; 39 L.T. 308; 26 W.R. 819, H.L.; 9 Digest (Repl.) 299, 1883.

**I** **Appeal** by the defendants in the action from a decision of the Court of Appeal (LORD ESHER, M.R., LOPES and KAY, L.JJ.), reported [1891] 2 Q.B. 614, affirming a decision of POLLOCK, B., in favour of the respondents in an action brought by them against the appellants company.

*Finlay, Q.C., Buckley, Q.C., and Sutton* for the appellants.

*Reid, Q.C., and Hollams* for the respondents.

Their Lordships took time for consideration.

July 20, 1893. The following opinions were read.

**LORD HERSCHELL, L.C.**—This action was brought by the respondents, A Tomkinson and Price, who carried on business as stockbrokers in partnership, to recover damages in respect of the refusal by the appellant company to register the purchasers from the respondents of some shares in the appellant company. Pollock, B., who tried the action, gave judgment for the respondents for £717 10s., and this judgment was affirmed by the Court of Appeal.

The respondents, in December, 1888, advanced to one Powter the sum of £250 B by way of loan, on the faith of and in exchange for a transfer of 1,000 shares in the appellant company, which Powter deposited with the defendants as security for such advances. The transfer was what is termed a certified transfer—that is to say, it bore upon its face, above the signature of the secretary of the company, these words “certificate lodged.” There can be no doubt that the purpose of this certification is to give an assurance to the person taking the transfer that the C transferor has deposited with the company a certificate showing his right to transfer. The loan of £250 was paid off in January, 1889, and further loans were afterwards made from time to time on the faith and security of this certified transfer. In May, 1889, the respondent Tomkinson, with the knowledge and sanction of Powter, inserted his own name (as representing his firm) in the transfer as transferee of the shares, and having executed the transfer, lodged it at the office D of the appellant company for registration. On July 1, 1889, the appellant company, on the application of the respondents, issued to them a certificate signed by two of the directors, countersigned by the secretary, and sealed with the seal of the company, certifying that the respondent Tomkinson was the proprietor and duly registered owner of the 1,000 shares. In August, 1889, the balance due from Powter to the respondents was £193 14s. 6d., for which they held the 1,000 shares E as security. Powter then instructed them to realise for the purpose of paying his debt. The respondents, accordingly, in that month, sold the 1,000 shares to various purchasers for the sum of £426 17s. 6d., and, for the purpose of completing such sales, the respondents lodged with the appellants the certificate which had been issued in respect of the shares, together with transfers in favour of the F respective purchasers thereof, in order that they might be certified.

This having been done, the transfers, with the certification signed by the secretary of the appellant company upon them, were returned to the respondents and handed by them to the various purchasers, who thereupon paid their purchase money. Out of the £426 17s. 6d. thus received by the respondents they repaid themselves the balance of £193 14s. 6d. which remained due as already mentioned, and, after paying to Powter a sum of £110, they retained the balance of £123 3s., G Powter, who shortly afterwards absconded, being indebted to them to an amount largely in excess of that sum. The appellant company refused to recognise the certified transfers or to register the purchasers named therein as the holders of the shares. The respondents were consequently compelled, in accordance with the custom and rules of the Stock Exchange, to complete their contracts with the purchasers by purchasing and delivering to them 1,000 other shares in the appellant H company in the place of those named in the transfers. The market price of the shares having risen, the respondents were compelled to pay the sum of £717 10s. for such substituted shares, and it is the amount of this payment which they have been held entitled to recover.

From the evidence adduced at the trial it appeared that in December, 1887, Powter was the registered proprietor of a large number of shares in the appellant company. I In March, 1888, the company certified a transfer of £5,000 of these shares (of which the 1,000 which Powter purported to transfer to the respondents formed part) to Maitland and Balfour. A note of this was endorsed by the appellant company on the certificate of Powter's shares which was in their possession. In January, 1889, the company registered Balfour and Maitland as proprietors of the 5,000 shares, and gave them the usual certificate. It was under these circumstances that they refused to recognise the respondent Tomkinson as proprietor and to register his transferees. It was contended for the respondents that the

- A certificate which the respondent Tomkinson received from the appellant company was given to him for the purpose of being used by him as evidence of his title to the shares; that on the faith of this he entered into contracts of sale which he was bound to fulfil; that the appellant company were, under these circumstances, estopped from denying that he was the proprietor of the shares, and that, having refused to register the purchasers and transferees from him, on the ground that he was not the proprietor of them, they were liable to make good to him the loss he had sustained in consequence.

It was held by the Court of Queen's Bench, in *Bahia and San Francisco Rail. Co.* (1) that such an estoppel might arise where a certificate was issued, stating that the person named in it was the registered holder of certain shares in the company. The persons named in the certificate of the Bahia and San Francisco Rail. Co. having sold to a purchaser who was registered as holder, his name was afterwards removed on its being discovered that the transfer to the persons named in the certificate was a forgery. The court held that the giving of the certificate amounted to a statement by the company, intended by them to be acted upon by the purchasers of shares in the market that the persons certified as the holders were entitled to the shares; and that, the purchasers having acted on that statement by the company, they were estopped from denying its truth, and liable to pay as damages the value of the shares. BLACKBURN, J., in the course of his judgment, remarked that when joint-stock companies were established it was a great object that the shares should be capable of being easily transferred, and that the legislature had accordingly provided for the keeping of a register of the members, in order to keep which the company must alter the register whenever there was a transfer of its shares, and the learned judge drew attention to s. 31 of the Companies Act, 1862, which provided that a company might give certificates, and that these should be prima facie evidence of the title of the person named to the shares specified [see now Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 452), s. 79 (1)], and pointed out that by granting the certificate the company make a statement that they have transferred the shares specified to the person named in it, and that he is the holder of the shares, and that, if the company have been deceived and the statement is not true, they may not be guilty of negligence, but they, and no one else, had power to inquire into the matter. The learned judge expressed the opinion that it was the intention of the legislature that these certificates should be documents on which buyers might safely act, and continued thus (L.R. 3 Q.B. at pp. 596, 597):

- G "It is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And, the claimants having bona fide acted upon that statement, and suffered damage, can they recover from the company? I think they can, on the principle enunciated in *Freeman v. Cooke* (2)."
- H The decision in the *Bahia and San Francisco Railway Case* (1) was followed under somewhat different circumstances by the Court of Exchequer in *Hart v. Frontino and Bolivia South American Gold Mining Co., Ltd.* (3). The plaintiff in that action bought and paid for shares in the defendant company, and received duly executed transfers and share certificates, which certified that the person named in the register of shareholders was the proprietor of five shares, numbered, etc. The seller of the shares, being afterwards compelled to pay a call upon them, demanded repayment from the plaintiff, who required to have the transfer completed by registration. His name was accordingly entered on the register, and he received from the company a certificate that he was the proprietor of the shares. On the faith of this certificate, he repaid the seller the amount of the call. The company having discovered that the shares had been sold by a previous owner by a duly executed transfer to another person removed the plaintiff's name from the register and inserted the name of that person. It was held that by the registration of the plaintiff and the delivery to him of the certificate, followed by the payment



by him of the call, the defendants were estopped from denying his title to the shares, and were liable to pay for their value. A

The learned counsel for the appellants impeached these decisions, as they were entitled to do in your Lordships' House, and contended that they ought to be overruled. After carefully considering the able arguments urged at the Bar, I have no hesitation in expressing my concurrence in the law laid down by the Court of Queen's Bench in the *Bahia and San Francisco Rail. Co. Case* (1). The reasoning of BLACKBURN, J., in pronouncing judgment in that case appears to me to be sound and in accordance with the law, and I think it would be very mischievous to cast any doubt on the authority of that case. B

The appellants argued, however, and correctly, that the present case is distinguishable from that in the Queen's Bench, inasmuch as it is not the purchasers who are seeking to render the company liable by way of estoppel, but the vendor of the shares, who himself received the certificate from the company. Does that, in the circumstances which your Lordships have to consider, make any difference? If the company must have known, as was said in the *Bahia and San Francisco Railway Case* (1), that persons wanting to purchase shares might act upon the statement of fact contained in the certificate, it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the faith of it enter into a contract to sell the shares. The respondents did enter into such a contract, and thereby altered their position by rendering themselves liable to the persons with whom they contracted to sell the shares. All the elements necessary to create an estoppel would appear, therefore, to be present. C D

The appellants, however, relied upon the decision in *Simm v. Anglo-American Telegraph Co.* (4) as showing that one who receives from a company a certificate that he is the proprietor of shares therein is not in the same position as regards his rights by estoppel against the company as a transferee from him would be. In that case Burge, who was the buyer of stock in the defendant company, received in pursuance of his purchase a transfer of the stock purporting to be executed by Coates, who was the registered owner of stock to the amount purchased. The transfer was, in fact, forged by a clerk in Coates's employ. Burge having borrowed money from a bank, the stock was transferred to Ingelow as trustee for the bank, and the company registered Ingelow as the owner, and issued a certificate accordingly. The advance having been repaid by Burge, the bank's trustee became trustee for him. The company having discovered the forgery and refused to recognise Ingelow as the owner of the shares, an action was brought by Burge and Ingelow to compel the company to recognise their title. It was held by the Court of Appeal that they had no title by estoppel as against the company. The grounds for the decision appear to have been twofold—in the first place, that Burge had not altered his position by reason of the statement in the certificate, and, in the next place, that he had himself, by producing to them a forged transfer, induced the company to insert the name of his nominee as the proprietor of the stock. E F G

Neither of these grounds apply in the case before your Lordships. I have already shown that the respondents did alter their position by entering into a contract which imposed liability upon them, and they did not in any way mislead the company into registering the respondent Tomkinson as a shareholder, and giving the certificate relied on. The company had certified the transfer to the respondents—that is, they had stated in effect that there was in their possession a certificate showing the title of Powter to make the transfer to them; they knew, and the respondents did not, that they had already certified a transfer of these very shares from Powter to Maitland and Balfour, and that the certificate referred to in their endorsement "Certificate lodged," bore on the face of it a statement showing that this was the case. I can see nothing, therefore, in the circumstances under which the respondents obtained the certificate to deprive them of the right to claim by way of estoppel against the company. H I

*Ashbury Railway Carriage and Iron Co. v. Riche* (5), which was much pressed upon your Lordships in the argument for the appellants, appears to me to have no

A bearing on the question at issue between the parties to this appeal. The argument was put, as I understand, in this way. The company, it was said, are only authorised to issue a limited number of shares, and to hold it liable by estoppel, as is sought to be done in this case, to a person who is not the proprietor of any of those shares would in effect enable them to contract a liability in respect of shares beyond their authorised issue. I do not think this argument is a sound one. A  
B person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed, the very title by estoppel implies that he is not one. It has never been laid down, and is manifestly not the law, that a company is not authorised to employ its funds in paying damages for a wrong done, and, if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder  
C the person whose title they deny as if his title to be registered had in fact been a good one.

It remains to consider whether the respondents are entitled to recover as damages the sum which they have had to pay in order to purchase shares to enable them to carry out their contract. It is certain that this expenditure became necessary because, and only because, the company refused to register the purchasers. But it  
D is said that the sum thus expended is nevertheless not recoverable. It was argued that in respect of the refusal to register a transfer from him, a shareholder can recover nominal damages only. This may, no doubt, be so in some cases. In my opinion, it cannot be laid down as a proposition applicable to all cases that a person claiming by estoppel against a company is limited to nominal damages only in respect of the refusal to register a transferee from him. Again, it was said that  
E the company have a certain discretion allowed them, and were not bound to register every person to whom a shareholder might choose to transfer his shares. This is also true, but in the present case the refusal was not based on any exception taken to the proposed transferees; it was grounded upon a denial of the title of the intending transferor, to whom a certificate of his proprietorship of the shares had been issued by the company. In such a case I can see no good reason why, if he  
F can establish an estoppel against the company, he should not be entitled to recover the damages which he has in fact sustained owing to the refusal of the company to register. But it is contended that some deduction ought to be made from the sum of £717 10s. in respect of the amount received from the purchasers of the shares. I agree with the court below in seeing no ground for such a deduction. If the company had registered the purchasers of the shares (which in assessing the  
G damages it must be taken as against them they were bound to do) these moneys would equally have been received, and the £717 10s. would not have been expended. My Lords, for the reasons I have given, I think the judgment appealed from ought to be affirmed, and this appeal dismissed with costs.

**LORD MACNAGHTEN** stated the facts and continued: It appeared at the trial  
H that the shares which Powter pretended to transfer to Tomkinson had at one time belonged to him, but he had parted with them, and other persons were on the register in succession to Powter at the time when Tomkinson sent in his transfer to the company, and received the certificate of July 1, 1889, from them. It also appeared that in regard to these and other shares in the company Powter had pursued a course of systematic fraud, which he was enabled to carry on for a time  
I without detection by the help of some officials in the company's service who were in collusion with him, but it was established beyond question, and it is admitted by the appellants that Tomkinson and his firm acted throughout in good faith, and had no reason to suspect any want of good faith on the part of Powter. Under these circumstances **POLLOCK, B.**, and the Court of Appeal held the company liable on the ground that they were estopped by the certificate of July 1, 1889, from denying that Tomkinson was the registered proprietor of the 1,000 shares in question.

The general principle of law relating to estoppel by representation cannot be

questioned. It is, as LORD CRANWORTH observed in *Jorden v. Money* (6), a principle of universal application that if a person makes a false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. Then, after referring to some cases on the subject, his Lordship goes on to say (5 H.L.Cas. at p. 212):

"I think that the principle . . . may be carried much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But, if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying."

There is no doubt, I think, in this case that the company must be taken to have known that the certificate was required by Tomkinson or his firm for the purpose of being acted upon. In fact, when the certificate was sent back to the company, and Tomkinson's transfers were sent in for certification, the company had express notice that the certificate was being acted upon. There is no difficulty in this respect. Nor is there, I think, any difficulty created by the circumstance that all the shares of the company were issued, and that the company could not have gone into the market to buy its own shares. The company are not asked to make good their representations by transferring shares to Tomkinson. They are called upon to pay damages in order to compensate Tomkinson for loss to which he has been put by reason of their misrepresentation. Nor do I think that it is any answer to Tomkinson's claim to say that he had a statutory right to inspect the register, and that if he had taken the trouble to do so he would have found out that Powter had no shares to transfer; and I agree to the measure of damages. The only difficulty that I have felt arises from the connection between Powter and Tomkinson in this relation, or assumed relation of mortgagor and mortgagee, and from the fact that Powter, acting or pretending to act on Tomkinson's behalf as well as on his own account, was instrumental in procuring the certificate of July 1, 1889, and that Tomkinson was an active, though unconscious, instrument of Powter's fraud. Whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made to which he has in a sense, and to a certain extent, contributed, is, I think, a matter not unworthy of consideration. The point, however, was not argued; the evidence bearing upon it was not sifted; and the attention of the learned counsel for the respondents was not called to it. It would not, therefore, be right for me to say more than that, in my opinion, there is nothing to prejudice the question if it should ever be raised, even under circumstances similar to those which have occurred in the present case. With this reservation I concur in the motion which has been proposed.

**LORD FIELD.**—I concur with my noble and learned friends in the conclusion at which they have arrived, that this appeal must be dismissed. It seems to me to be impossible, for the reasons which the Lord Chancellor has given, after the repeated and hitherto, I think, substantially unquestioned decisions with which he has so fully dealt, not to hold that a transferee of shares, who has parted with the consideration money for the transfer upon the faith of, and in exchange for, a certificate of proprietorship issued by a company under their seal, is entitled to rely upon the truth of the statement contained in it, and that the company are precluded, in any action brought by him in which that statement is material, from denying the truth of it, and setting up a want of title in the person whom they have certified as owner. I agree also in thinking that a transferor who has entered into a contract to deliver valid shares upon the faith of a certificate of his ownership issued to him by the company, is in the same position. The reasoning upon which the cases referred to proceed seems to me to be sound, and to be quite as applicable



**A** in the one case as in the other. I can, however, well understand that there may be cases in which the untruth of the statement is not depending upon any fact within the knowledge of the company as to which they have means of knowledge to which they reasonably ought to have recourse, and the person setting up the estoppel having equal means of knowledge, and having applied for and obtained the certificate upon an alleged transfer—I say there may be such cases in which no

**B** such estoppel may exist.

Such a state of things existed in *Simm v. Anglo-American Telegraph Co.* (4), which has already been referred to. There the untruth of the certificate consisted in the fact that the signature to the transfer sent in for registration, which purported to be that of the person actually registered as holder in the company's register, had been forged, and, as BRETT, L.J., observed, that was a fact which lay

**C** as much within the knowledge of the applicant as of the company, and the certificate, as he says, did not contain a statement of facts which must have been known to the company, but were not known to the person to whom the representation was made, that case, therefore, differs widely from the present. Here the falsity of the representation depended upon the fact that Powter, the proposed transferor, was not, and had not been for some months, to the knowledge of the

**D** company, the registered owner of the shares which he purported to transfer, they having in the January preceding not only received a transfer from him to Maitland and Balfour, and entered it in their transfer book, but having actually registered Maitland and Balfour for the whole of the shares in question, and afterwards other persons for some of them. In *Simm's Case* (4) as in the present, no fraud was imputed to the applicants, and the learned judge who tried it also absolved all

**E** parties from negligence in the sense of want of reasonable care. But in the present case I cannot acquit the appellants of a certain amount of negligence or want of due care, for all that was requisite to ascertain the defect was a reference to the share register, the duty of keeping which is thrown upon the company by statute.

In *Simm's Case* (4) the Court of Appeal held, and I agree with them, that there was no duty upon the company to inquire of a registered holder whether the

**F** signature was genuine, although it was the practice of the company to do so. But I do think that before affixing the seal of the company and the signature of the directors to a representation which they know that the applicant requires as evidence of title upon which he may go into the market and make contracts of sale according to the regulations of the Stock Exchange involving the duty of making a complete delivery of genuine shares, it is at least the duty of a company to

**G** ascertain by reference to their own register, whether the proposed transferor appears to be the holder of the shares which he purports to transfer. It was in evidence that it was the practice for companies to do so. In sending in a transfer to a company for registration, it does not appear to me that the applicants give any warranty, or even make a material representation to the company that the transferor is the registered holder of the shares. That is a fact of which, in the

**H** ordinary course of business at the time when the transferee would part with his money he would not only have no knowledge, but no reasonable means of knowledge; whereas the company, who are under an obligation to grant or refuse the certificate, with ample time to refer to their own documents of title, have all the means of knowledge in their own office. That is a duty which I think they owe to a person who is desirous of becoming a member of their body and wishes to

**I** ascertain whether he may safely rely upon his admission as such, and to be fortified with an assurance by the company to that effect.

It is of course true in this case, as in *Simm's Case* (4), that the respondents were the persons who sent in the transfer to the appellants for registration and certificate; and in that sense, and to that extent, they may be said to have induced its issue. But I cannot come to the conclusion that in so doing they in any way induced the appellants to believe that Powter was the registered holder, or that the appellants were induced by them to make the false representation contained in the certificate. The respondents' relations with Powter were no doubt those of principal and agent;

but I can see no substantial ground for inferring that those relations in any way made the respondents responsible for Powter's frauds. No fraud on their part was imputed to them, and it was expressly negatived by the learned judge who tried the case. And to hold that a proposed transferee, who innocently sends in a transfer from a person appearing upon a certificate to be the registered owner, is deprived of the value of the assurance contained in the certificate, would, I think, very much tend to reduce the value of what seems to me to be a very important link in a man's title. There is also no doubt that in the present case the sales which were made by the respondents upon the faith of the certificate, were made by the order of Powter.

I arrive, therefore, at the result that the judgment of the Court of Appeal must be affirmed, and I am unable to come to the conclusion that there is anything in the conduct of the respondents to bring them within any authority or principle of equity which ought to prevent them from relying upon the estoppel which they set up, the maintenance of which in general, in the case of sellers as well as buyers, is, I think, in conformity with principles of equity and most essential to the conduct of the vast transactions in shares of registered companies which daily take place in this country. If, therefore, the estoppel exists, as I think it does, how does it operate in favour of the respondents? The breach of duty which they substantially allege is a refusal to register their transferees under circumstances which, as I hold, preclude the appellants from denying the respondents' ownership of the shares. If the latter had been such proprietors they would have had a right to require the appellants so to register, and the refusal to do so was, therefore, as against the respondents, upon the assumption of fact which the appellants were precluded from denying, in my opinion an actionable wrong in respect of which the respondents are entitled to recover damages.

The measure of those damages is, I think, the same which they have had to pay to enable them to carry out the contracts into which they entered upon the faith of the assurance given to them by the certificate. The moneys which they received upon their own sales were not in any sense received to the use of the appellants. Upon the assumption which the estoppel creates as against the appellants that the certificate was well founded, that money was properly received by the respondents, and I do not see how the appellants can recover it back in the shape of deduction from the £717 10s. which the respondents would not have had to pay in that view of the case. It was argued that the appellants were not liable because, as a corporation, they could not exceed their powers by registering stock which was already registered in the names of other proprietors, and if this had been an application to compel them to do so, or to purchase other stock of an equal amount, that might have been so. But this is an action to recover damages for a wrong to which no such principle can apply any more than to other breaches of contract or duty of which they might have been guilty.

*Appeal dismissed.*

Solicitors: *Stretton, Hilliard, Dale & Newman; Hollams, Sons, Coward & Hawkesley.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## SOAR v. ASHWELL

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), June 8, August 10, 1893]

[Reported [1893] 2 Q.B. 390; 69 L.T. 585; 42 W.R. 165;  
4 R. 602]

*Trustee—Express trustee—Solicitor—Receipt of trust property.*

A person occupying a fiduciary position who has property deposited with him as a result of that relation is to be dealt with as an express, and not merely a constructive, trustee of the property.

Accordingly, where a solicitor to trustees of a will invested trust money in an equitable mortgage by deposit of deeds, and, when the mortgagor paid off the mortgage, retained part of the money instead of paying it to the beneficiary,

**Held**, in an action against the solicitor by the beneficiary's daughter, who at his death had become absolutely entitled to the money, that the solicitor was in the position of an express trustee of the money, and could not avail himself of the defence of the limitation of the action provided by s. 8 of the Trustee Act, 1888.

**Notes.** By s. 8 of the Trustee Act, 1888, a trustee, in an action against him, was given all rights and privileges conferred by any statute of limitations except where the claim against him was founded on a fraud or fraudulent breach of trust or to recover trust property retained by him. This section was repealed by the Limitation Act, 1939, its effect being re-enacted in s. 19 of that Act.

Applied: *Re Lands Allotment Co.* (1894), 63 L.J.Ch. 291. Considered: *Price v. Phillips* (1894), 11 T.L.R. 86; *Re Gallard, Ex parte Gallard*, [1897] 2 Q.B. 8; *Trevor v. Hutchins* (1897), 76 L.T. 183; *Re Dixon, Haynes v. Dixon*, [1900] 2 Ch. 561. Applied: *North American Land and Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Henry v. Hammond*, [1913] 2 K.B. 515. Considered: *Taylor v. Davies*, [1920] A.C. 636. Applied: *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533. Referred to: *Mara v. Browne*, [1895] 2 Ch. 69; *Rochejoucauld v. Boustead*, [1897] 1 Ch. 196; *Friend v. Young*, [1897] 2 Ch. 421; *Trevor v. Hutchins* (1897), 76 L.T. 183; *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; *Re Mason* (1928), 79 L.J.Ch. 321; *Re Blake, Re Petition of Right of A. M. Minahan*, [1931] All E.R.Rep. 372; *Re Tintin Exploration Syndicate, Ltd.* (1947), 204 L.T.Jo. 56.

As to express and constructive trusts, see 38 HALSBURY'S LAWS (3rd Edn.) 880, 855; and for cases see 43 DIGEST 553, 631. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Burdick v. Garrick* (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 18 W.R. 387, L.C. & L.J.; 43 Digest 974, 4136.
- (2) *Barnes v. Addy* (1874), 9 Ch. App. 244; 43 L.J.Ch. 513; 30 L.T. 4; 22 W.R. 505, L.C.; 43 Digest 715, 1538.
- (3) *Life Association of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G.F. & J. 58; 4 L.T. 311; 7 Jur.N.S. 785; 9 W.R. 541; 45 E.R. 800, L.C. & L.J.J.; 43 Digest 851, 2990.
- (4) *Lee v. Sankey* (1873), L.R. 15 Eq. 204; 21 W.R. 286; sub nom. *Lee v. Sankey, Ginder v. Sankey*, 27 L.T. 809; 43 Digest 711, 1501.
- (5) *Bridgman v. Gill* (1857), 24 Beav. 302; 53 E.R. 374; 32 Digest 506, 1667.
- (6) *Wilson v. Moore* (1833), 1 My. & K. 126; 39 E.R. 629; affirmed (1834), 1 My. & K. 337, L.C.; 43 Digest 960, 3993.
- (7) *Bonney v. Ridgard* (1784), 1 Cox, Eq. Cas. 145; 29 E.R. 1101; 43 Digest 710, 1495.
- (8) *Beckford v. Wade* (1805), 17 Ves. 87; 34 E.R. 34; 52 Digest 500, 1608.



- (9) *Townsend v. Townsend* (1783), 1 Cox, Eq. Cas. 28; 1 Bro. C.C. 550; 29 E.R. 1047; 32 Digest 469, 1330. A
- (10) *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; 37 E.R. 294; 32 Digest 498, 1589.
- (11) *Marquis of Cholmondeley v. Lord Clinton* (1820), 2 Jac. & W. 1; 37 E.R. 527; affirmed (1821), 4 Bli. 1, H.L.; 32 Digest 511, 1698.
- (12) *Banner v. Berridge* (1881), 18 Ch.D. 254; 50 L.J.Ch. 630; 44 L.T. 680; 29 W.R. 844; 4 Asp.M.L.C. 420; 43 Digest 553, 28. B
- (13) *Gray v. Bateman* (1872), 21 W.R. 137; 32 Digest 503, 1646.
- (14) *Re Bell, Lake v. Bell* (1886), 34 Ch.D. 462; 56 L.J.Ch. 307; 55 L.T. 757; 35 W.R. 212; 32 Digest 482, 1450.
- (15) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 38 Sol. Jo. 151, C.A.; 32 Digest 505, 1653. C
- (16) *Robertson v. Armstrong* (1860), 28 Beav. 123; 54 E.R. 313; 43 Digest 889, 3332.
- (17) *Re Cross, Harston v. Tenison* (1882), 20 Ch.D. 109; 51 L.J.Ch. 645; 45 L.T. 777; 30 W.R. 376, C.A.; 43 Digest 1006, 4471.
- (18) *Petre v. Petre* (1853), 1 Drew. 371; 1 W.R. 139; 61 E.R. 493; 43 Digest 553, 26. D

Also referred to in argument :

*Rolfe v. Gregory* (1865), 4 De G.J. & Sm. 576; 5 New Rep. 257; 34 L.J.Ch. 274; 12 L.T. 162; 11 Jur.N.S. 98; 13 W.R. 355; 46 E.R. 1042, L.C.; 43 Digest 711, 1497.

**Appeal** by the plaintiff from a decision of DAY, J., at the trial of the action without a jury at Nottingham. E

The plaintiff was the surviving trustee and also the cestui que trust, under the will of Joseph Soar, and the defendant was the widow and executrix of one Ashwell, who had been solicitor to the trustees of the will. The action was brought for an account of moneys received by Ashwell in the following circumstances. Joseph Soar died in 1859, and the whole of his estate was distributed with the exception of a sum of £256, which was held by the trustees of his will upon trust for two persons during their respective lives and after the death of each his share was in trust for his children. This sum, with other moneys belonging to different trusts, Ashwell, as solicitor to the trustees, invested upon an equitable mortgage by deposit of deeds. In January, 1879, the mortgagor paid off the mortgage, and paid the £256 to Ashwell. The tenant for life of one half of this sum having died, Ashwell paid £128 to his children, who were absolutely entitled to it; the remaining half, i.e., £128, remaining in Ashwell's hands. In November, 1879, Ashwell died. His affairs were wound-up by his managing clerk, and the plaintiff's father, who was entitled to the interest of £128 during his life, was paid such interest regularly every half year up to January, 1886. On July 5, 1886, the plaintiff's father died, and the plaintiff became absolutely entitled to the £128, the remaining half of the £256. No interest was paid after January, 1886. On Feb. 21, 1891, this action was commenced. At the trial of the action before DAY, J., without a jury, the learned judge held that the claim was barred by the Statute of Limitations, and he gave judgment for the defendant. The plaintiff appealed. F

*W. H. Stevenson* for the plaintiff. G

*Stanger* for the defendant. H

*Cur. adv. vult.* I

Aug. 10, 1893. The following judgments were read.

**LORD ESHER, M.R.**—In this case there was no such relation between the plaintiff and the deceased Ashwell as would entitle the plaintiff to maintain against Ashwell's executors an action at law in respect of the complaint he makes. The

A relief he demands is the subject solely of a suit or action in equity. The only way in which the plaintiff can validly state his demand in equity is to assert that Ashwell was a trustee of money now claimed by the plaintiff, which, if the trust were observed, must necessarily have come to the plaintiff, and that Ashwell committed a breach of trust by misappropriating the money which was in his hands, as a trustee of the trust, to his own use. If Ashwell did this thing, he must have done so before November, 1879, when he died. If there was the trust asserted by the plaintiff, the breach of it relied upon by the plaintiff must have happened—and it is the cause of the plaintiff's action, if any—before November, 1879. If the Statute of Limitations is applicable, it is fatal to the plaintiff's right to recover.

In order to determine whether a statute of limitations applies or not to a cause of action before the court, the court must first determine what is the cause of action relied on. The court must do so in order to see whether it is an action of a class to which the statute in question applies. If the action is of a class within the statute, then the court must determine whether the alleged breach, if any, occurred beyond the time of limitation. If the alleged breach, if it occurred at all, must have occurred beyond the time of limitation, the court will not further inquire whether the breach did or did not in fact occur. The plaintiff's right to relief is barred. The questions in this case, therefore, are: Was Ashwell a trustee of the money now claimed by the plaintiff within a meaning of the word "trustee" attributed to it in equity? and Was he such a trustee as a court of equity will not allow to rely on the statutes of limitation? If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a court of equity, upon proof of such facts, will not allow him to vouch a statute of limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a court of equity, the defendant a trustee for the plaintiff, the court of equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the court of equity allows statutes of limitation to be vouched. There are cases not falling strictly within either of those thus enunciated, some of which have been treated by the courts of equity as within the class in respect of which a statute of limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched. It must obviously be unnecessary on this occasion to state exhaustively all the different cases. It suffices to determine in which class is the present case.

It is not in the first enunciated case. There was an express trust created, but Ashwell was not at any time nominated as a trustee of that trust. He was the solicitor of the nominated trustees. As such solicitor he was entrusted by the nominated trustees to take and have in his hands the trust money, with a direction on their behalf to deal with it according to the terms of the trust. Assume that he misappropriated that money to his own use, and that that was all; the misappropriation would at once of itself make him the holder of the money in trust for the rightful owner, but, if that were all, only a trustee by construction of a constructive trust. But the questions in this case are whether Ashwell was not, in view of a court of equity, a trustee of the money before the alleged breach by misappropriation, and, if he was, under which class of trust he was with regard to limitations. The moment the money was in his hands, he was in a fiduciary relation to the nominated trustees: he was a fiduciary agent of theirs; he held the money in trust to deal with it for them as directed by them; he was a trustee for them. He was, therefore, a trustee of the money before he committed, if he did commit, the alleged breach of trust, and was in possession of and had control over the money before he committed, if at all, the alleged breach of trust.

The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a court of equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his cestuis que trust for all such money or property without regard to lapse of time. There is another recognised state of circumstances in which a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property. Such a person will be treated by a court of equity as if he were an express trustee of an express trust.

The propositions thus enunciated seem to me to follow the judgments of LORD HATHERLEY and GIFFARD, L.J., in *Burdick v. Garrick* (1) and of LORD SELBORNE in *Barnes v. Addy* (2). Where, in cases decided by judges as judges both of fact and law, you can collect the principle of law on which they have all assumed to act, it seems to me unnecessary to determine, though it is useful to consider, whether one would have applied that principle of law to the facts in the same way that any particular judge did in the case before him. I am of opinion that the present case is within the description of that which is treated as and is called in equity an express trust, and that the inquiry as to the alleged breach cannot be stopped by the Statute of Limitations. I am clearly convinced by the evidence that Ashwell became on receipt of the money a trustee of it, and that, as he has not been shown to have accounted for it, the defendant, his executrix, is liable as such for a breach of trust by him.

**BOWEN, L.J.**—It appears to me to have been in the present case clearly shown that the deceased husband of the defendant, who is the representative of his estate, was during his lifetime solicitor to the trustees, of whom the plaintiff is one besides being a beneficiary under the will; that, while acting as such solicitor, the deceased was entrusted with the custody of some of the trust moneys; and, lastly, that such trust moneys have never been repaid. The question, therefore, arises whether the claim of the plaintiff can be barred through lapse of time by analogy to the Statute of Limitations. That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust is a doctrine which has been clearly and long established.

It was argued on behalf of the defendant that the present was the case of a constructive trust only, and the learned judge below appears so to have thought. On the decision of the question whether this is the case of an express or only of a constructive trust, the present appeal appears to hang. An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the court construes as involving him in the duties and responsibilities of a trustee, although, but for such conduct and behaviour, he would be a stranger to the trust. A constructive trust is, therefore, as has been said, "a trust to be made out by circumstances." It is not unreasonable that in the latter class of cases, where the liability of a stranger to the trust arises from his conduct and depends on the proof of his contemporary acts, time should run in favour of the person to be charged. In such cases conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust.

Although this general principle of justice has been authoritatively laid down in courts of equity, there has been some variety and inconsistency, both in the language used about constructive trusts and in the line of demarcation that has been



- A drawn between the cases of express and constructive trusts. First, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust: *Life Association of Scotland v. Siddal* (3). This extension of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends.
- B Secondly, the rule as to limitations of time, which has been laid down in reference to express trusts, has also been thought appropriate to cases where a stranger participates in the fraud of a trustee: *Barnes v. Addy* (2). Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property, and dealt with it in a manner inconsistent with trusts of which he was cognisant: *Lee v. Sankey* (4). Fourthly, in some other cases—e.g., in *Bridgman v. Gill* (5), by LORD ROMILLY, and in *Wilson v. Moore* (6), by LORD BROUGHAM—language has been employed in regard to the question of limitations of time in certain instances of constructive trust which can scarcely be reconciled with the language held in *Bonney v. Ridgard* (7); *Beckford v. Wade* (8); *Townsend v. Townsend* (9), and in other cases.

- It is not necessary in the present appeal to discuss the somewhat fluctuating expressions that can be discovered in equity authorities on the subject of constructive trusts. One thing seems clear. It has been established beyond doubt, by authority binding on this court, that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: *Chalmer v. Bradley* (10); *Marquis of Cholmondeley v. Lord Clinton* (11); and this confidence or trust imposes on him the liability of an express or direct trustee.
- E

- The principle which clothes those who receive property in their fiduciary position with the liabilities of express or direct trustees was clearly laid down in *Burdick v. Garrick* (1). LORD HATHERLEY, L.C., said (5 Ch. App. at pp. 240, 241):
- F

"I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply; but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application."

- G GIFFARD, L.J., said (*ibid.* at p. 243):

"I do not hesitate to say that, where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time."

- H It is with reference to this language that KAY, J., said, in *Banner v. Berridge* (12) (18 Ch.D. at p. 264):

"That obviously enlarges the definition which KINDERSLEY, V.-C., gave [*in Petre v. Petre* (18), 1 Drew. at p. 393], and points out that a man may be bound by an express trust where moneys, which in no sense belong to him, and in which he has no kind of interest, or goods, plate, or jewels, are placed in his hands by the real owner as deposittee of them, and that without any writing or even expression in words that it was to be a trust. That would come, according to LORD HATHERLEY's dictum here, within the definition of express trust."

- I This view was followed by WICKENS, V.-C., in *Gray v. Bateman* (13), and by CHITTY, J., in *Re Bell, Lake v. Bell* (14), and has never since been impeached. In *Re Sharpe* (15), recently before the Court of Appeal, the principle was applied

to the case of directors of a company who had improperly parted with the assets of a company. **FRY, L.J.**, said ([1892] 1 Ch. at p. 172): A

"Where money has found its way into the hands of a trustee or other person against whom this court gives the same relief as against a trustee, there the trustee, or the person in a fiduciary position, cannot set up the Statute of Limitations or the analogy of the Statute of Limitations as an answer to the demand for money, which was in his hands." B

When we turn to the facts of the present appeal, the case is one which obviously falls within this category or class. The deceased solicitor was the solicitor, not of the cestuis que trust but of the trustees. To such trustees, however, he stood in a fiduciary relation, and on the strength of it received property from them. What he received from his own clients he received under a trust to them. Whether his estate is liable after this lapse of time on the ground of an express trust between himself and the original cestuis que trust becomes unimportant, since his estate remains clearly liable on this ground to his own clients, the trustees, one of whom is plaintiff, and, indeed, this liability is one of which the original cestuis que trust under the trust would be entitled to the benefit in a properly constituted suit, not because the defaulter was their own trustee, but because he was bound under a direct trust to persons who were the trustees. C  
D

On this simple ground, whatever other law or equity may or may not be applicable to the matter before us, whatever may be the limitations or definitions to be introduced into the doctrine of the Statute of Limitations and constructive trusts, this case (which is one of express or direct trust) lies outside them all. I am of opinion that the appeal must be allowed, and that the plaintiff is entitled to succeed with costs both here and below. E

**KAY, L.J.**—This action is brought by the surviving trustee under a will, who is also the cestui que trust, against the representative of a deceased person named Ashwell, who was solicitor to the trust, claiming an account of part of the trust fund received by him. Under the trust a sum of £256 was held for two persons for their respective lives, and after the death of each his share was in trust for his children. This sum of £256 Ashwell, as solicitor to the trust, invested, with other moneys belonging to different trusts, upon an equitable mortgage by deposit of deeds, apparently in his own name. In January, 1879, this mortgage was paid off, and the £256 was paid by the mortgagor to Ashwell. One moiety of this sum was distributed, the tenant for life of that moiety having died, among his children, who were absolutely entitled to it. What became of the other moiety—£128—does not clearly appear; but it was not paid to the trustees or invested in their joint names, and, therefore, Ashwell, it must be inferred, retained it in his own hands. Ashwell died in November, 1879. The tenant for life of this moiety died on July 5, 1886. Thereupon the plaintiff became entitled to it absolutely. The interest had been paid during the life of the tenant for life by a clerk of Ashwell's, who was employed in winding-up his business. Whether such payments were made by any authority of Ashwell's representative, which would prevent the Statute of Limitations running, is not very clear. This action was begun on Feb. 21, 1891, twelve years after Ashwell had received the mortgage-money, but within six years after the death of the tenant for life, when the plaintiff's title as cestui que trust vested in possession. The defendant, who is the legal personal representative of Ashwell, pleads the Statute of Limitations. F  
G  
H  
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The first answer made to this is that Ashwell was an express trustee of the fund. Generally speaking, a person who is not the appointed trustee, and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee. An express trustee, *prima facie*, is a trustee appointed by the author of the trust, or under a power created by him, or by the court under the Trustee Act. But, where the case is that it is

- A** sought to affect a stranger, or to make him responsible as a trustee, that must be by evidence of facts not contained in the original declaration of trust. One of the reasons for the distinction between an express trust and a trust raised by implication of law upon external facts of that kind is that the lapse of time, which may have destroyed important evidence, renders it unjust to take such a case out of the operation of the Statute of Limitations. Here the trust is expressed by the
- B** will, and no external evidence is wanted to establish that. But, it may be argued, such evidence is requisite to make out that Ashwell was bound by the trust, of which he was not an appointed trustee, and, therefore, this reason for the distinction appears to apply to this case. Ashwell is dead. His evidence might have been conclusive against the claim. He might have disproved all the facts relied on to make out that he was a trustee. For instance, he might have proved that
- C** he never received the money, or that, having received it, he paid it over to the trustees. Ought he not to be considered only constructively a trustee, and is not the statute on this ground a proper defence?

In *Townsend v. Townsend* (9) LORD COMMISSIONER ASHURST says (1 Cox, Eq. Cas. at p. 34):

- D** "As to trusts being an exception to the Statute of Limitations, the rule holds only as between trustees and cestuis que trust; it is true that a trustee cannot set it up against his cestui que trust; but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within a reasonable time."

- E** This language is quoted by SIR WILLIAM GRANT in *Beckford v. Wade* (8), a case in the Privy Council, and SIR WILLIAM GRANT adds (17 Ves. at p. 97):

- F** "It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but, if it is meant to be asserted that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the facts, but where the true state of the facts is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief."

- G** The authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts. In *Townsend v. Townsend* (9) land was conveyed in 1701 to trustees, to the use of the settlor for 500 years, and subject thereto to A. for life, with a proviso that, if A. paid a life annuity to the settlor and £500 to his executors, the term should be void. The settlor died,
- H** having bequeathed the £500 to his daughter. A. paid £500 to the settlor's executrix, who assigned the term to a trustee for A.; and after his marriage, A., in 1708, settled the term, with the concurrence of the trustee of it, by assigning it to other trustees upon trust for himself for life, remainder to his wife for life, remainder to their children. Subsequently, by a deed in 1739 and a fine, A. conveyed the lands to other uses in favour of the defendants, and the term was
- I** assigned by the surviving trustee to attend, on the ground that this deed defeated the deed of 1708. The plaintiff claimed the benefit of the term under the deed of 1708; but, as his claim was not made till twenty years after his title accrued, the bill was dismissed on the ground that the defendants were merely trustees by implication.

In *Bonney v. Ridgard* (7), stated by SIR WILLIAM GRANT, leasehold property was bequeathed in trust for the testator's children. The executrix sold it to a purchaser who had notice of the will under circumstances which satisfied the judge that the sale was a gross fraud on the part of both vendor and purchaser; but



LORD KENYON refused to "turn the defendants into trustees" because of the lapse of time, acting by analogy to the Statute of Limitations. In *Wilson v. Moore* (6), merchants, by direction of an executor, applied moneys, to which they knew he was trustee, in discharge of his private debt to them; and it was held by LORD BROUGHAM, L.C., affirming the judgment of SIR JOHN LEACH, that having concurred in this breach of trust, they could not rely on the lapse of six years as a bar to the claim against them; they must be held to be trustees, and time would not run. In *Life Association of Scotland v. Siddal* (3), a person, who was not actually trustee of a will, assumed to act and acted as though she were trustee. TURNER, L.J., said (3 De G.F. & J. at p. 72):

"If she had by writing declared herself to be a trustee, the trust in her could not have been otherwise than express, and her conduct is equivalent to her written declaration."

In *Bridgman v. Gill* (5), bankers transferred money from a trust account to the account of the tenant for life, who was indebted to them, in order to pay that debt, and it was held that, having been parties to this breach of trust, they could not avail themselves of the Statute of Limitations in answer to a claim by the trustees against them.

In *Robertson v. Armstrong* (16) the cestui que trust under a settlement of a fund sued the original trustees of a will, under which the fund was derived, and the solicitors of his own trustees of the settlement, who by direction of such trustees had received the fund and misapplied it, making such last-mentioned trustees also parties, and praying that the original trustees of the will and the solicitors of the settlement trustees might be ordered to pay the fund to the settlement trustees. The Master of the Rolls held that the will trustees were completely discharged by the payment to the solicitors of the settlement trustees, that the solicitors could only be made liable through the settlement trustees, and that they could not be reached in that form of suit, and he dismissed the bill. No question of the Statute of Limitations seems to have been raised; but the decision is important, because it shows that the proper suit is by the trustees against their agent, or by the cestuis que trust against both the trustees and their agent, seeking to make both liable.

In *Lee v. Sankey* (4), a firm of solicitors were employed by the trustees of a will to receive the proceeds of a real estate taken by a railway company. They received the money, and paid it in various sums from time to time to one of the trustees without the sanction of the other. Six years after the last of such payments the other trustee, who was tenant for life under the will, and her children, who were entitled to the fund subject to her life interest, sued the solicitors for restitution of the fund. It was held that the Statute of Limitations was no defence. I am not sure that the ground of this decision was not that the money retained the character of real estate, in which case the statutory period would be twenty years, which had not elapsed. In *Re Bell* (14), the solicitor, who acted for a mortgagee selling the mortgaged estate under a power of sale, retained the balance of the purchase money, and it was held that he became an express trustee of it, and that his executors could not rely on the Statute of Limitations.

*Burdick v. Garrick* (1); *Gray v. Bateman* (13); *Banner v. Berridge* (12); *Re Cross*, *Harston v. Tenison* (17), recognise that express trusts of personal property may be created either verbally or by conduct only, and that s. 25 of the Supreme Court of Judicature Act, 1873, to quote the language of BAGGALLAY, L.J., in the last-mentioned case (20 Ch.D. at p. 121),

"is but a statutory declaration of a law which had always been recognised and administered in courts of equity."

In the first of these cases it was held that agents entrusted with funds under a power of attorney which authorised them to manage the real and personal property of their principal, to receive rents, to sell, to purchase lands to be conveyed to

**A** or in trust for their principal, and to invest the residue in certain securities in the name of the principal or of some other person in trust for him, were in a fiduciary position, which disabled them from relying on the Statute of Limitations. LORD HATHERLEY, L.C., said (5 Ch. App. at p. 240):

**B** "How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case."

GIFFARD, L.J., concurred, relying on the very special power of attorney as an answer to the defence of the Statute of Limitations. He said (*ibid.* at p. 243):

**C** "Under these circumstances, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created . . . and I do not hesitate to say that, where the duty of persons is to receive property and hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over the property to somebody entitled to it."

**D** This case was followed by WICKENS, V.-C., in *Gray v. Bateman* (13), where an agent who had acted for a person since deceased during his lifetime with full and unrestricted powers of managing his property, was held to be a trustee who could not avail himself of the Statute of Limitations.

**E** *Barnes v. Addy* (2) is an instructive and important authority. The surviving trustee of a fund, in exercise of a power of appointing new trustees, appointed a trustee of one moiety of the fund, remaining himself sole trustee of the other moiety. His solicitor advised against the appointment, but prepared the deed of appointment, and also a deed of indemnity from the new trustee. There was no suspicion of any intention on the part of the new trustee to misappropriate the fund, but he afterwards did so, and the cestuis que trust of the moiety so lost filed a bill against the original trustee and his solicitor, seeking to make them both liable as having concurred in a breach of trust. LORD SELBORNE, L.C., held that the solicitor was not in the position of a trustee, saying this (9 Ch. App. at pp. 251, 252):

**G** "In this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to those who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions perhaps of which a court of equity may disapprove—unless those agents receive or become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design on the part of the trustees."

**H** These words seem to me to define, as accurately as is perhaps possible, the difference between an express and constructive trustee. A stranger to the trust, who receives the trust money with notice of the trust, or knowingly assists the actual trustee in a fraudulent and dishonest disposition of the trust property, is a constructive trustee. The trust may be clear, may be declared in a written instrument, and may be in that sense express, but the stranger is not expressly appointed a trustee. He becomes bound by the trust by the construction which the law puts upon his dealings with the trust property. The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence. Among these

are the case where a stranger to the trust has assumed to act and has acted as a trustee, and the case where a stranger has concurred with the trustee in committing a breach of trust, and has taken possession of the trust property, knowing that it was trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely entitled to it. **A**

I think that the present case comes within one or both those categories. I think that Ashwell did assume to act and acted as a trustee of the funds which he received, and that he has not duly discharged himself from the plaintiff's share of those funds, and must, therefore, be treated as an express trustee. The judgment must be reversed, and the appeal must be allowed, with costs here and below. **B**  
If the executrix admits assets, there will be judgment for the plaintiff for the sum of £128, with interest at 4 per cent. since the last payment of interest. If assets are not admitted, there must be the usual judgment for an account, which should be transmitted to a chancery judge to work out. **C**

*Appeal allowed.*

Solicitors: *Clinton & Co.* for *H. P. Day*, Nottingham; *S. G. Warner* for *R. W. Miller*, Nottingham.

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*] **D**

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## NEW ZEALAND GOLD EXTRACTION CO. (NEWBERRY-VAUTIN PROCESS), LTD. *v.* PEACOCK AND OTHERS

[COURT OF APPEAL (Lindley, A. L. Smith and Davey, L.JJ.), December 4, 1893]

[*Reported* [1894] 1 Q.B. 622; 63 L.J.Q.B. 227; 70 L.T. 110; 9 R. 669]

*Company—Sale of undertaking—Transfer of amounts due for unpaid calls—Uncalled capital called up before sale completed.*

The memorandum of association of a company empowered it "to sell the undertaking of the company . . . for shares . . . of any other company" having similar objects. In 1892 the directors entered into a contract with another company by which the company agreed to sell and transfer to the other company its assets, including all amounts due for unpaid calls, in exchange for shares in the other company. The agreement having been approved by the shareholders of both companies, the directors of the first company called up an unpaid 10s. per share. **G**

**Held:** "undertaking" in the memorandum might not include uncalled capital and the company might have no power to sell uncalled capital as part of their undertaking, but the calling up of uncalled capital before the sale was completed was not ultra vires the company, and the call was valid. **H**

*Company—Shares—Unpaid call—Death of shareholder—Liability of estate.*

By an article of association of a company a notice might be served by the company on any member at his registered address. A member of the company died. Notice of call on his shares was sent to his registered address, but was returned marked "gone away." When the liquidator of the company became aware of the member's death he applied for payment of the call to the member's executors who up to that time had not known that their testator had held any shares in the company. **I**



A **Held:** until notice of the member's death reached the company the dead man or his estate remained a member of the company, and, therefore, the member's estate was liable for the call.

**Notes.** Considered: *Allen v. Gold Reefs of West Africa*, [1899] 2 Ch. 40. Distinguished: *Bisgood v. Henderson's Transvaal Estates*, [1908-10] All E.R.Rep. 744. Referred to: *Re Bank of South Australia*, [1895] 1 Ch. 578; *James v. Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456; *Wall v. London and Northern Assets Corpn.*, [1898] 2 Ch. 469.

As to unpaid calls on shares and notice of calls, see 6 HALSBURY'S LAWS (3rd Edn.) 225-231; and for cases see 9 DIGEST (Repl.) 332 et seq.

Case referred to:

(1) *King v. Marshall* (1864), 33 Beav. 565; 4 New Rep. 258; 34 L.J.Ch. 163; 10 L.T. 557; 10 Jur.N.S. 921; 12 W.R. 971; 55 E.R. 488; 10 Digest (Repl.) 765, 4971.

Also referred to in argument:

*Re Sankey Brook Coal Co.* (1870), L.R. 10 Eq. 381; sub nom. *Re Sankey Brook Coal Co., Ex parte Alliance Bank of Liverpool*, 22 L.T. 784; 18 W.R. 914; 10 Digest (Repl.) 753, 4897.

D *Clinch v. Financial Corpn.* (1868), 4 Ch. App. 117; 38 L.J.Ch. 1; 19 L.T. 334; 17 W.R. 84, L.C. & L.J.J.; 10 Digest (Repl.) 1086, 7519.

*Turquand v. Kirby* (1867), L.R. 4 Eq. 123; 36 L.J.Ch. 570; 16 L.T. 260; 15 W.R. 730; 9 Digest (Repl.) 423, 2736.

**Appeal** by the defendants in an action by the liquidator of the New Zealand Gold Extraction Co. (Newbery-Vautin Process), Ltd. (which was in course of voluntary winding-up), in the name of the company, against the executors of John Thomas Peacock, a deceased shareholder, to recover £190, being the amount of a call of 10s per share on 380 shares of the plaintiff company which had belonged to the testator and had passed to the defendants as executors of his will. The defendants resisted the claim on the ground that the call was made for purposes which were ultra vires of the plaintiff company, and was, therefore, invalid; and further, that they had not been served with notice of the call in accordance with the articles of association of the plaintiff company.

Clauses 7, 11, and 12 of the memorandum of association of the plaintiff company empowered it:

G "7. To amalgamate, unite, or co-operate either generally or to or for any limited extent or period determinable, continuous, or otherwise with any corporations, companies, or persons already or hereafter to be established for or engaged in objects which are or shall be within the scope of the objects of this company, and to purchase or acquire the business or any interest in the business carried on by any such corporation, company, or persons, and being a business which this company is authorised to carry on, and for any such purpose to make and enter into any contracts, agreements, or arrangements, and to undertake any liabilities. 11. To sell the undertaking of the company or any part thereof for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company, or for any other consideration which the company may think fit. 12. To do all such things as are incidental or conducive to the attainment of the above objects or any of them."

I By the articles of association of the plaintiff company the directors had power to make calls of which fourteen days' notice was to be given, specifying the time and place of payment and to whom such calls should be paid. Article 133 was as follows:

"A notice may be served by the company upon any member whose registered place of address is in the United Kingdom, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of address."

The articles provided for forfeiture of shares for non-payment of calls, and for transfers by representatives of deceased members either to themselves or to other persons; but there was no provision that notices to the representatives of a member who had died should be valid if left at his registered address or sent by post addressed to him. **A**

In October, 1887, a company, called the Newbery-Vautin (Patents) Gold Extraction Co., Ltd., had been registered with the object, as stated by its memorandum of association, of purchasing the rights, property, assets, and effects of the Newbery-Vautin Gold Extraction Syndicate, Ltd., and the Newbery-Vautin Gold Extraction Co., Ltd., or of either of them. In January, 1892, the directors of the plaintiff company resolved to recommend to the shareholders the amalgamation of their company with the Newbery-Vautin (Patents) Gold Extraction Co., Ltd., and entered into an agreement on Jan. 7, 1892, with the latter company to convene a meeting to approve the agreement and to call up an uncalled 10s. per share upon the 20,000 shares of the plaintiff company by instalments, such call to be made before the time for the confirmation of special resolutions passed by the Newbery-Vautin company sanctioning the scheme. In the event of the agreement being duly approved by the shareholders of the two companies and the special resolutions being duly passed, the plaintiff company agreed to sell and transfer, and the Newbery-Vautin company agreed to purchase and take over, all and singular the patents, goods, chattels, moneys, credits, debts, and things in action, including all amounts due and to become due for calls on the shares of the plaintiff company, and the undertaking, business, and goodwill thereof, and other the assets of the plaintiff company, with the full benefit of all contracts and agreements and all securities held by the plaintiff company or to which the plaintiff company was entitled, and all other the property of the plaintiff company whatsoever and where-soever upon the terms thereafter expressed. The Newbery-Vautin company agreed to allot and issue to the plaintiff company, or the liquidators thereof or their respective nominees, 47,500 shares in the capital of the Newbery-Vautin company as fully paid up to the amount of £47,500—that was to say, one fully paid-up share of £1 for every complete number of two shares held by any member in the plaintiff company, and one fully paid-up share of 10s. for every single share in a holding or odd share beyond a multiple of two. It was provided that the Newbery-Vautin company should not be bound to issue or allot such shares in respect of any shares in the plaintiff company until the said calls for 10s. and any other calls that might be in arrear or payable thereon should have been paid, except to the holder of such unpaid shares in the plaintiff company at his request, and on an assignment to the Newbery-Vautin company of the amount of such calls. The agreement was approved by the shareholders of both companies, and in order to carry the scheme into effect a resolution of the directors of the plaintiff company was duly passed on Feb. 1, 1892, for a call of 10s. per share payable by four instalments of 2s. 6d. each, the last payment being due on Sept. 19, 1892. A resolution was also passed and confirmed on April 6 and 28, 1892, for the voluntary liquidation of the plaintiff company. **B**  
**C**  
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Notice of the call was given through the post by letter addressed to John Thomas Peacock at his registered address. Peacock, however, had died on Feb. 15, 1889, and his will, by which the defendants were appointed his executors, had been duly proved by them some time prior to the making of the call. The letter enclosing the notice of the call was returned through the post to the company with the words "gone away" marked on the outside. The plaintiff company did not become aware of Peacock's death until September, 1892, and thereupon the liquidator, in a letter dated Sept. 3, 1892, applied to Peacock's executors for payment of the call, informing them that the notice sent to Peacock's registered address had been returned through the post. The executors had not received the notice sent to Peacock's registered address, and they did not know, until the liquidator made this application, that Peacock held any shares in the plaintiff company. On Dec. 29, 1892, the defendants' solicitors wrote that their counsel **I**

A had advised the defendants that they should not pay the call, which he was of opinion was ultra vires. Consequently, this action was brought on Jan. 5, 1893. It came on for trial before KENNEDY, J., sitting without a jury, in August, 1893, and he gave judgment for the plaintiff company. The defendants appealed.

*Cozens-Hardy, Q.C., and Eustace Smith* for the defendants.

B *Channell, Q.C., and C. T. Mitchell*, for the plaintiff company, were not called on to argue.

LINDLEY, L.J.—I do not see any difficulty in deciding the first point—that the call was bad because it was made for purposes which were ultra vires of the company.

C This is an action brought by the liquidator of a company now in course of voluntary winding-up to enforce a call not made by him, but made by the directors before the commencement of the winding-up. The question whether that call is invalid as being made for purposes which are ultra vires depends upon what were the objects for which the company was formed. The provisions of the memorandum are in extremely wide terms, and, among others, are cl. 7, 11, and 12. [His LORDSHIP read those clauses, and continued:] While their shares were still not fully paid up the company agreed to sell their undertaking to the Newbery-Vautin, Patents company. It is said that the word “undertaking” in cl. 11 of the memorandum does not include uncalled capital. Perhaps it does not, but, although there may be no power to sell uncalled capital as part of the undertaking, nevertheless, one of the terms of the sale of the undertaking can be that the uncalled capital should be called up before the sale is completed. There is nothing ultra vires in that. There is no reason why the purchasers should not make that a condition of the sale. I see no difficulty in that point at all.

E The next point is a purely technical one. This shareholder, Mr. Peacock, obtained, and was registered in respect of, 380 shares, and he died on Feb. 15, 1889. At the time of his death his name and address were still on the register, and that address was the place to which notices were to be sent. The company were not informed of Mr. Peacock's death; if they had been, it would have been their duty to rectify the register. On the other hand, Mr. Peacock's executors had no information that he had been the holder of these shares, and did not ascertain the fact for some time after the agreement by the company for the sale of their business. After his death, and before the fact of his being a shareholder came to the knowledge of his executors, the call was made, and it is said that, he being dead, the directors could not make a call on him; that, his executors not having been made members of the company in his place, there was no member in respect of his shares to whom notice could be given in accordance with the articles; and that, consequently, the call cannot be enforced against his estate. Notice of the call was sent addressed to him at his registered place of address, but it came back to the company marked “Gone away.”

H The question is whether in these circumstances his executors are liable to pay the call out of his assets. Let us go by steps. He became a member, but his executors did not become members, and were not bound to do so against their will. The articles are so drawn that they do not provide for dead men, nor for notice to dead men, nor for notice to anybody in the place of dead men. It is said that it is part of the bargain between the shareholders and the company that, if a member dies, and the company have no notice of his death, his estate cannot be called upon to pay calls. On the construction of the articles I think it is obvious that no such bargain was intended. We must put a reasonable construction on the articles, and I have no doubt that the key to the difficulty is to be found in the suggestion made by MR. BUCKLEY in his book on the COMPANIES ACTS (6th Edn.), at p. 461, and that until notice of his death reaches the company the dead man, or his estate, continues to be a member. I have no doubt that that is the true construction of the articles. In order not to make these articles absurd, we must hold that a deceased member remains a member until notice is given.



A. L. SMITH, L.J.—I agree.

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DAVEY, L.J.—I agree with the judgment and opinion which have just been expressed, and I agree with the reasons given for his decision by KENNEDY, J. On the first point I should have been almost prepared to admit that the scheme might have been an amalgamation, and I only hesitate because I do not know the exact meaning of the word “amalgamation,” and whether it must be a joining of two companies so as to form a third entity. If so, the scheme is not within cl. 7, but I think it is clearly within the power of sale. The memorandum ought to be read in the widest possible way, and not so as to make this scheme ultra vires if it is otherwise unobjectionable. I quite agree that, if this is not an amalgamation, it is a sale within cl. 11. The question is whether the call is included in the sale. It has been held that the words “undertaking” does not include uncalled capital [in *King v. Marshall* (1)], and it would be ultra vires to sell the right of making calls to another company. But there is nothing to prevent the directors exercising their power of making calls and then selling the assets thus produced. Counsel for the defendants has quoted no authority against that proposition, and I do not see anything to make such a proceeding ultra vires.

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The second question is whether art. 133 can be read so as to include a deceased member, so that the company could serve him with notice in the way there provided. I do not think that, if they had notice of the death of the member, they could rely on notice upon him at his registered place of address, and nothing that we say in this case touches that question. It is the duty of the representatives of a deceased member to give notice of his death to the company at the earliest possible opportunity; and if they want to go on treating him as still on the books, it is the duty of the executors to give notice to the company, and send notice to them of their desire to become members in his place. It is to be observed that Table A contains no such article as is said to be necessary, and it is surprising to me to hear that such a clause is requisite in order to make the estate of a deceased member liable. It would surprise most people to hear that without such an article you cannot make a call upon and enforce it against the estate of a dead member. I am prepared to adopt Mr. BUCKLEY's suggestion, and to hold that a deceased member, or his estate, remains a member so long as his name continues on the register without notice to the company of his death.

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*Appeal dismissed.*

Solicitors: *Dalston, Son & Elliman; Snell, Sons & Greenip.*

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[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

A

## PAGE v. MIDLAND RAIL. CO.

[COURT OF APPEAL (Lindley, A. L. Smith and Davey, L.JJ.), October 27, November 9, 1898]

B

[Reported [1894] 1 Ch. 11; 63 L.J.Ch. 126; 70 L.T. 14;  
42 W.R. 116; 38 Sol. Jo. 41; 7 R. 24]

*Sale of Land—Title—Covenant for title—Liability of vendor—Defect known to purchaser.*

A vendor is liable to a purchaser under his covenants for title for any defect which comes within the words of the covenants although the defect is disclosed in the conveyance or is otherwise known to the purchaser.

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*Hunt v. White* (1) (1868), 37 L.J.Ch. 326, overruled.

*Sale of Land—Title—Defective title—Consent of purchaser—Reliance on vendor's covenant—Statement in conveyance as to agreement on this matter.*

Where a purchaser consents to take a defective title, relying for his security on the vendor's covenants, this should be particularly mentioned to be the agreement of the parties.

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**Notes.** Considered: *May v. Platt*, [1900] 1 Ch. 616; *Great Western Rail. Co. v. Fisher*, [1905] 1 Ch. 316. Applied: *Wise v. Whitburn*, [1924] 1 Ch. 460; *Butler v. Mountview Estates, Ltd.*, [1951] 1 All E.R. 693. Referred to: *Marten v. Whale*, [1917] 1 K.B. 544.

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As to covenant for title, see 34 HALSBURY'S LAWS (8rd Edn.) 369-378; and for cases see 40 DIGEST (Repl.) 305-310, 367-379.

Cases referred to:

(1) *Hunt v. White* (1868), 37 L.J.Ch. 326; 19 L.T. 141; 16 W.R. 478; 40 Digest (Repl.) 306, 2540.

(2) *Levett v. Withrington* (1688), 1 Lut. 317; 125 E.R. 166; 40 Digest (Repl.) 367, 2942.

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Also referred to in argument:

*Ogilvie v. Foljambe* (1817), 3 Mer. 53; 36 E.R. 21; 40 Digest (Repl.) 36, 198.

*Savage v. Whitebread* (1669), 3 Rep. Ch. 24; 21 E.R. 717; 28 Digest (Repl.) 679, 1816.

*Vane v. Lord Barnard* (1708), Gilb. Ch. 6; 25 E.R. 5, L.C.; 40 Digest (Repl.) 368, 2948.

G

**Appeal** from a decision of ROMER, J., in an action for possession.

By her will, dated Jan. 19, 1852, Ann Palmer, among other devises and bequests, gave to her daughter Amy, the wife of Joseph Page, the sum of £60, already paid into court by the Oxford, Worcester, and Wolverhampton Rail. Co., in part payment and on account of a small quantity of land, part of the "Little Piece" proposed to be taken by such company,

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"and all sums of money which shall hereafter be paid by the company or any other railway company in respect to any part of the said Little Piece taken for railway purposes."

Subject thereto she devised the Little Piece, together with some other land, to

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Amy Page for life, and after her decease to all the children of Amy Page living at her death, as tenants in common. Ann Palmer died on April 16, 1855, and her will was duly proven by the executors named therein. At the date of her death the testatrix was entitled to the fee simple of the land referred to in her will as the "Little Piece," with the exception of the small part which had been taken by the Oxford, Worcester, and Wolverhampton Rail. Co. Amy Page and her three children were living at the death of the testatrix. In 1856 Amy Page, together with her husband Joseph Page and her children, mortgaged the "Little Piece" to secure a sum of £2,000, and in 1857 they executed a further charge to secure the sum of £200.

On July 14, 1860, this mortgage and further charge were transferred to J. Hazlehurst, A. P. Shelley, and T. F. Hazlehurst. **A**

In 1879, Joseph Page being then dead, Amy Page entered into an agreement with the Midland Rail. Co. for the sale to them of the "Little Piece" for £5,250, and the sale was carried out by an indenture dated June 26, 1879, and made between John Hazlehurst, A. P. Shelley, T. F. Hazlehurst, of the first part, Amy Page, of the second part, and the Midland Rail. Co., of the third part. The will of Ann Palmer was recited, and also the mortgage, the further charge, the transfer, and the death of Joseph Page. It was then recited that the company requiring, and by the Midland Rail. Co. (New Works) Act, 1877, being empowered, to take and purchase for the purposes of the railway the piece of land called the "Little Piece," had **B**

"entered into an agreement with the said Amy Page for the purchase thereof for an estate of inheritance in fee simple in possession free from incumbrances, at the price of £5,250." **C**

It was also recited that the sum of £2,200 remained due on the mortgage and further charge, and that it had been agreed that that sum should be paid off out of the purchase money. It was then witnessed that, in pursuance of the said agreements, and in consideration of £2,200 paid to the parties, of the first part, and also **D**

"in consideration of the sum of £3,050 to the said Amy Page, paid by the said company on or before the execution of these presents,"

they the said John Hazlehurst, A. P. Shelley, and Thomas F. Hazlehurst, at the request and by the direction of the said Amy Page, do, and each of them doth hereby grant and release, and she, the said Amy Page, doth hereby grant and confirm unto the said company, their successors and assigns, the piece of land called "Little Piece," and **E**

"all such estate, right, title, and interest in and to the same as the said John Hazlehurst, A. P. Shelley, Thomas F. Hazlehurst, and Amy Page, or either of them, are, or is, or shall become seised or possessed of, or are or is by the said Act or otherwise empowered to convey," **F**

to hold the same unto and to the use of the company, their successors and assigns. The indenture contained the following covenant:

"And the said Amy Page doth hereby for herself, her heirs, executors, and administrators, covenant with the said company, their successors and assigns, that notwithstanding any act or thing by the said Amy Page or the said Ann Palmer deceased, or any of her ancestors or testators, or any of them, made, done, or executed, or knowingly suffered, the said John Hazlehurst, Abraham Parker Shelley, and Thomas Francis Hazlehurst, or some or one of them, now have or hath good right and full power to grant and release, and the said Amy Page now hath good power to grant and confirm, the said hereditaments and premises hereinbefore expressed to be granted or otherwise assured to the use of the said company, their successors and assigns, in manner aforesaid; and that the same hereditaments and premises shall at all times hereafter remain and be to the use of the said company, their successors and assigns, and be quietly entered into and upon, and held, occupied, and enjoyed, and the rents and profits thereof received and taken by the said company, their successors and assigns, accordingly, without any lawful interruption by the said Amy Page, or any person lawfully or equitably claiming by, from, under, or in trust for her, or by, from, or under the said Ann Palmer deceased, or by, from, or under any of her ancestors or testators, or any of them; and that free and discharged, or otherwise, by the said Amy Page, her heirs, executors, and administrators sufficiently indemnified from and against all estates, encumbrances, claims, and demands whatsoever, either already or hereafter to be made, occasioned, or suffered by the said Amy Page or any person lawfully or **G**  
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- A** equitably claiming by, from, under, or in trust for her, or by, from, or under the said Ann Palmer deceased, or by, from, or under any of her ancestors or testators, or any of them."

Then followed a covenant for further assurance. On the same day Joseph Page the younger, a son of Amy Page, gave the company an indemnity against all damages, costs, charges, and expenses which they might sustain or be put to by reason of any claims or demands made by any children or other issue of Amy Page by reason of the purchase money being paid to Amy Page.

- B** Amy Page died on July 27, 1891. William Palmer Page, her eldest son, died on Oct. 20, 1889, leaving a widow and two children, W. J. Page, and Helen Page, and under the will of W. P. Page his children were entitled to all his interest under the will of his deceased grandmother, Ann Palmer, in equal shares, W. J. Page being also the heir-at-law of W. P. Page.

- C** On Dec. 22, 1892, this action was commenced by W. J. Page and Helen Page against the Midland Rail. Co., claiming to recover possession of one undivided third share of the "Little Piece," or, in the alternative, payment to them by the company of one-third of the £3,050 paid by the company to Amy Page. In their statement of claim the plaintiffs stated that they were willing that the conveyance to the company of June 26, 1879, should stand upon payment to them by the defendant company of one-third part of the £3,050. The plaintiffs claimed on the ground that on the true construction of Ann Palmer's will Amy Page was only tenant for life of the land sold to the company. By their defence the company contended that they obtained a good title under the deed of June 26, 1879. They, however, obtained leave to serve a third-party notice on the executors of Amy Page, claiming to be indemnified out of her estate under her covenants for title; and also to serve a similar notice on Joseph Page, the younger, claiming to be indemnified by him under his indemnity to them. The third parties appeared and took part in the trial. The action was tried by ROMER, J., who gave judgment for the plaintiffs, directing the company to pay them one-third of the £3,050, together with interest and costs, and he ordered Joseph Page the younger to repay the company the amount paid by them to the plaintiffs, together with costs. His Lordship dismissed with costs the claim of the company against the executors of Amy Page, as he felt himself bound to follow *Hunt v. White* (1). The company appealed against the judgment on both points.

- E** The first appeal turned on the construction of the word "hereafter" in the will of Ann Palmer, and does not call for a report. This appeal was dismissed on Oct. 27, 1893, and the decision that the company were liable to pay the plaintiffs one-third of £3,050 was affirmed. The appeal from the decision that the executors of Amy Page were not liable to indemnify the company was then heard.

- G** *Beale, Q.C.*, and *Macnaghten* for the defendant company cited the following text-books: *ELPHINSTONE, NORTON and CLARK ON RULES FOR THE INTERPRETATION OF DEEDS*, pp. 137, 481; *DART ON VENDORS AND PURCHASERS* (6th Edn.), vol. 2, p. 886; *BYTHEWOOD and JARMAN ON CONVEYANCING* (3rd Edn.), vol. 9, p. 381; *DAVIDSON ON CONVEYANCING PRECEDENTS* (4th Edn.), vol. 2, p. 379; *RAWLE ON COVENANTS FOR TITLE* (4th Edn.), p. 116; and *SUGDEN ON VENDORS AND PURCHASERS* (14th Edn.), p. 573.

- H** *Bramwell Davis* (*Neville, Q.C.*, and *W. Shakespeare* with him) for the executors of Amy Page.

*Cur. adv. vult.*

**I** Nov. 9, 1893. The following judgments were read.

**LINDLEY, L.J.**—This is an appeal from a portion of a judgment of ROMER, J., which decided that the Midland Rail. Co. was not entitled to any relief in respect of a covenant for title entered into by one Amy Page, who sold some land to them.

The circumstances giving rise to the company's claim were shortly as follows. One Ann Palmer devised certain lands to Amy Page, but in such language as to

render it doubtful whether she was absolutely entitled to the purchase money paid by the Midland Rail. Co. who bought some of this land from her and took a conveyance from her in fee and paid her the price of the fee. By the deed of conveyance she entered into the usual covenants for title. Amy Page died in 1891, and an action was brought by persons claiming the land under Ann Palmer's will upon the footing that Amy Page was only tenant for life, and that on her death the land vested in the plaintiffs. The railway company contested this claim, relying on the terms of Ann Palmer's will; but the railway company also brought in Amy Page's executors as third parties and claimed to be indemnified by them under her covenants for title in the event of its being decided that Amy Page was not absolutely entitled to the purchase money. ROMER, J., first, and this court afterwards, decided that Amy Page was not entitled to give a discharge for the purchase money. The result of this decision was that the plaintiffs in the action recovered the value of one-third part of the land from the company, but ROMER, J., further decided that the railway company had no remedy against Amy Page's representatives under her covenants for title. This is the point which we have now to determine.

Before addressing myself to this question, it is important to observe that the conveyance by Amy Page to the company was made by her as an ordinary vendor in fee. The conveyance was not made by her under the statutory powers conferred on tenants for life by the Lands Clauses Consolidation Act; nor was the purchase money paid into a bank pursuant to those sections in the same Act which apply to purchasers from tenants for life and persons whose titles are doubtful. Moreover, the railway company did not by their pleadings or at the Bar claim to have acquired a good title under that statute, or contend that the plaintiffs' remedy, if any, was for compensation under s. 68 of the Lands Clauses Consolidation Act; nor did the third parties, Amy Page's representatives, raise any such point. Both in the court below and in this court the case has been fought on different lines; and the only controversy has been respecting the true construction of Ann Palmer's will, and the true construction and effect of Amy Page's conveyance to the defendant company. I think it necessary to call attention to these facts, in order to prevent misconception as to the scope of the present decision.

I say nothing on the point whether the defendant company could or could not have defended the action brought against them on the ground that the company had obtained a good statutory title, and that the plaintiffs' proper course was to proceed to obtain compensation under s. 68 of the Lands Clauses Consolidation Act; nor do I say anything on the point whether, having regard to the Lands Clauses Consolidation Act, the plaintiffs have any title to any estate or interest in the land conveyed to the company as distinguished from a claim for compensation under s. 68. ROMER, J., decided that Amy Page's covenants for title did not protect the company from the plaintiff's claim, because Ann Palmer's will was recited in the conveyance to the company, and because the covenants for title ought to be confined to defects in the vendor's title not shown on the conveyance. In so deciding ROMER, J., followed a decision of MALINS, V.-C., in 1868, viz., *Hunt v. White* (1), which he did not consider himself at liberty to depart from, and the question we have to determine is whether the principle on which that case was decided ought to be upheld or not. If that case had been generally followed as correct, I for one should not think it right now to disturb it even if I did not approve it. But, singularly enough, the decision seems to have been lost sight of. The case does not appear ever to have been cited in court; nor is it to be found in the textbooks on real property and conveyancing which legal practitioners are in the habit of consulting. The note in MR. DART'S book on VENDORS AND PURCHASERS (6th Edn.), vol. 2, at p. 886, shows that eminent conveyancers at all events regard the principle on which the Vice-Chancellor proceeded as by no means settled. Under these circumstances this court ought, in my opinion, to treat the question as still open, and to decide it on sound principles of construction.

To what is a vendor's covenant for title applicable? Is it to the title shown to

**A** the purchaser, or is it to the title expressed to be conveyed to him? The answer to this question can only be found by reading the whole conveyance including the covenant for title. If, on the true construction of the whole document, the title conveyed is clear and the covenant is so worded as to apply to the title so conveyed, then, although the recitals may show some defect or uncertainty in the vendor's title, effect ought to be given to the words of the covenant so as to give

**B** to the purchaser the title which the deed shows he was to have. In the case supposed there is no warrant for giving the words a more restricted meaning than that which they ordinarily bear; no warrant for qualifying the acts covenanted against by inserting "save as herein appears," or "save as shown by the abstract," or "save as explained before the execution of this deed," or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to

**C** defects disclosed to the purchaser, whether on the face of the deed or aliunde, the vendor must take care not to word his covenant so as in terms to cover such defects; or he must insert some clause in the deed clearly explaining and controlling his covenant. This is in accordance with ordinary rules of construction and with fair dealing. No doubt a purchaser is well advised to make the matter plain by inserting words to show that even defects known to him are intended

**D** to be covered; and this is what conveyancers have advised for years (see BUTLER's note to Co. LITT. 384a and the other works cited by the counsel for the defendant company). But they have advised this course only as a matter of prudence and precaution. Apart from *Hunt v. White* (1) there is no authority for not giving effect to the clear and express words of a vendor's covenants for title, simply because a defect covered by them was disclosed by a recital in the conveyance. The principle on

**E** which that case was decided is, in my opinion, manifestly unsound.

I pass now to Amy Page's conveyance itself. The words of the conveyance and covenant for title are quite clear and unambiguous, and the covenant clearly extends to claims by persons deriving title through Ann Palmer. The insertion of the words "Ann Palmer" in the covenant for title is, I think, significant. They may, no doubt, have been put in to cover unknown acts done by her, but they are

**F** not really wanted for this purpose, and they may well have been put in to emphasise the fact that the covenant was really intended to extend to her acts in particular as well as to those of the vendor and her other predecessors in title. The fact that in this case the company took a separate indemnity from a third person cannot affect the construction of the vendor's covenant. I am of opinion, therefore, that this appeal should be allowed, and that the order of ROMER, J., should

**G** be varied by declaring that the company are entitled to be indemnified by the representatives of Ann Page; that the indemnity must be confined to the value of the land claimed by the plaintiffs, i.e., £1,016 13s. 4d. and interest from the death of the tenant for life, and not extend to the costs of the plaintiffs which the defendant company have been ordered to pay. These costs could not, I apprehend, be recovered by the railway company in an action at law on the covenant. The

**H** executors of Amy Page must pay the costs of the appeal and of the proceedings against them.

**A. L. SMITH, L.J.**—I have had an opportunity of reading the judgment of LINDLEY, L.J. I entirely agree with it, and have nothing to add.

**I DAVEY, L.J.**—The question in this appeal is whether the railway company have a right under the covenants for title contained in a conveyance to them of June 26, 1879, to be indemnified by the representatives of Mrs. Amy Page against the claim of the plaintiffs in the action which, in the previous appeal, we have held to be well founded in law.

The conveyance in question is made between certain mortgagees of Amy Page and her husband and children, of the first part, Amy Page, of the second part, and the railway company, of the third part. It contains a full recital of the will of Ann Palmer under which Amy Page and the plaintiffs derive title, and under



which the question of title arises. There was, therefore, full notice on the face of the instrument of the nature and grounds of the claim made by Amy Page and of the title of the plaintiffs. There is a recital of an agreement with Amy Page for the purchase of the land for an estate of inheritance in fee simple free from all encumbrances, but the deed contains no express recital of an intention to protect the railway company by the covenant for title from any claim by the plaintiffs. By the operative part it is witnessed that, in consideration of £2,200 paid to the mortgagees, and the further sum of £3,050 paid to Amy Page, she and her mortgagees convey to the company in fee simple, and then follow the covenants for title. We have determined in the first appeal that Amy Page had no power to give the company a discharge for the purchase money, and the plaintiffs in the events which have happened have a right to claim it against the railway company in some form of action. Under these circumstances the company claim to be indemnified by the representatives of Amy Page against the claim of the plaintiffs. It may be mentioned that at the time of the conveyance the company took an indemnity from one of the beneficiaries.

It is not disputed on the pleadings or by counsel at the Bar that the claim of the plaintiffs is "a claim or demand made by a person claiming under Ann Palmer" against or in respect of the lands in question, or that it is occasioned by an "act or thing made, done, or executed by Ann Palmer," or (in other words) that there would be a breach of the covenant if it is to be construed literally. But it is said that, assuming this to be so, we ought to construe the covenant so as not to cover any claim or demand arising out of matters appearing on the face of the conveyance. The question which we have to decide, therefore, is (assuming there would otherwise be a breach of the covenant): Ought we to read into the covenant by construction an exception of defects of title or encumbrances appearing on the face of the instrument, or to imply the words "save as appears by those presents," or similar words?

In support of the argument of the representatives of Amy Page, *Hunt v. White* (1), decided by MALINS, V.-C., in 1868, has been referred to, and ROMER, J., felt himself bound by this authority, and decided accordingly without expressing any opinion of his own. It is conceded that there is no other authority on the point, and, although it might be possible to distinguish *Hunt v. White* (1) in one respect, I am of opinion that the Vice-Chancellor intended to decide the case before him on general grounds. He says (37 L.J.Ch. at pp. 327, 328):

"If the object had been that the vendor was in all events to guarantee the purchaser's title, the covenants for title should have been extended by express words to meet that case. . . . The covenant for quiet enjoyment can only extend to protect the purchaser from encumbrances and defects in the title, of which the purchaser has no notice. . . . Where the title is made under a written instrument the purchaser must put his construction upon the instrument, and must be bound thereby. It would be a perversion of law to say that the covenant extended to cover such a case as this, viz., the misconstruction by a purchaser of the written instrument under which he takes his title and conveyance."

The Vice-Chancellor was himself a conveyancer of considerable experience, and his opinion upon such a point is entitled to the highest respect. But still it is only the learned judge's opinion, and we are bound to express our opinion whether we agree with it. The Vice-Chancellor's proposition is certainly expressed too widely, for where the defect of title is one of which the purchaser has notice, though it does not appear on the face of the conveyance, it was held in *Levett v. Withrington* (2) that notice of the defect in title relied on as a breach is no defence to an action on the covenant in respect of the breach.

I adopt the statement of the learned editors of *DART ON VENDORS AND PURCHASERS* (6th Edn.), vol. 2, at p. 886, and it would, in my opinion, be contrary to principle to hold that the construction or effect of a covenant can be controllable by extrinsic

**A** evidence of notice or intention. The Vice-Chancellor's opinion, however, seems to be based on the fact of notice independently of the source from which it is derived. Various opinions of text writers on conveyancing were referred to in the course of the argument, the most important of which is MR. BUTLER's note to Co. LITT. 384a. He says:

**B** "It sometimes happens that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title subject to it; and that the covenants for title should not extend to warrant it against this particular defect."

**C** It does not appear to me that this passage, or the passages read from the other works, really assist the court, as they seem to me to amount to nothing more than a salutary caution by the learned authors to the practitioner, and I agree with the note in DART ON VENDORS AND PURCHASERS (6th Edn.), vol. 2, at p. 886 (g).

Looking at the question, therefore, unfettered by binding authority, I am of opinion that it is safer and more consistent with principle to construe the covenant literally without importing into it any exception or qualifications which the parties have not themselves introduced by express words, and to say that, if the parties do not intend the covenant to be so construed for the protection of the purchaser, they should express their intention, instead of throwing upon those who maintain that the covenant should be read according to the ordinary use of language, the onus of finding an expressed intention to that effect. I may add that I think this construction is at least as likely to be in accordance with the intention of the parties as the construction contended for at the Bar. I am, therefore, of opinion that the general rule laid down in *Hunt v. White* (1) cannot be supported, and, notwithstanding that the case has been on the books for twenty-five years, I think we ought not to follow it. It is not even referred to in DART ON VENDORS AND PURCHASERS (6th Edn.), and it does not appear to have been extensively known, and I cannot conceive that any titles depend upon it. The result will be that the claim of the railway company against the representatives of Amy Page ought, in our opinion, to succeed, and we must reverse the judgment, though I do not know that we are differing from the opinion of the learned judge in the court below.

**F** Solicitors: *Beale & Co.*; *Timbrell & Deighton* for *W. Shakespeare & Co.*, Birmingham.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

## Re ARBITRATION BETWEEN KEIGHLEY, MAXSTED & CO. AND DURANT & CO.

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), November 21, 30, 1892]

[Reported [1893] 1 Q.B. 405; 62 L.J.Q.B. 105; 68 L.T. 61;  
41 W.R. 437; 9 T.L.R. 107; 37 Sol. Jo. 99; 7 Asp.M.L.C. 268;  
4 R. 138]

*Arbitration—Remission of award—Ground for remission—New evidence—Discovery since award—Evidence not admissible in court of law.*

The discovery of new evidence since the making of the award is a ground upon which the court may properly remit the matters referred to the consideration of the arbitrator under s. 10 of the Arbitration Act, 1889 [now Arbitration Act, 1950, s. 22].

*Burnard v. Wainwright* (1) (1850), 19 L.J.Q.B. 423, applied.

Per LORD ESHER, M.R., and LOPES, L.J.: Where the submission is to lay arbitrators who are not bound by legal rules of evidence the award will be remitted on the ground mentioned above even though the new evidence put forward is such as would not be admitted as evidence in a court of law.

**Notes.** Applied: *Re Palmer and Hosken*, [1898] 1 Q.B. 131; *Re Montgomery, Jones and Liebenthal* (1898), 78 L.T. 406. Followed: *Re Baxters and Midland Rail. Co.* (1906), 95 L.T. 20. Considered: *Margulies Bros., Ltd. v. Dafnis Thomaidēs & Co. (U.K.), Ltd.*, [1958] 1 All E.R. 777. Referred to: *Re Enoch and Zaretsky, Bock & Co.'s Arbitration*, [1908-10] All E.R.Rep. 625.

As to remitting an award, see 2 HALSBURY'S LAWS (3rd Edn.) 56, 57; and for cases see 2 DIGEST (Repl.) 694-699.

Cases referred to:

- (1) *Re Burnard and Wainwright* (1850), 1 L.M. & P. 455; sub nom. *Burnard v. Wainwright*, 19 L.J.Q.B. 423; 2 Digest (Repl.) 695, 2088.
- (2) *Dinn v. Blake* (1875), L.R. 10 C.P. 388; 44 L.J.C.P. 276; 32 L.T. 489; 2 Digest (Repl.) 654, 1737.
- (3) *Flynn v. Robertson* (1869), L.R. 4 C.P. 324; 38 L.J.C.P. 240; 17 W.R. 767; 2 Digest (Repl.) 654, 1741.
- (4) *Mills v. Bowyers' Society, Bowyers' Society v. Mills* (1856), 3 K. & J. 66; 69 E.R. 1024; 2 Digest (Repl.) 653, 1735.

Also referred to in argument:

- Re Morris and Morris* (1856), 6 E. & B. 383; 25 L.J.Q.B. 261; 27 L.T.O.S. 103; 2 Jur.N.S. 542; 4 W.R. 549; 119 E.R. 908; 2 Digest (Repl.) 694, 2081.
- Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 694, 2083.
- Re Huntley* (1853), 1 E. & B. 787; 22 L.J.Q.B. 277; 21 L.T.O.S. 113; 17 Jur. 571; 1 W.R. 305; 1 C.L.R. 426; 17 J.P.Jo. 294; 118 E.R. 631; 2 Digest (Repl.) 566, 1010.

**Appeal** by Keighley, Maxsted & Co. from an order of the Divisional Court (MATHEW and BRUCE, JJ.), remitting an award to the appeal committee of the London Corn Trade Association.

Keighley, Maxsted & Co. contracted, in writing, to purchase from Bryan Durant & Co. 3,000 tons of Karachi wheat, more or less, to be delivered to one safe floating port direct in the United Kingdom, or on the Continent between Havre and Hamburg, both included, but Calais and Rouen excluded. Ralli & Co. shipped 3,800 tons of Karachi wheat on board the steamship *Bombay*, and Bryan Durant & Co. wrote to Keighley, Maxsted & Co. informing them that they had appropriated 3,000



A tons of this wheat to their contract with them. By the terms of the charterparty, under which Ralli & Co. had chartered the *Bombay*, the *Bombay* was to discharge at any safe port in the United Kingdom, except at Sharpness and Bristol Old Dock. Keighley, Maxsted & Co. gave notice to Bryan Durant & Co. to discharge the 3,000 tons of wheat at Sharpness. An arrangement was thereupon made by Ralli & Co. with the shipowners by which the charterparty was modified so as to enable  
B the *Bombay* to discharge at Sharpness, the shipowners reserving the full right to claim for all extra expenses, loss, or damage which might be occasioned by reason of the vessel going to Sharpness, and the charterers undertaking to pay the same. This arrangement was endorsed upon the charterparty. Keighley, Maxsted & Co. refused to accept delivery.

By the contract it was provided that

C "All disputes from time to time arising out of this contract... shall be referred according to the rules endorsed on this contract, and this stipulation may be made a rule of any of the Divisions of the High Court."

On the back of the contract was endorsed :

D "All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be chosen by each party in difference, the two arbitrators having power to call in a third in case they shall deem it necessary."

The dispute was referred under that rule, and the arbitrators made their award in favour of Keighley, Maxsted & Co. upon the ground that the alteration in the charterparty threw fresh liabilities upon the purchasers of the wheat. By the

E rules endorsed upon the contract it was provided that the award of any two arbitrators in writing (subject only to the right of appeal thereafter mentioned) should be conclusive and binding upon all disputing parties; that in case either party should be dissatisfied with the award an appeal should lie to the committee of appeal elected for that purpose, and in accordance with the rules and regulations of the London Corn Trade Association; that the committee of appeal should

F confirm the award unless four of the members appointed to hear such appeal decided to vary the award; and that such committee should consist of five members to hear such appeal. Bryan Durant & Co. appealed to the committee of appeal, who confirmed the award of the arbitrators. Bryan Durrant & Co. applied to GORELL BARNES, J., at chambers, for an order remitting the matter for reconsideration by the appeal committee, upon an affidavit by Mr. Durant, which stated

G that, since the award of the appeal committee he had discovered that, after the making of the award, the shipowners had written to the charterers saying that by the endorsement upon the charterparty it was not intended that the consignees of the cargo, other than the charterers themselves, should be liable for any of the extra expenses, etc., the charterers being personally liable to the steamer for such extra expenses, the cargo's liability being limited to freight, and that the ship-

H owners' solicitors had written confirming this statement, and that the charterers had replied confirming and accepting such statement. The affidavit also stated that some of the members of the committee of appeal had said that, if such evidence had been before them, their decision would have been in favour of Bryan Durant & Co. GORELL BARNES, J., refused to make the order, but the Divisional Court (MATHEW and BRUCE, JJ.), on appeal, made an order remitting the matter  
I to the reconsideration of the committee of appeal. Messrs. Keighley, Maxsted & Co. appealed.

By the Arbitration Act, 1889, s. 10 (1) :

"In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the re-consideration of the arbitrators or umpire."

Cohen, Q.C., and Carver for Keighley, Maxsted & Co.

Finlay, Q.C., and Pollard for Bryan Durant & Co., were not called on to argue.

**LORD ESHER, M.R.**—In this case the parties to an arbitration were related to each other by a contract for the purchase and sale of wheat. A dispute arose in connection with that contract which raised the question whether the purchasers were bound to accept a cargo of wheat on board ship at Sharpness. In the contract of purchase and sale the parties agreed to refer all disputes to arbitrators chosen from the corn trade, subject to the condition that their award should be final and conclusive between the parties, but that if either party wished to go further and be heard before certain umpires he could do so by way of appeal. Those umpires were to be the committee of the London Corn Trade Association. This case went before the arbitrators, who gave their decision. One of the parties desired to go before the umpires. The parties had agreed that the committee should act according to its usual rules by which a panel of five was to act as umpires, and if one of those five died before a final determination was made, another was to be put in his place. The case then went before five members of the committee acting as umpires; one of those five has died, but another can and will be put in his place. There was a determination by this committee of five and *prima facie* that determination must be treated as final and conclusive between the parties, and not subject to any revision by a court of law. One party has, however, asked the court to remit this award to the umpires, under the provisions of s. 10 of the Arbitration Act, 1889 [re-enacted by s. 22 of Arbitration Act, 1950: 29 HALSBURY'S STATUTES (2nd Edn.) 89].

In my opinion, this was an arbitration. The case, therefore, comes within the Arbitration Act, and we have to see whether the circumstances will justify a remittal to the umpires to re-consider the case. The Arbitration Act, 1889, has, in a great measure, followed the provisions of the Common Law Procedure Act, 1854, as to arbitrations. If any part of the later Act is enacted in the same terms as the earlier Act, then, according to the ordinary rules of construction, if any cases have been decided as to the true construction of the Common Law Procedure Act, 1854, the same construction must be given to the same words in the Arbitration Act, 1889. The provisions of the Common Law Procedure Act, 1854, and of the Arbitration Act, 1889, as to referring back the awards of arbitrators, arose, as has been pointed out in the decided cases, in this way. There were submissions to arbitration which contained a provision that the award might be referred back to the arbitrator, and there were submissions which did not contain such a provision. If the submission did not give such power, the court could not refer an award back to the arbitrator; but if the submission did contain that power, then the court could refer back the award, but only upon certain grounds. The effect of the provisions of the Common Law Procedure Act, 1854, and of the Arbitration Act, 1889, has been stated to be, and obviously is, that all submissions to arbitration, whether they are by agreement or are compulsory, are to be treated as if they contained a power to refer the award back to the arbitrator, and it is, therefore, necessary to construe the Arbitration Act in the same way as the old submission to arbitration which gave power to refer back the award. The decisions upon the provisions of the Common Law Procedure Act, 1854, were that the power of the court to refer back an award under that Act was only as large as that formerly given by a submission, and it was held that the effect of the Act was that it expressed the well-known law as to the decision of an arbitrator and umpire—that it was final and conclusive both as to matters of law and matters of fact, and that where there had been a mistake of law or of fact, the parties alone could not set up such a mistake as a ground for referring back the award. Formerly where there was a power to refer back, if one party alleged that a mistake of law or fact had been made, the courts construed the submission as providing that the parties had taken the arbitrator for better or for worse, and must submit to his mistakes; but if the arbitrator himself came forward, told the court that he had made a mistake of law or fact, and asked that his award might be referred back, then the court would not refer the award back. That law was continued under the Common

A Law Procedure Act. It seems to me that *Dinn v. Blake* (2) adopts that law, and it is said in that case (L.R. 10 C.P. at pp. 389, 390) that

"the exceptions are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact. . . . The latter case [*Flynn v. Robertson* (3)] was decided on the authority of *Mills v. Bowyers' Society* (4), in which case it was said that the court could refer back the award if the arbitrator himself stated that in his opinion he had made a mistake of law or fact and was desirous of the assistance of the court and willing to review his decision on the point on which he believed himself to have gone wrong. These cases have apparently established another exception in addition to those mentioned by WILLIAMS, J. But the exception depends on the admission of the arbitrator himself."

C Unless the arbitrator so states, the award will not be referred back to him. This rule of the court or of law applies, however, only to the allegation that there has been a mistake of law or fact, and *Dinn v. Blake* (2) applies only to such a case and is no authority beyond it.

D The present case is not a case in which it is alleged that the arbitrators made a mistake of law or fact upon the case as it was laid before them; it is a case in which it is alleged that the whole case and evidence was not laid before them, and that material evidence has been discovered since the award. The case before us now is one where evidence has been discovered since the arbitration proceedings, and we are not called upon to say whether there are other cases which may justify the court in sending back an award; e.g., where evidence has been purposely kept back. When other cases do arise the court will give their opinion upon them. Here the only question is, whether new evidence has been discovered since the award, and whether that is a good ground for referring the award back when the arbitrator himself does not come forward to ask that it may be referred back.

E On that point there is *Burnard v. Wainwright* (1), which was decided before the F Common Law Procedure Act, 1854, but on a submission which contained a power to refer back the award, and was, therefore, in the same position as are now all submissions to arbitration. In that case it was decided by WIGHTMAN, J., in express terms that, if evidence is discovered since the decision of the arbitrator, that is a ground upon which the court may send back the award for reconsideration by the arbitrator, even if there were no request by the arbitrator to do so.

G being held, then, in the case of a submission containing a power to refer the award back, we ought now to adopt the same rule in a case under the Arbitration Act, 1889. Has any new evidence been discovered in this case? It is said that we ought not to send this award back unless the alleged new evidence is such as would be admitted as evidence in a court of law. The parties, however, have agreed to take their dispute before umpires who are not bound by the rules of

H evidence which are observed in a court of law, and the court, therefore, ought not to bind the parties by its own rules of evidence, but ought only to consider whether something has been discovered since the award which an arbitrator might consider material. We cannot say whether this alleged evidence would be considered material by the arbitrator or not. If it is something relating to the matter in dispute, whether it is evidence according to the rules of a court of law or not, the

I court may send back the award to the arbitrator for reconsideration, though the court is not bound to do so. Here it seems to me that that which has been discovered does relate sufficiently to the matter in dispute to justify the court in sending back the award to the arbitrator for him to consider the matter, leaving the decision as to the effect of this alleged evidence to the arbitrator. The judges of the Divisional Court in the exercise of their discretion did think that they ought to send back this award to the arbitrators for reconsideration, and I agree with their view. The appeal fails and must be dismissed.



**LOPES, L.J.**—I am of the same opinion. I think that the decision of the Divisional Court was right, and must be affirmed. This case arises under s. 10 of the Arbitration Act, 1889, and the words of that section are : A

“In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.” B

Those words are very large and general, but I am not prepared to say that they are larger or more comprehensive than the words of s. 8 of the Common Law Procedure Act, 1854 [repealed by Arbitration Act, 1889], which were :

“In any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper.” C

It appears to me, then, that all the cases decided upon s. 8 of the Common Law Procedure Act, 1854, are applicable to s. 10 of the Arbitration Act, 1889.

It becomes material, therefore, to consider what was the law under the Common Law Procedure Act, 1854, and before that Act. The first case which has been cited, a case of great importance, was *Burnard v. Wainwright* (1), which, in my opinion, governs the present matter. That case raised the same point as that which has been raised here, and the headnote to the report of that case is as follows (19 L.J.Q.B. 423) : D

“After an award made in favour of B. against W. on a submission to reference between them, which contained a clause empowering the court to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B. which contained material evidence in his favour. The arbitrators deposed that, had such a letter in the handwriting of B. been produced at the reference, their decision would have been materially affected. B. in answer swore that the letter was not in his handwriting, but was an absolute forgery. The court remitted the case to the arbitrators for them to say if the letter were in B.’s handwriting, and if they found that it was, then for them to reconsider the matters in difference.” E

It is to be observed that the submission in that case contained a power to send back the award, and also that the arbitrators stated that their decision would have been materially affected by the new evidence. That case, therefore, is very similar to the present case, because it has been decided that under the Common Law Procedure Act the law upon this matter was the same as before that Act, and because there has been in this case a statement by the arbitrators in respect of the new evidence. The judgment of **WIGHTMAN, J.**, was as follows (*ibid.* at pp. 424, 425) : F

“It seems to me that, according to a fair construction of the affidavits, this letter was a new piece of evidence, discovered after the award was made. I think it reasonable that the award should be sent back to the arbitrators for them to determine on the genuineness of this letter and its effect if genuine.” G

He did not seem to attach any importance to the statement made by the arbitrators that the new evidence would have materially affected their decision. It is material, however, to observe that there was not in that case any affidavit by the arbitrators asking the court to assist them, or any intimation from them to that effect. That case, therefore, is most material in the consideration of this case. H

Then followed a case, important to the consideration of this case, which decided that under s. 8 of the Common Law Procedure Act, 1854, it was no longer neces- I

A sary to insert in a submission a power to remit the award. That was *Mills v. Bowyers' Society* (4), in which Wood, V.-C., says (8 K. & J. at pp. 71, 72):

B "It appears to me that s. 8 of the Common Law Procedure Act, 1854, in no way authorises any such course of proceeding as that which I understood was endeavoured to be pressed on the court in the argument of this case. It does not appear that there is anything in that statute which would authorise the court to send back an award for the reconsideration of the arbitrators upon any other grounds than those which have hitherto prevailed to invalidate an award. . . . This s. 8 is nothing more or less, as it appears to me, looking back to the history of what took place before the passing of the Act, than the introduction of a statutory enactment enabling the court to do that which experience had shown it was convenient it should have the power of doing, and which had frequently before been specially provided in orders of reference by the court, and in submissions by consent between the parties, namely, that there should be a special power in the court to remit the matters in question, or any of them, to the consideration of arbitrators, rather than set the whole award aside."

D That decision makes it perfectly clear that, since the Common Law Procedure Act, 1854, a submission without that clause has precisely the same effect as a submission containing that clause previously had.

In 1875 *Dinn v. Blake* (2) was decided, which is very material, because it was there pointed out precisely under what circumstances an award may be sent back to arbitrators. The headnote to that case is as follows (L.R. 10 C.P. 388):

E "An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake";

and ARCHIBALD, J., stated the law shortly and clearly, saying (*ibid.* at p. 391):

F "The general principle is that an award is final; and, assuming that it is good on the face of it, there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the court in setting it right."

The present case is quite distinct from *Dinn v. Blake* (2), and is governed by *Burnard v. Wainwright* (1). There is power to remit an award, not upon the ground of any mistake of law or fact, but upon the ground of the discovery of new evidence since the hearing by the arbitrators. It is clear to me that the court has jurisdiction to remit this award. It has been argued that this is not a case in which the court ought to exercise that power, but I think that it is a case in which the court may properly exercise such jurisdiction. I think that new evidence has been discovered in this case. It is said that it is not such evidence as would be received in a court of law, and that we ought not, therefore, to remit this award on the ground that this evidence has been discovered. That argument entirely fails; these are lay arbitrators who are not bound by legal rules of evidence. We must look at this matter as an arbitrator would, and, if this is evidence which he might receive, then it is evidence in respect of which the award should be sent back to him for reconsideration. I am not, indeed, prepared to say that this is not legal evidence, but I express no opinion upon that question. The conclusion to which I come is, that the court has jurisdiction to remit an award upon this ground, and that the alleged evidence which has been discovered since the hearing is such evidence as to justify the court, in the exercise of its discretion, in remitting the award for reconsideration. This appeal must, therefore, be dismissed.

KAY, L.J.—This appeal raises one question of great importance as to the remitting of awards for reconsideration. The question is whether s. 8 of the Common Law Procedure Act, 1854, which has been, in effect, re-enacted by s. 10

of the Arbitration Act, 1889, gives the court any larger power to interfere with awards than it had before those Acts. I am strongly of opinion that neither Act intended to give any appeal from an arbitrator—that is, to give the court power to set aside an award simply because the court thought that the arbitrator was wrong. What, then, was the effect of the Act of 1854? It is difficult to say what is the limit of power of the court to remit an award. We cannot, however, do better than follow those decisions which show with what caution the courts acted in exercising the power to set aside an award. An award should be, generally speaking, final and conclusive, because the arbitrators have been chosen by the parties themselves to settle their disputes. I think that the cases have laid down with sufficient clearness the rules upon which the court should act in exercising the power to remit, to enable us to say that the facts of this case bring it within those rules.

From the judgment of ARCHIBALD, J., in *Dinn v. Blake* (2), a case decided since the Common Law Procedure Act, 1854, it appears in what cases the power to remit an award should be exercised, and that such power should be exercised in narrow limits. There is one case, *Burnard v. Wainwright* (1), in which other circumstances were added to those in which an award will be remitted, namely, where after an award has been made new evidence has been discovered which might affect the decision of the arbitrators, and was not before them at the hearing. That, it was held, may be a ground for remitting an award, and certainly may be so if the arbitrators themselves say it might have affected their decision. A statement to that effect seems to have been made by the arbitrators in *Burnard v. Wainwright* (1), and something much the same has been said by the arbitrators in this case. I think, therefore, that this case is brought exactly within *Burnard v. Wainwright* (1). That case was decided before the Common Law Procedure Act, 1854, and in the submission in that case there was contained a power to remit the award to the arbitrators. That clause was not treated as giving the court an absolute discretion whether it would remit the award or not, but, in the exercise of that power, it was thought to be a proper case to remit because new evidence had been discovered after the award which the arbitrators might consider material. I think that the present case comes within that decision, and that we shall not be extending the jurisdiction of the court to remit awards by doing so in this case, because we are simply following a previous case. I am not prepared to go one step beyond those cases, and I think that s. 8 of the Common Law Procedure Act, 1854, and s. 10 of the Arbitration Act, 1889, did not give any right of appeal from the decision of arbitrators.

It is not, I think, too much to say that *Mills v. Bowyers' Society* (4) decided that one object of s. 8 of the Common Law Procedure Act, 1854, was to obviate the necessity of inserting in a submission a power to remit the award, and to give the court that power which it did not previously possess. Before the Common Law Procedure Act, 1854, the court acted very cautiously in exercising the power to remit given by submissions. Perhaps the Act gave the court a little larger power, but very little, I think, than the clause formerly inserted in submissions. We should, in my opinion, hold that it would not be right to remit an award if it would not have been remitted by the court, previously to the Common Law Procedure Act, 1854, under a power to remit contained in a submission.

Another important point has been raised. It is said that the evidence here is of such a nature that a court of law would not receive it; that, according to the rules of evidence observed in the High Court, this evidence would not be admitted; and that, therefore, the court would go too far if it said that, upon the discovery of such evidence, it was right to remit the award for re-consideration. It is difficult to lay down any strict and definite rule upon this point. If something were alleged to have been discovered, which it might be grossly unjust to admit contrary to the legal rules of evidence, the court might refuse to remit. Here, however, I am not satisfied that this evidence would be inadmissible in the High Court, and, therefore, I have no hesitation whatever in saying that the subsequent discovery of this



**A** evidence is a good ground for sending back the award for re-consideration. I do not say that the court would not have jurisdiction to remit, even if the evidence were plainly not admissible in a court of law, but only that the court ought not to do so. That, however, is not the case here. For these reasons I am not prepared to disagree with the decision of the court below, and think that this appeal must be dismissed.

**B**

*Appeal dismissed.*

Solicitors: *Simpson & Cullingford; Freshfields & Williams.*

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]

**C**

**D**

## MIGHELL v. SULTAN OF JOHORE

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), November 27, 28, 29, 1893]

**E**

[Reported [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64;  
58 J.P. 244; 10 T.L.R. 115; 9 R. 447]

*Constitutional Law—Foreign sovereign—Immunity from being sued—Voluntary submission to jurisdiction—Sojourn within jurisdiction as private individual under assumed name.*

**F**

An action against an independent foreign sovereign prince cannot be maintained in an English court, for the court has no jurisdiction over him, unless he voluntarily submits himself in the face of the court to the jurisdiction when the court cites him to appear before it. It is not necessary for him to assert his right of immunity; the court is bound to take cognisance of it. The fact that at the time when the cause of action arose he was living in this country as a private individual under an assumed name does not constitute a submission to the jurisdiction.

**G**

*Constitutional Law—Foreign sovereign—Status—Proof—Statement by Secretary of State.*

A letter from a Secretary of State (which for this purpose is equivalent to a letter from Her Majesty the Queen herself) on the question whether or not an individual is an independent sovereign prince is decisive evidence in an English court of the facts stated in the document.

**H**

**Notes.** Considered: *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811; *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139. Applied: *The Gagara*, [1919] P. 95. Considered: *Compania Mercantil Argentina v. United States Shipping Board*, [1924] All E.R.Rep. 186. Applied: *Duff Development Co. v. Kelantan Government*, [1924] All E.R.Rep. 1. Considered: *Compania Naviera Vascongada v. Cristina, The Cristina*, [1938] 1 All E.R. 719; *Re Amand*, [1942] 1 All E.R. 236; *Kahan v. Federation of Pakistan*, [1951] 2 T.L.R. 697. Referred to: *Re Suarez, Suarez v. Suarez*, [1916–17] All E.R.Rep. 641; *The Porto Alexandre*, [1918–19] All E.R.Rep. 615; *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] All E.R.Rep. 138.

As to the immunity from suit of foreign sovereigns, see 7 HALSBURY'S LAWS (3rd Edn.) 265–267; and for cases see 1 DIGEST (Repl.) 50–61, 11 DIGEST (Repl.) 613 et seq., 22 DIGEST (Repl.) 311 et seq.

Cases referred to :

- (1) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, 516.
- (2) *The Charkieh* (1873), L.R. 4 A. & E. 59; 42 L.J.Adm. 17; 28 L.T. 513; 1 Asp.M.L.C. 581; 11 Digest (Repl.) 615, 434.
- (3) *The Exchange*, 7 Cranch, 116.
- (4) *Wadsworth v. Queen of Spain, De Haber v. Queen of Portugal* (1851), 17 Q.B. 171; 8 State Tr.N.S. 53; 20 L.J.Q.B. 488; 16 Jur. 164; 117 E.R. 1246; sub nom. *R. v. Lord Mayor of London, Wordsworth v. Queen of Spain, De Haber v. Queen of Portugal*, 18 L.T.O.S. 39; 11 Digest (Repl.) 622, 492.

Also referred to in argument :

- Duke of Brunswick v. King of Hanover* (1848), 2 H.L.Cas. 1; 9 E.R. 993, H.L.; 1 Digest (Repl.) 60, 438.
- Munden v. Duke of Brunswick* (1847), 10 Q.B. 656; 2 New Pract. Cas. 213; 6 State Tr.N.S. 403; 16 L.J.Q.B. 300; 9 L.T.O.S. 532; 11 Jur. 801; 116 E.R. 248; 1 Digest (Repl.) 56, 415.

**Appeal** by the plaintiff from a decision of the Queen's Bench Division (WILLS and LAWRENCE, JJ.) setting aside an order for substituted service.

The writ was issued against "His Highness the Sultan of the State and Territory of Johore, otherwise known as Albert Baker," and was for damages for breach of promise of marriage, and for the return of a pair of diamond buckles or their value and damages for their detention. A master made an order for substituted service of this writ upon the defendant, and on appeal the learned judge referred the case to the court, the question being whether the defendant was subject to the jurisdiction of the courts of this country. In an affidavit filed by the plaintiff she stated that she was introduced to the defendant in August, 1885, as Mr. Albert Baker, and that she has known him ever since under that name, being the name under which he always passed; that he proposed and promised marriage with her in that year when she knew him as Mr. Albert Baker, and that he was known by that name in the neighbourhood in which he lived; that in October, 1885, she accidentally discovered his real name and position, but he made her promise never to reveal it or call him by any other name than the one she had previously known; that at the defendant's request she assumed the name of Mrs. Baker in her communications with him; that in October, 1885, the defendant took a furnished private house in London as and in the name of Mr. Albert Baker; that he afterwards left England for some years, but that upon his return in 1891 he again represented himself as Mr. Baker and as a private individual and subject to the Queen, and that on his visits to the plaintiff he always so represented himself.

To ascertain the position of the defendant, a communication was addressed by the learned judge at chambers to the Colonial Office, and in answer thereto a letter, dated Sept. 9, 1893, was received from an official in the Colonial Office on behalf of the Secretary of State, in which it was stated that

"Johore is an independent state and territory in the Malay Peninsula, and that his Highness Abubakar is the present Sovereign ruler thereof; that the relations between himself and Her Majesty the Queen, which are relations of alliance and not suzerainty, are now regulated by treaty, wherein he is called the Maharajah of Johore; that the Sultan has raised and maintains armed forces by sea and land, has organised a postal system, dispenses justice through regularly constituted courts of justice, and generally speaking exercises, without question, the usual attributes of a Sovereign ruler."

The Divisional Court set aside the order for substituted service and stayed the action, and the plaintiff appealed.

*George White* for the plaintiff.

*Finlay, Q.C.*, and *George Wallace* for the defendant.

**A** **LORD ESHER, M.R.**—For the purposes of this case we must assume that the defendant, the Sultan of Johore, lived in this country under the name of Albert Baker, that he looked as if that might be his real name, and that the plaintiff believed that it was his real name. We must also assume that under this name he promised to marry the plaintiff, and that he broke his promise. On being sued for a breach of this promise, he says that he is a sovereign prince, and that, therefore, no civil action can be maintained against him in this country. An elaborate argument on this point has been presented to us, which was much the same as that which was put forward in *The Parlement Belge* (1). The House of Lords had formerly declined to determine the point. It was, however, argued and determined and all the authorities upon it inquired into with the utmost care in *The Parlement Belge* (1). That case was decided by the Court of Appeal, and the judgment in it would, therefore, be binding on us in deciding the present case, even if we did not altogether agree with it.

The first point argued was that there was no sufficient evidence that the defendant is an independent sovereign prince. The evidence is a letter written from the Colonial Office and signed by an official on behalf of the Secretary of State for the Colonies. The Secretary of State is the adviser of the Queen, and upon such a matter as this a letter from the Colonial Secretary has the same effect in courts of justice as if the letter had been written by the Queen herself. It was argued that the court ought not to remain satisfied with the letter, but ought to make further inquiries, and reference was made to what was said by SIR ROBERT PHILLIMORE in *The Charkieh* (2). I know what he said in that case, but the judgment of the court in *The Parlement Belge* (1) shows that his opinion was not right. I think that a certificate from the Queen, given through her responsible Minister upon the question of the position of a foreign sovereign with regard to herself, is decisive in her courts of law. It is, therefore, clear that the defendant is an independent sovereign. All independent sovereigns are, so far as this question is concerned, equal to one another.

That being the defendant's position, the question arises whether he can be sued in the courts of this country. It is suggested that in this case he can be sued, because, by coming to this country and living here under a false name and so deceiving the plaintiff, he has lost his privilege as an independent sovereign and made himself subject to the jurisdiction of the courts in this country. Now the whole of this subject was carefully considered in *The Parlement Belge* (1). It was then pointed out that great judges had formerly declined to give decisive opinions on the matter, but I think that in that case the court was called upon to decide the point and did decide it. In delivering the judgment of the court I used these words (5 P.D. at p. 206):

“The first question therefore is—what is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised? ‘Our king,’ says BLACKSTONE (bk. 1, c. 7),

**H** ‘owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a court would be contemptible unless the court had power to command the execution of it; but who shall command the king?’

**I** In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. ‘The word,’ says WHEATON, adopting the words of the judgment in the case of *The Exchange* (3),

‘being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete juris-



diction within their respective territories which sovereignty confers.' 'This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.' 'One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why have the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.' "

Later, I used these words (5 P.D. at pp. 214, 215) :

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

The Court of Appeal seems to me to have there laid down an absolute rule, without any exception or qualification whatever. No mention was made there of the case of a sovereign voluntarily submitting himself to the authority of a foreign court. Everyone knows that a sovereign can do so, if he wishes. What is the time when a sovereign must decide whether he submits or not? It must be when the court is about to exercise authority over him. He elects whether he will submit or not when the court cites him to appear, and if at that time he proves that he is an independent sovereign, then the court has no jurisdiction over him. The court cannot inquire into what he has previously been doing, and if he at that time elects not to submit to the jurisdiction of the court, then the court has no jurisdiction over him. The court cannot inquire whether he has been acting incognito or deceitfully, nor make any inquiries into the nature of his conduct. That seems to me to be the law as laid down in *The Parlement Belge* (1), which is a decision binding upon this court. I think that this appeal fails, and must be dismissed.

**LOPES, L.J.**—It was contended that the defendant's position as an independent sovereign prince was not satisfactorily established. It seems to me to have been fully established that the defendant is as much an independent sovereign prince as any in Europe, and like all independent sovereign princes he is entitled, upon coming into this country, to immunity from the jurisdiction of English courts. That such is the law seems to me to have been clearly established in *The Parlement Belge* (1). **VATTEL**, too, in a passage that was cited in the judgment in *The Parlement Belge* (1) (5 P.D. at pp. 206, 207), says (bk. 4, c. 7, s. 108) that a sovereign prince who may come as a traveller into a foreign country is exempted from all jurisdiction. There is no doubt that a foreign sovereign may submit, if he chooses to do so, to the jurisdiction of the courts of this country. It is argued that the defendant has done so in this case, because he has lived and acted in this country as a private individual and under an assumed name. We are, therefore, asked to infer that he has submitted to the jurisdiction of the courts of this country. I am clearly of opinion that we cannot draw any such inference. The only mode in which a foreign sovereign can submit to the jurisdiction of our courts is by a submission in the face of the court. He does not waive his rights by taking an assumed name or doing anything of that kind. **VATTEL** again says that a sovereign, on making himself known, cannot be treated as subject to the common laws, for it

A is not to be presumed that he has consented to such a subjection. It is clear, to my mind, that there has been no submission by the defendant to the jurisdiction of English courts, and I agree that the appeal should be dismissed.

KAY, L.J.—The status of a foreign sovereign is one of which the courts will take judicial cognisance; that is to say, neither party to the action is required to prove to the court whether or not a person is in the position of an independent sovereign. If there is any doubt upon the matter the court will take means to inform itself. Here the defendant is the Sultan of Johore, and the means which WRIGHT, J., took to inform himself was an inquiry at the Colonial Office. A letter was sent to him from that office signed by an official, who stated that he was directed by the Secretary of State for the Colonies to give the information which the letter contained. For the plaintiff it was argued that that was not enough. I confess that I cannot conceive a more satisfactory mode of obtaining information of this kind than a letter from one of the Queen's Secretaries of State, which, for this purpose, is entirely the same as a letter from the Queen herself, and if Her Majesty condescends to state to one of her own courts that a certain person is an independent sovereign, such a statement must be conclusive. That this letter contains such a statement seems to me to be perfectly clear. A treaty is referred to in it, under which the Sultan is entitled to British protection, and by which he undertakes not to enter into any negotiations or treaty with any foreign State without the consent of Her Majesty. From this it was argued that he had ceased to be an independent sovereign; but clearly he is not dependent on anyone. The Queen has given him her protection as a condition of his not entering into relations with foreign countries, and if he should do so, contrary to his agreement, he would lose his right of protection, and possibly other consequences might follow. But there seems to me to be nothing in this treaty to disprove or to qualify the statement contained in the letter that the Sultan of Johore is an independent sovereign.

The next point in the argument was this: An independent sovereign, who is sued in a foreign court, may waive his rights of immunity and become subject to the jurisdiction of the court. I agree that that is so; but how is it to be done? Supposing some great European potentate were to be sued in an English court, but were to take no notice of the proceedings, then the court would take judicial notice of the fact that he was a foreign sovereign, and, therefore, not subject to English jurisdiction. This shows that it is not necessary for a foreign sovereign to assert his rights of immunity, but that the court is bound to take notice of the fact, and to say that it has no jurisdiction. It was said that the defendant in this case had waived his rights. It is said that he came to England as a private person, passed under the name of Albert Baker, as such entered into the relations with the plaintiff upon which this action is founded, and that by doing this he showed that he intended and wished to be treated in this country as a private individual, and therefore as subject to the jurisdiction of the courts of this country in the same way as any other private individual would be. The question arises, whether a foreign sovereign who has lived in this country perfectly incognito, no one knowing that he is an independent sovereign, thereby waives his rights of immunity as an independent sovereign. The only authority cited in support of that is a dictum of LORD CAMPBELL, C.J., reported in *Wadsworth v. Queen of Spain* (4) (20 L.J.Q.B. at p. 492). The case is also reported in the LAW REPORTS, but the dictum relied on appears nowhere but in the LAW JOURNAL report. Under these circumstances the dictum seems to me not to be one of very great authority. Probably when the LAW REPORTS report came, as it may have done, to LORD CAMPBELL for revision, he would not allow it to remain in the report. Besides that dictum certain textbooks were cited; but in the books by writers of great authority, such as VATTEL, nothing of the kind appears. On the contrary, there are the passages from VATTEL which LOPES, L.J., has referred to, which show that the moment at which a defendant should claim immunity as a foreign sovereign is the moment

when he is cited to appear before the court. The true proposition of law seems to me to be that a foreign sovereign is entitled to immunity from an action brought in the courts of this country, unless in any particular action he chooses to waive his immunity and submit to the jurisdiction of the court. Here the defendant has not consented to submit to the court; but has acted just to the contrary. Having done nothing to waive the immunity which he now claims, I think that, upon principles which are well settled upon abundant authority, he is entitled to immunity, and that this appeal must therefore be dismissed.

*Appeal dismissed.*

Solicitors: *Colyer & Colyer; Edward F. Turner.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## HEWLETT v. ALLEN

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Morris and Lord Shand), April 27, May 4, 7, 1894]

[Reported [1894] A.C. 383; 63 L.J.Q.B. 608; 71 L.T. 94;  
58 J.P. 700; 42 W.R. 670; 10 T.L.R. 464; 38 Sol. Jo. 455;  
6 R. 175]

*Master and Servant—Wages—Truck Acts—Agreement respecting person to whom part of wages to be paid—Agreement by employee to subscribe to sick and accident club—Payment of subscriptions by employer out of wages—Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 2.*

A payment made by an employer at the instance of a person employed by him to discharge some obligation of the person employed, or to place the money in the hands of a third person in whose hands the person employed desires it to be placed, is, in the sense and meaning of ss. 3 and 4 of the Truck Act, 1831, a payment to the person employed as much as if the current coin of the realm had been placed in his hands and he had made the payment to the third person himself.

The appellant, an employee of the respondent, as a condition of her employment signed an agreement with the respondent by which she undertook to become a member of a sick and accident club and to subscribe a weekly sum of the funds in proportion to her wages. Those sums were deducted weekly from her wages and paid to the treasurer of the club.

**Held:** assuming, but not deciding, that the agreement fell within s. 2 of the Truck Act, 1831, the payments made by the respondent on behalf of the appellant were equivalent to payments made by the respondent to the appellant herself in current coin within the meaning of the Act.

**Notes.** The Payment of Wages Act, 1960 [40 HALSBURY'S STATUTES (2nd Edn.) 290], relaxes the provisions of the Truck Acts and provides that, if employer and employee so agree, the employee's wages may be paid into a bank, or by postal order, money order, or cheque.

Distinguished: *Penman v. Fife Coal Co.*, [1935] All E.R.Rep. 46. Considered: *Kenyon v. Darwen Cotton Manufacturing Co.*, [1936] 1 All E.R. 310. Referred to: *Phillips v. London School Board*, *Cockerton v. London School Board*, [1898] 2 Q.B. 447; *Williams v. North's Navigation Collieries (1889), Ltd.*, [1904-7] All E.R.Rep. 907; *Riverdale Mill Co. v. Hart* (1926), 43 T.L.R. 73.

As to the Truck Acts and allied matters, see 17 HALSBURY'S LAWS (3rd Edn.)



A 138-148; and for cases see 24 Digest (Repl.) 1096 et seq. For the Truck Act, 1831, see 9 HALSBURY'S STATUTES (2nd Edn.) 11.

Case referred to:

(1) *Re Morris, Ex parte Cooper* (1884), 26 Ch.D. 693; 51 L.T. 374, C.A.; 24 Digest (Repl.) 1102, 484.

B **Appeal** by the plaintiff in the action from a decision of the Court of Appeal (LORD ESHER, M.R., BOWEN and KAY, L.JJ.), reported [1892] 2 Q.B. 662, affirming a decision of the Divisional Court (DAY and CHARLES, JJ.), on an appeal from a county court.

*Robson, Q.C., Corrie Grant, and Compton Smith* for the appellant.

*Finlay, Q.C., and Crispe* for the respondent.

C Their Lordships took time for consideration.

May 7, 1894. The following opinions were read.

**LORD HERSCHELL, L.C.**—The facts of this case are very simple, and may be shortly stated, but the point raised is one by no means free from difficulty.

D The appellant, who was plaintiff in the action below, entered several times into the service of the defendants, who are the respondents at the Bar, first in the year 1886, again in the year 1888, and again in the year 1890. On each occasion the appellant entered into an agreement with her employers, which was signed by her,

"to conform to all the rules and regulations of Messrs F. Allen and Son's works, and to submit to the penalties for breach of the same, a copy of which rules and regulations was given me at the time of signing this."

E One of the rules to which she so agreed to conform was in these words: "All employees will have to become members of the Sick and Accident Clubs." It appears that there was a sick and benefit society established in connection with the employment for the benefit of employees at Messrs. Allen & Son's works. The rules of that society provided that the contributors to the fund were to "consist of

F all employed in the works who" were to be divided into five classes, and according to the class was the amount of weekly subscription, varying from 5d. down to 1½d., and also the amount of "weekly relief in case of sickness or accident," varying from 12s. down to 3s., and "death money" varying from eight guineas down to two guineas. The subscription was to "include doctor's attendance free within three miles, unless members" were "able to call at his surgery." By another rule

G "a member of the firm" was "to act as treasurer, and the club" was to "have its own committee of management of twenty members," who were to "conduct all the business of the club, their services rendered being gratuitous." In accordance with these rules it was the practice for a weekly payment to be made to the treasurer of the fund, and the sums received by him were paid from time to time to a separate account which was kept at the bank, and in case of sickness or the other cases referred to, the members received relief from the fund so established. H There was deducted from the plaintiff's wages (in the manner which I will refer to in a moment) weekly the sum of, at one time 2½d., and at another 3d. a week; that is to say, the subscriptions of the fourth class and the third class.

I It appears that each week the appellant received a ticket, of which one was produced to your Lordships, showing the gross amount of wages due, and there was in this particular case 15s. 9d., from which was deducted, "fines 2d., sick club 2½d."; so that each week at the time when the appellant received the balance she was made aware that there was being paid by the firm to the treasurer of the sick club this amount of 2½d. or 3d., as the case might be, and that payment was made without objection during the whole time that she was in the employ of the respondents. When she left she received the sum of 3s. from the fund, which it appears was the amount to which any member was entitled on ceasing to be in the employ of the employers. Of course, during the whole time she was in their employment she received the advantages of being a member of this sick and benefit

club. It was suggested on behalf of the appellant that she had received nothing from the fund except the 3s. on leaving it, that that was the only benefit she had derived. I cannot at all concur in that view. Although she in point of fact did not fall ill during the time that she was in their employ, she received the benefit of having secured to her, in case she fell ill, a considerable weekly payment out of the sick fund.

After her employment ceased the present action was brought, and she claimed a right to recover, less certain deductions with which I need not trouble your Lordships, the total amount that had been in this way weekly paid to the sick club, and, in the manner that I have described, deducted from the sum which she otherwise would have received from the employers. If it had not been for the provisions of the Truck Act, I do not think it can be doubted for a moment that the plaintiff would have had no possible claim. The fact that she had become a member of this sick club, and that week by week to her knowledge and with her assent a sum had been paid by the employers on her behalf to the sick fund, which gave her a right to all its advantages would be a complete answer to any such action. I do not think that was really disputed at the Bar, but the plaintiff's case rested entirely upon the provisions of the Truck Act, 1831. It was alleged that she had not received the whole of her wages in the manner in which that Act entitled her to demand them, and that, she not having received the whole of her wages, the balance now fell to be paid by her employers. I should state that, during a portion of the time when she was first in the service of the employers, the character of the employment was not one within the Truck Act, 1831. It only came within the Truck Acts by reason of the amending Act, the Truck Amendment Act, 1887, which brought that particular occupation within it.

The Act of 1831 is intituled, "An Act to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm." By s. 3:

"The entire amount of the wages earned by or payable to any artificer . . . in respect of any labour by him done . . . shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

By s. 4:

"Every artificer . . . shall be entitled to recover from his employer . . . in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer . . . as shall not have been actually paid to him by such his employer in the current coin of this realm."

It is on those two sections that in the first place the plaintiff founds her action. She alleges that she has not been paid in the current coin of the realm the wages to which she was entitled. I do not think it can be doubted that the object of this enactment was to strike at the practice which had grown up of employers making their payment in part by the supply of goods in the sale of which they were interested—a practice which it was thought would place the person employed at an unfair disadvantage, and one which it was thought was calculated to result in the person employed obtaining something less than the agreed remuneration for services.

The contrast in those sections is between payment in current coin of the realm and payment in some other fashion, and I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as

A if the current coin of the realm had been placed in his or her hands. It is said that money paid in that way would not be a payment of the debt—that it could not have been pleaded as payment; that the defence must have been one of set-off. Whether that be so or not, in accordance with the system of pleading which previously prevailed, I do not think it at all necessary to inquire. The distinction between payment and set-off was often a very fine one in the old days. But, however that may be, as a matter of pleading, I cannot myself doubt that, looking at the purpose and object as well as the words of this statute, a payment made in that fashion would be a payment in the current coin of the realm, and not otherwise, within the meaning of the Truck Act. The case obviously would not be in the slightest degree within the mischief against which that statute was directed.

B  
C I ought also to call attention to the fact that s. 5 of the statute does prohibit set-off in particular cases. The employer in any action commenced by an artificer for the recovery of wages is not to be allowed a set-off,

“nor to claim any reduction of the plaintiff's demand by reason . . . of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages . . . or by reason or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.”

D  
The object of that enactment is obvious, but it does not touch a case of set-off (if it be a case of set-off) of money paid for the person employed at his or her request. But then it is said that s. 2 of the statute enacts:

E “If, in any contract hereafter to be made between any artificer . . . and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void.”

F The words relied on in that section by the appellant are these, that any provision made directly or indirectly respecting the manner in which, or the person with whom, any of the moneys to become due shall be laid out or expended is rendered illegal, null, and void. The contention on behalf of the appellant is this. The appellant, by a provision in the contract between her and her employers agreed to become a member of the sick and accident club; although the agreement did not in terms provide that the subscriptions to that club were to be paid out of her wages, yet, nevertheless, that must have been in the contemplation of the parties; and, therefore, the stipulation in the agreement was illegal within the Truck Act, and null and void, because it was an agreement as to the mode in which week by week a portion of her wages was to be expended.

G  
H The question raised by that contention is certainly one of very considerable importance, and also one of very considerable difficulty. Various cases were put at the Bar, in which it would be strange to suppose the legislature had prohibited the agreements suggested; as, for example, if the agreement contained a provision that the person employed should enter into a fidelity insurance contract, and keep up that policy so as to make a provision against any default on his or her part towards the employers. Such a provision for the protection of the employers, it was said,

I would be not in the slightest degree within the mischief against which the Truck Act was directed; it would be a reasonable and proper agreement to come to, and it cannot be supposed that the legislature intended to prohibit it by the general words which have been used in s. 2 of the Truck Act. Here, it was said, in the agreement in this case nothing was stipulated with regard to payment out of the wages, or that the subscription was to be kept up by payment from the wages. It was merely a general contract that she would join this sick fund, no doubt implying that she would make the payments which were requisite to secure such membership. There is, no doubt, very great force in that argument; but, on the other



hand, it would be, I think, very dangerous to hold that any contract made by a person employed which involved expenditure of money from time to time was not within the section merely because it did not provide that the money should be paid out of wages. So to hold would be, in some cases, undoubtedly to enable the purpose and object of s. 2 to be evaded.

I find it very difficult indeed to say where the line should be drawn, if a line is to be drawn, between cases such as these, which would be the one class within and the other without the scope and intention of the Truck Act. It may be that it is impossible to draw any such line, and that each case must be dealt with upon a consideration of its own circumstances, and a determination whether it is, or is not, within s. 2. In the present case it does not seem to me to be necessary to determine this question. For the purpose of my decision I will assume that the case is within s. 2 of the Truck Act, though I must not be understood as in any way indicating an opinion that it is so. But, assuming it to be within s. 2, what is the effect of that section? It makes that provision illegal, null, and void. As regards its illegality, of course, if it be within the section, it would render the employer liable to the penalty provided by the Truck Act. But, in addition to that, it is made null and void.

It is to be observed that the becoming a member of this sick and accident club is certainly not made illegal or null and void. It is the contract to become so and to pay the subscriptions which alone can be said to be made null and void; that is to say, that the employer, it being null and void, could not as against the employee, enforce that provision. That, and nothing more than that, seems to me to be the result of the application of s. 2, supposing it to apply to such a case as the present—that the employed might at any time have said: "I will not join," or "I will not continue a member of the sick club," and by so saying would not have committed any breach of contract as against the employers, because the contract was null and void. But supposing, in that sense (and that seems to me the only sense in which the section could be operative), the contract to become a member was null and void, the question which has to be considered in the present case is what is the position of the employed as regards the employers, supposing that, with her assent, the employers have made a payment week by week on her behalf to the treasurer of a society to which she has consented to belong, and has belonged, during the time she was in their service. I can find nothing in the Truck Act, under such circumstances, to prevent the employer, when sued, relying on the fact of such payments as the discharge of his obligations towards his employee in respect of such sums of money as he has not personally handed over to her. I will not repeat again the observations I have made about the only set-off or reduction of demand which is prohibited by the Act.

The question, then, is whether in the present case it is established that the total wages of the plaintiff have been paid, either by handing them to her in the current coin of the realm or by making, on her behalf, payments which she has authorised. I cannot doubt that, on the true view of the circumstances of this case, it has been established that the employer has thus discharged himself, and, unless there are provisions in the Truck Act which prevent the inferences being drawn, which otherwise would be drawn, the conclusion is absolutely irresistible.

I find that, in *Re Morris, Ex parte Cooper* (1), circumstances which were very similar to the present were considered by the Court of Appeal. In that case deductions were made from the wages when payment was made to the person employed, and on the back of the ticket which was given to each workman when he received his wages were printed some terms and regulations, among which were regulations as to the payment to the doctor's fund of so much a month according to the wages which he received, and payments to the reading-room fund of "4d. per month, payable by all men and boys over sixteen years of age. These payments will be deducted from the wages." That had gone on for a considerable time, and deductions to a substantial amount had been made in that way from the wages for the purpose of being paid to the treasurer of the reading-room fund and to the

A doctor, but the firm in fact had not paid either the doctor or the treasurer of the reading-room fund. Under those circumstances steps were taken by the persons employed to recover the money which had been so deducted from their wages. Of course, that case differed from the present inasmuch as there remained in the hands of the firm the moneys which they had deducted, and the defence suggested in the present case did not arise there. The court so held, but LORD SELBORNE, B L.C., in delivering judgment, said (26 Ch.D. at p. 698):

C "It was suggested that certain sums were payable by the workmen under contracts, which were in substance their contracts, to the doctor and for the purposes of the reading-room, and that by arrangement with the employers those sums were to be paid out of that part of the wages which had not been paid to the men. If that had been actually done and a settlement upon that footing had taken place, I am not, as at present advised, prepared to say that such a settlement could have been treated as a nullity by reason of the Truck Act."

D That is an expression of opinion on the very point now under consideration; because I can see not the slightest distinction between a payment to the treasurer of that reading-room fund and a payment to the treasurer of this sick and accident club. COTTON, L.J., in that case, said (*ibid.* at p. 699):

E "We do not in any way encourage the idea that our decision would apply (I desire to guard myself in this way, and I understand that the Lord Chancellor intended to do so) to any deduction made from the wages, and in fact applied by the employers by the direction of the workmen, or in pursuance of an arrangement made with them, in discharge of a debt for which they were liable."

F Therefore, we have a very distinct expression of opinion by those eminent judges. LORD SELBORNE and COTTON, L.J., in favour of the view which in substance has been taken by the court below, and which I am prepared to recommend your Lordships to adopt. For these reasons I move that the judgment appealed from be affirmed and the appeal dismissed.

G LORD WATSON.—In my opinion, the stipulation in her contract of employment that she should become a member of the sick and accident club, when taken by itself, imposed a perfectly lawful condition upon the appellant. I am also of opinion that the course of dealing, by which the respondent firm paid her contributions to the club, and deducted the amount at the weekly settlement of her wages, had all along the tacit assent of the appellant, and that the case must be disposed of on the same footing as if each contribution had been advanced by them under express authority from the appellant. H After the exhaustive observations which have been made by my noble and learned friend, I need not recapitulate the sections of the Truck Act, 1831, which bear upon the question before us, or criticise their enactments in detail. For the reasons which the Lord Chancellor has assigned, I think that, while the case is one of nicety, your Lordships ought to accept the opinions expressed by the EARL OF SELBORNE, L.C., and COTTON, L.J., in *Re Morris, Ex parte Cooper* (1), and to hold that the contributions advanced by the respondent firm, on behalf of the appellant, were substantially equivalent to payments made by them to the appellant herself, in current coin, within the meaning of the Act. I am personally inclined to hold that the inference thus derived from the earlier sections of the Act is supported by the terms of s. 24, which (*inter alia*) enacts:

"Nothing herein contained shall extend or be construed to extend to prevent any employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law. . . ."

Apart from the statute, advancing the artificer's contributions to a friendly society, A established according to law, and advancing his contributions to a domestic club, having the same objects in view, appear to me to stand in *pari passu*. If s. 24 had been expressed in terms which clearly established an exception from preceding sections, it would, in my opinion, have afforded an argument in favour of the appellant, because such an exception would have indicated an intention of the legislature that advances of that kind were within the intendment of the Act, B and were not to be permitted unless in cases specially referred to. But, on consideration, I am of opinion that the section does not create a proper exception, and that it must be taken as indicating that the previous enactments were not intended to include and prohibit advances identical in principle with those mentioned. I, therefore, concur in the judgment proposed by the Lord Chancellor.

**LORD MORRIS.**—I entirely concur in the opinion which has been so fully expressed by the Lord Chancellor; but, having a strong opinion on s. 2 of the Truck Act as affecting the present case, I consider that I am bound to state it. In my opinion, the contract in question is not one which is either aimed at or struck by s. 2 of the Truck Act. If we look at the contract itself as contained in the written document, it is merely to the effect that all employees shall become members of the sick and accident club. There is nothing in the contract, so far as the writing is concerned, that is at all within the purview of the Truck Act. But then, it is said that we must, upon the facts of the case, come to the conclusion that there was some understanding or agreement that a portion of the wages of an employee was to be deducted and paid to this benefit society, and that consequently that contract becomes illegal under s. 2. D

I cannot come to the conclusion in the first place that it is a portion of the contract. But, even if it was, it does not appear to me to be a matter aimed at by s. 2, which was passed entirely, as the preamble of the Act states, and as is stated in its title, in order to get rid of the payment of wages by goods. The words are that E

"If . . . any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void."

In my opinion, the contract in question, even if there was this understanding, G certainly does not come within the spirit of the Act; in my opinion it does not come within the letter of the section, as a payment made to the benefit society was not a laying out or expending of the wages of the artificer within the meaning of s. 2, but was merely an allocation of part of the wages of the employee at the request of the employee, and, therefore, in my opinion, it does not come within the section. H

**LORD SHAND.**—I confess that it is satisfactory to me that your Lordships have come to the conclusion that this appeal should not be allowed, for I have felt throughout the argument that, whether it might or might not be possible to bring the case within the letter of the provisions of the Truck Act, it was not substantially within the mischief which that Act was intended to remedy, or within the spirit of the statute as striking against the evil which had been in existence at the time when it was passed. The grounds upon which your Lordships have proceeded, in which I entirely concur, are materially different from those which are the basis of the judgment of the learned judges of the Court of Appeal. Those learned judges have held expressly that the contract in this case was struck at by the provisions of the statute. Upon that question I shall only say that, while I shall not express myself so strongly as LORD MORRIS, I am certainly not satisfied that the contract in this case is one in violation of the provisions of the statute. If I



**A** one looks at these various provisions it appears plainly enough that the mischief to be remedied was, as has been already mentioned by the Lord Chancellor, that goods were given instead of or in part payment of wages to the persons employed, and that the employers, besides getting a benefit from the proper work done by their servants, were obtaining a second benefit by the supply of goods in the sale of which they were presumably interested; there was a double benefit to them.

**B** You see from the provisions of the statute that the two things which are strongly brought out in many of its various provisions and in the schedules attached to the Act, and which it was intended to prohibit, are payment in goods and an advantage thereby gained by the employers. In the present case neither of those elements is present. The contract has nothing to do with goods, and it cannot be suggested, indeed it has not been suggested in the argument, that the employer was to obtain any benefit whatever. But further than this, I participate in the view expressed by LORD MORRIS that it is an important circumstance here that there was no stipulation for the payment to be made out of wages at all. Apart from the acts of the parties, I find nothing in the contract which can be said to be struck at by the statute. I think an employer may fairly say: "I shall not employ or retain a servant in my employment unless he contributes to a sick and benefit fund, and thus makes a provision for a time of illness from accident or otherwise, or it may be death." As an employer he may say that he requires security from certain classes of servants, and will not employ those unless they contribute to one of the fidelity associations, or that he will only employ persons who belong and contribute to some temperance society, or something of that kind. There can be no doubt that the contract would have been fully implemented if the appellant, having obtained her wages week after week, had herself gone and contributed, out of the moneys which she had received, or other moneys, to the payment of any premium she required to pay, or the payments might have been made for her by other persons altogether. In short, so far as the contract itself is concerned, I do not read into it that it was necessary that the payments should be made out of her wages, nor should be deducted from each term's wages, which

**F** is essential to make the statute apply.

I certainly feel the difficulty which the Lord Chancellor has expressed in saying that, if there had been a provision that goods should be purchased at a particular store, it might perhaps be successfully contended that this would have been struck at by the Act, although it were not expressly stipulated that payment was to be made out of wages. I do not say how that might be, but the element that there

**G** is no personal advantage gained, or which might be presumed to be gained, by the employer (in a case like this) would weigh very much with me in considering whether upon the construction of such a contract it was struck at by the Act at all. Having expressed these views, differing from what has been indicated as the basis of the judgment in the court below, I entirely agree on the particular ground on which the Lord Chancellor has put the judgment which he has proposed in this

**H** case. I mean that there is clear evidence, or at all events evidence sufficient, to show that there was such an authority given by this appellant, week by week, for the payment of a contribution towards this sick and benefit fund as precludes her from now challenging those payments. The payment was made to the treasurer acting for this association, and I think that a payment made, presumably as when wages have become due, at the request or on the mandate of one of the persons

**I** employed, to meet an obligation or for a purpose which he or she desires to fulfil, is a payment which is not invalid as being struck at by the requirements of the statute. Upon these grounds I concur with your Lordships in thinking that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Shaen, Roscoe, Massey & Co.; M. Jutsum.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

## Re LANDS ALLOTMENT CO., LTD.

[COURT OF APPEAL (Lindley, Kay and A. L. Smith, L.JJ.), January 31, February 1, 2, 1894]

[Reported [1894] 1 Ch. 616; 63 L.J.Ch. 291; 70 L.T. 286;  
42 W.R. 404; 10 T.L.R. 234; 38 Sol. Jo. 235; 1 Mans. 107;  
7 R. 115]

*Company—Director—Trustee of company's money of which he has control—Breach of trust—Ultra vires dealing with company's funds.*

Directors are express trustees, or trustees by implication of law, of the moneys of the company of which they have control, and as such are entitled to the limitation of actions against trustees in respect of trust property prescribed by s. 8 of the Trustee Act, 1888 (now s. 19 of the Limitation Act, 1939), subject to the exceptions contained in that section. Directors of trading companies are not for all purposes trustees, or in the position of trustees, or quasi-trustees, but if they deal with the funds of the company which are under their control in a manner which is beyond their powers, as to that dealing they are treated as having committed a breach of trust.

*Company—Director—Liability for false statement made by co-director—Statement made at shareholders' meeting—Need to prove thorough apprehension of falseness of statement and concurrence therewith.*

Per KAY, L.J.: To render directors of a company liable for a false statement made by one of their number at a meeting of shareholders it must be proved very clearly that they thoroughly apprehended the falseness of the statement that was made and concurred in it for the purpose of deceiving the shareholders. The mere fact that they were present when the false statement was made is not enough to enable the court to treat them as having committed a fraud for the purpose of concealing the true facts from the shareholders.

**Notes.** Followed: *Whitwam v. Watkin* (1898), 78 L.T. 188. Applied: *Lucas v. Fitzgerald* (1903), 20 T.L.R. 16. Distinguished: *Re Windsor Steam Coal Co. (1901), Ltd.* (1928), 140 L.T. 80. Referred to: *Mara v. Browne*, [1895] 2 Ch. 69; *Re Severn and Wye and Severn Bridge Railway*, [1896] 1 Ch. 559; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Percival v. Wright*, [1902] 2 Ch. 421; *Young v. Naval, Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687; *Re Macjadyen, Ex parte Vizianagaram Mining Co.*, [1908] 2 K.B. 817.

As to the duties and liabilities of directors and misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 293-315, 621; and for cases see 9 DIGEST (Repl.) 485 et seq., 10 DIGEST (Repl.) 943-953. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450; 40 L.T. 287; 27 W.R. 594; 9 Digest (Repl.) 508, 3347.
- (2) *Re Faure Electric Accumulator Co.* (1888), 40 Ch.D. 141; 58 L.J.Ch. 48; 59 L.T. 918; 37 W.R. 116; 5 T.L.R. 63; 1 Meg. 99; 9 Digest (Repl.) 536, 3522.

Also referred to in argument:

*Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 36 W.R. 641, H.L.; 10 Digest (Repl.) 945, 6493.

*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; 61 L.J.Ch. 617; 67 L.T. 90; 41 W.R. 75; 8 T.L.R. 738; 36 Sol. Jo. 683; 9 Digest (Repl.) 508, 3349.

*Sovereign Life Assurance Co. v. Wilmot* (1893), 9 T.L.R. 525; 37 Sol. Jo. 581; 9 Digest (Repl.) 542, 3563.

- A** *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 9 Digest (Repl.) 526, 3461.
- Re Oxford Benefit Building and Investment Society* (1886), 35 Ch.D. 502; 55 L.T. 598; 35 W.R. 116; 3 T.L.R. 46; sub nom. *Re Oxford Building Society, Ex parte Smith*, 56 L.J.Ch. 98; 9 Digest (Repl.) 479, 3135.
- B** *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 36 W.R. 322; 3 T.L.R. 841; 9 Digest (Repl.) 588, 3889.
- Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 36 Sol. Jo. 151, C.A.; 9 Digest (Repl.) 541, 3561.
- C** *Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch.D. 431; 59 L.J.Ch. 403; 62 L.T. 596; 38 W.R. 475; sub nom. *Manchester Royal Infirmary Dispensary and Lunatic Hospital v. A.-G., Re National Permanent Mutual Benefit Building Society*, 6 T.L.R. 129; 43 Digest 926, 3646.
- Re Bowden, Andrew v. Cooper* (1890), 45 Ch.D. 444; 59 L.J.Ch. 815; 39 W.R. 219, L.J.; 43 Digest 794, 2312.
- D** *Moore v. Knight*, [1891] 1 Ch. 547; 60 L.J.Ch. 271; 63 L.T. 831; 39 W.R. 312; 42 Digest 378, 4259.
- Re Swain, Swain v. Bringeman*, [1891] 3 Ch. 233; 61 L.J.Ch. 20; 65 L.T. 296; 32 Digest 495, 1567.
- Re Page, Jones v. Morgan*, [1893] 1 Ch. 304; 62 L.J.Ch. 592; 41 W.R. 357; 3 R. 171; 32 Digest 495, 1559.

**E** **Appeal** by the Official Receiver from a decision of WRIGHT, J., on two summonses taken out by the official receiver and liquidator, under s. 10 of the Companies (Winding-up) Act, 1890, with the view, by the first summons, of making the respondents, S. Rowles Pattison, the Rev. Dawson Burns, George Dibley, and Morrell Theobald, who had been directors of the company, jointly and severally liable to make good to the assets of the company the sum of £35,000, alleged to have been improperly employed by them out of the moneys of the company in the purchase of 7,000 shares of £5 each in the Building Securities Co., Ltd., and, by the second summons having Edward Barnard, Joseph William Dresser, George Edward Brock, and Morrell Theobald declared jointly and severally liable for £5,200 invested in the purchase of 1,040 other shares in the Building Securities Co., Ltd.

**G** *Finlay, Q.C.* and *E. S. Ford* (Muir Mackenzie with them) for the Official Receiver.

*Marshall Hall* and *R. E. Moore* for the respondent Brock.

*Ingen* for the respondent Burns; *Swinfen Eady, Q.C.*, *Woodfall*, and *G. E. Tyrrell* for the respondent Dibley; *H. Reed, Q.C.*, and *C. E. E. Jenkins* for the respondent Theobald; and *Houghton* for the respondent Pattison, were not called

**H** on to argue.

**LINDLEY, L.J.**—This is an application under s. 10 of the Companies (Winding-up) Act, 1890, which has replaced a previous section of the Companies Act, 1862 [see now Companies Act, 1948, s. 333]. Section 10 enacts:

**I** "Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company . . . examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore



any property so misapplied or retained, or for which he has become liable or accountable together with interest." A

Under that section two summonses were taken out in 1893 against former directors of the Lands Allotment Co., which is now being wound-up. The object of the first summons is to compel certain of the directors to refund or make good the sum of £35,000. The object of the second summons is to compel two of the directors—namely, Mr. Brock and Mr. Theobald—to make good a sum of £5,200. B

As to the £35,000, the case stands thus. It appears that in the year 1885 a Mr. Hobbs was indebted to this company to the extent of £35,000. It appears that a company, called the Building Securities Co., was formed to take over Hobbs's business—to take over his assets and his liabilities—and under the arrangements made in the formation or after the formation of the Building Securities Co. it became their duty, as between them and Hobbs, to pay off that £35,000 which he owed to the Lands Allotment Co., and they proceeded to do that in this way. They had not, as I infer from the form taken by the transaction, got £35,000 with which to pay off Hobbs's debt. Therefore, the Building Securities Co. said to the Lands Allotment Co.: "If you will buy £35,000 of our shares and send us a cheque for that sum, you shall have the cheque back, and so we will repay you Hobbs's debt." That device was carried out. What is the effect of that? In point of fact no money passed out of the coffers of the Lands Allotment Co. into the coffers of the Building Securities Co. It was a mere paper transaction so far as cash was concerned. It is true that cheques were handed into the bank one day and the money taken out the next. But the net result and the real substance of that transaction, when you see through the cloak thrown around it, is that the Lands Allotment Co. took £35,000 worth of shares in the Building Securities Co. in satisfaction of Hobbs's debt. That is the real truth. C D E

It is said that that is a transaction which is ultra vires the directors of the Lands Allotment Co. I doubt, if you look at it, as I am disposed to do, as a matter of substance, whether it is ultra vires. I have not the slightest intention of throwing any doubt whatever upon its being ultra vires if the effect of it was to invest money of the Lands Allotment Co. in the purchase of shares in the Building Securities Co. I have not the slightest doubt that then it would be ultra vires, notwithstanding the ingenious argument we have heard upon the memorandum of association of the Lands Allotment Co. But in substance I doubt whether it was not within the powers of the directors to take fully paid-up shares of any company in satisfaction of a debt which they could not get paid. At all events, I shall pass that over, and for the rest of my observations I shall assume that the learned judge in the court below was right in holding it to be an ultra vires transaction. If it was an improper transaction, all those directors who were parties to this improper investment would obviously be liable to make good these moneys. All that is conceded if the assumption is granted. Then comes the question whether they are protected by the Statute of Limitations which is applicable to trustees. The learned judge in the court below has held that they are, and I confess that it appears to me that he is obviously right in the construction which he puts upon the Trustee Act, 1888. Consider what we are asked to do here. We are asked to put ourselves in a most grotesque position. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit which comes into operation through a statute which was passed for the benefit of trustees. F G H I

I cannot be party to any decision so supremely absurd. It appears to me, I confess, when you have to apply the Trustee Act, 1888, to directors, you must bear in mind that, though directors are not trustees—if you talk of them generally, it would be a mistake to say that they are—yet they have always been considered and treated as trustees of moneys which come to their hands or are actually under their control. They have, ever since companies were invented, been held liable to make good moneys which they have misapplied upon the footing that they were trustees,

A and prior to the passing of the Trustees Act, 1888, it had always been held that directors were not entitled to the benefit of the Statute of Limitations when they had committed breaches of trust, and were, as regarded such moneys and in respect of such moneys, to be treated as trustees. When the legislature has passed an Act of Parliament protecting trustees against actions for breaches of trust—viz., the Trustee Act, 1888—how can it be with any sense said that they are not to have the benefit of that statute? I cannot go that length. I am satisfied that that statute does apply.

B Let us look at the words of s. 1 (3) of the Trustee Act, 1888 [see now Trustee Act, 1925, s. 68 (17)]. It says:

C "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds."

D Directors are express trustees of moneys of which they have control [see 6 HALSBURY'S LAWS (3rd Edn.) 299]. But if not, certainly they come within the other part of the definition of trustees "whose trust arises by construction or implication of law." It is precisely because they are one or the other that formerly they were always held liable, and were always denied the benefit of the Statute of Limitations. That being the case, I have no hesitation in saying that these directors are within the Trustee Act, 1888—always subject to some observations I must make about the alleged concealed fraud. I have no doubt the statute applies to them, and applies to all directors who have got in their hands or under their control money of a company, and who by mistake or carelessness misapply it. Of course we knew that there are words in s. 8 of the Trustee Act, 1888 [see now Limitation Act, 1939, s. 19], which render the Statute of Limitations inapplicable to the cases there mentioned, which are, substantially, cases of misappropriation of money to the use of the persons misapplying it, and also to cases of fraud.

E Although so far I have no doubt whatever that the Trustee Act, 1888, is applicable, yet a point is raised which is important. It is said that this is one of those cases of concealed fraud in which the Statute of Limitations does not come into operation—that is to say, that the cause of action did not accrue until the fraud was discovered. The misapplication in this case was not fraudulent in any sense. I am quite satisfied from the affidavits of the directors that they thought that it was a very good transaction. They made a mistake in their powers. There is no doubt at all about that, assuming, as I do now, that this was an ultra vires transaction. But the case of concealed fraud is attempted to be made out in this way. It is contended that at a meeting when this matter was referred to, the £35,000 was entered in the first balance-sheet and subsequent balance-sheets as an asset under the words which I will read. It is on the credit side: "Assets—By Building Securities Co. £35,000." That by itself, to my mind, may mean anything. It is, of course, clear that it means an asset. It may mean land owned by the Building Securities Co. It may mean that it is an investment in that company. That entry in the balance-sheet is quite consistent with either view. But we have it proved—subject to a remark which I will make presently—that on April 18, 1885, not long after this transaction had taken place, and after the balance-sheet to which I have referred had been circulated among the shareholders, Mr. Balfour [a director of the company] stated at the annual general meeting of the Lands Allotment Co. that the £35,000 was an asset representing an amount which was to be paid by the Building Securities Co. in respect of an "estate" which that company had purchased from the Lands Allotment Co.

I Whether the real word used there was "estate," as the shorthand-writer maintains, or was "asset," as is suggested, the statement by Mr. Balfour that that £35,000 was an asset representing an amount which was to be paid by the Building Securities Co. was untrue. No one could justify that in any sense. The case is

put in this way, that this untrue statement was made by Mr. Balfour at a meeting at which these directors who are now sought to be charged with this breach of trust were present, and that, unless they did not then and there get up and deny it and put it right, they are to be treated as parties to that untrue statement, and as having concealed the transaction. I think it would be pressing that contention against them a great deal too far. I can easily understand that they did not realise the effect of Mr. Balfour's statement about the money being paid at all, and the affidavits which they have filed satisfy me that they thought it was a thing not to be concealed, but a thing rather to be proud of. They thought they had done an uncommonly good thing for this company in putting £35,000 into the shares of the Building Securities Co. Why should they want to conceal it? Why Mr. Balfour should have gone out of his way to make that statement, I do not know; and, although there is some evidence, I think the evidence is far too weak to justify us in holding these other directors liable for these moneys on the ground that they were parties to a fraud in concealing what they had done. The only deduction which I can draw from the evidence is that it would not be right—I do not think that any jury would do it—to saddle these directors with a charge of fraud in respect of this transaction—either fraud or concealment, and I acquit them of it altogether. It appears to me, therefore, although if the true view is that this was an ultra vires transaction they would be liable to replace the money, they are protected by the Statute of Limitations, to which I have referred, and that the appeal against the learned judge's decision as regards this matter must be dismissed with costs as against all of them.

I now come to the second transaction. It appears that in July, 1889, a sum of £5,200 was invested in the purchase of shares of this Building Securities Co. There were 1,040 shares of £5 each which were applied for and taken. They were not paid for in cash at the time. They were paid for by three bills at various dates. At a board meeting on July 1, 1889, neither Mr. Brock nor Mr. Theobald, who are sought to be made liable for this improper investment, were present. On Oct. 9, 1889, after two of the bills which had been given had become due, and had been paid, and while the third bill was running and before it became due, the minutes of the meeting of July 1, 1889, were confirmed with others. At that confirmation meeting, on Oct. 9, 1889, Mr. Theobald and Mr. Brock were both present, and it is because Mr. Theobald was present at that meeting that it is sought to charge him with liabilities in respect of this sum. It is quite certain upon the evidence that he had nothing to do with the transaction originally. He was away on the sea. The case against him is simply that he was party to that confirmation. It is put in this way, that he thereby adopted or ratified it, and that he at all events might have taken legal proceedings, or induced the company to take legal proceedings, to set aside the transaction. I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done. I do not think it would be in accordance with the principles applicable to these cases if we were now for the first time to make a precedent of that kind. I am satisfied from Mr. Theobald's affidavit that he knew nothing at all about the matter; and that when he did come back, and found out what was done, in any business point of view it was too late. The matter was over so far as he was concerned. It appears to me, therefore, that WRIGHT, J., was quite right in exonerating Mr. Theobald from all liability in respect of that sum.

As regards Mr. Brock the case is very different. Mr. Brock, although he was absent in July, 1889, had been a director of this company for some time, and had been chairman of the directors. When he came back, which he did before Oct. 9, 1889, he took the chair at the meeting, and signed the resolutions confirming what had taken place. If the matter had stood there I should have thought that he would have been in the same position as Mr. Theobald. But the case does not stop there, for on April 17, 1890, there was a meeting at which Mr. Brock appears



A to have made a speech in which he said :

"We carefully considered the matter, and, having regard to the excellent return on our then holding and our confidence in the management of the company, we deemed it advisable that we should exercise our right of subscription, and we have since had no reason to regret the decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent."

B It is impossible, I think, after that to say that Mr. Brock knew no more about the matter than Mr. Theobald. I cannot construe that speech—even making all allowance for the use of the word "we"—as amounting to anything else than a statement by Mr. Brock that "we," including the directors and including himself, "carefully considered" this application before they made up their minds to accept that offer. He was chairman from April, and his chairmanship covered the whole period of the negotiations which led to this, and he says : "We carefully considered the matter, and we deemed it advisable that we should exercise our right of subscription." I have come to the conclusion that Mr. Brock was so mixed up in this, and took so active a part in it, from his own statement, that he is liable. I think that his view was that until the matter got into liquidation it was a judicious thing to do. He not only approved of it, but he thought it was an uncommonly good thing for the shareholders, and he claims credit to himself for his intelligence in seeing, as he thought, that it was an uncommonly good thing. I take him as doing exactly what he says he did—exercising his judgment upon it, believing it was *intra vires*, perfectly honestly, but making a mistake as to the powers of directors in investing money. As regards him, therefore, it appears to me that the appeal must succeed, and he must be held liable for this £5,200. He will be liable with the two other directors, but there is no appeal with regard to the other two.

KAY, L.J.—The transaction as to the £35,000 seems to have been of this kind. The Lands Allotment Co. had been formed, and Hobbs, the builder, became indebted to them in a sum of £35,000. Afterwards, in November, 1884, the Building Securities Co. was formed. We are told that it was formed for the purpose, among other things, of taking over the building business of Hobbs. Then the parties were in this position. The Building Securities Co. were going to buy Hobbs's business, and they would owe to Hobbs a large sum for the purchase of that business. Hobbs was indebted in £35,000 to the Lands Allotment Co., and an arrangement was made between Hobbs, the Lands Allotment Co., and the Building Securities Co., under which the Building Securities Co. were to pay Hobbs's debt upon condition that the £35,000 should be invested in shares of the Building Securities Co. It was a kind of compromise of the indebtedness of Hobbs to the Lands Allotment Co. I do not know what all the circumstances were, but it is quite possible it may have been the best way of getting Hobbs's debt paid, because it seems to me that these Building Securities Co. shares were very valuable at that time and for some while afterwards, and paid a large dividend for years after that time.

I will not pause to consider whether that was *intra vires* of the Lands Allotment Co. or *ultra vires*. But it would require a great deal of argument to convince me that the directors of a company like the Lands Allotment Co. might not make a compromise of that kind, if it was a compromise, with a person largely indebted to their company. I conceive that the directors of every company, being the managing agents of a trading concern, have considerable authority and power in dealing with outstanding debts due to the concern. It is quite possible that this may have been the very best arrangement that could have been made for compromising the large liability of Hobbs to the Lands Allotment Co. But I will assume that it was not; and will treat this, for the purpose of argument, as an investment in shares of the Building Securities Co. of £35,000, moneys which were the moneys of the Lands Allotment Co. I am very clearly of opinion that, if they did buy shares in that company, it might be an act beyond their powers. The

buying of the shares was not, be it observed, as an interim investment of moneys that they wanted at the time to invest in certain securities; but it appears they did buy the shares as shareholders out and out in this Building Securities Co. They intended to hold the shares, and they did hold them for a very long time afterwards. A

Then comes the question, what was the position of the directors who made an improper and ultra vires investment of that kind? Case after case has decided that directors of trading companies are not for all purposes trustees, or in the position of trustees or quasi-trustees, or to be treated as trustees in any sense. B But if they deal with the funds of a company, although those funds are not absolutely vested in them, but are funds which are under their control, in a manner which is beyond their powers, then, as to that dealing, they are treated as having committed a breach of trust. I do not believe that there has ever been any dissent from the language of SIR GEORGE JESSEL, M.R., in *Re Forest of Dean Coal Mining Co.* (1) (10 Ch.D. at p. 453), which I am citing from the judgment in *Re Faure Electric Accumulator Co.* (2) (40 Ch.D. at p. 151), where the position of directors of a trading company is conveniently stated. SIR GEORGE JESSEL said: C

"They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company." D

So that when directors get assets of their company under their control or into their hands, and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust.

That is not denied, but it is said that directors are not absolutely trustees; that they are quasi-trustees; and that, being in that position, they do not come within, and were designedly omitted from, the definition of "trustee" in the Trustee Act, 1888, which is now superseded by the Trustee Act, 1893. One section of the Act of 1888 applying to this case limits the liability of trustees. With deference I entirely dissent from that argument. It seems to me that the words used in the definition clause of that Act—the first section—do expressly include precisely such a case as a director dealing with moneys of the company in such a way as to make him liable as trustee. For the purposes of that Act, the expression "trustee" is to be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee. How does this obligation of a director and trustee arise if it does not arise "by construction or implication of law?" It seems to me that the words are apt to include that very case, and were intended to include a case of that kind. It is said by way of argument, "How is it, then, that the definition clause does not expressly include directors?" But it would have been quite wrong to have included directors, because directors are not always trustees. As directors they are not trustees at all. They are only trustees qua the particular property which is in their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that qua such funds they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Trustee Act, 1888. Therefore, s. 8 of that Act, which applies to all persons who come within the definition of "trustee," does operate to exonerate these directors from that misapplication of funds to which otherwise I assume they would have been liable. E F G H

Then it is urged that, if that was so, still the fact of this investment was concealed by a fraud of one of the directors in which the other directors concurred; and that this concealment by fraud prevents time from running in favour of the directors until the fact was discovered. I do not wish at all, at present, to express any decided opinion whether, if the fraudulent statement could be traced to all these directors, and they could be made responsible for it, time would or would not run until it was discovered. The ordinary application of that doctrine is in cases where you are suing people and the ground of your action is the fraud which has been committed. Undoubtedly, where the ground of your action is fraud, time I

- A** does not begin to run until the discovery of the fraud. It is not, however, quite the same thing where the ground of the action is not fraud, at all, but as here, a perfectly honest misapplication of money—a misapplication made by persons who might not unreasonably believe that they had power to do that which they were doing, and which was not, as far as any one of them was concerned, in the least degree a corrupt dealing. The investment of these moneys, however wrong it
- B** might be with regard to the powers of the company, as being beyond those powers, could in no sense be said to be a fraud on the part of the directors who made the investment. I do not wish to express any decided opinion as regards the rights of the shareholders in respect of that investment, if the fact of that investment had been fraudulently concealed from the shareholders, it might be that time would not begin to run until the discovery of the facts which gave them a right to sue.
- C** But now the question is: Is that fraud—if there was a fraud—brought home so clearly to these directors whom it is now sought to make liable so as to bring them within that doctrine, if such a doctrine exists? If we were dealing with Mr. Balfour, the case would undoubtedly be very different, because Mr. Balfour, according to the evidence before us, did make a statement at a public meeting of the shareholders which was, whichever view you take of the actual word used—whether it was
- D** “estate” or “asset”—an utterly untrue statement. If the action were against Mr. Balfour, and it was said: “Time did not begin to run in your favour until the untruth of that statement was discovered by the shareholders, because that statement put them off their guard completely, and prevented them knowing the facts which gave them a right to sue you,” I do not say that that argument might not prevail. But we have not got Mr. Balfour before us at all. The persons who are
- E** before us are persons who were present at that meeting, and it is sought to make them liable because they, being present at that meeting, must be taken to have heard Mr. Balfour’s statement, and, therefore, to have concurred in that statement and thus to have joined in misleading the shareholders. I am not prepared to say that the evidence is insufficient. All the evidence we have got is that they were
- F** at the meeting. I have no doubt that the directors at the time—all those directors, at any rate, who are now sought to be charged—believed, as they say they believed, that this was a perfectly valid and proper transaction. They had no ground whatever for concealing it. And in order to bind them by a false statement of this kind made by Mr. Balfour, speaking for myself, I should require it to be proved very clearly that they thoroughly apprehended the falseness of the statement that was made, and concurred in it for the purpose of deceiving the shareholders who were
- G** present. I do not think the evidence comes up to that. The mere fact that they were present at the meeting does not seem to me enough to enable the court to treat them as having committed a fraud for the purpose of concealing the actual facts from the shareholders in reference to this investment in the shares. Therefore I think that the learned judge in the court below was quite right in treating them as absolved from this investment by the lapse of time that has taken place.
- H** I will only say a very few words with reference to the other point, as to the liability of Brock, together with the two gentlemen who have been declared liable—namely, Barnard and Dresser—for the second investment in the shares of the Building Securities Co. That investment was not made till 1889, and therefore six years had not run when these proceedings were taken against them to make them liable. The Statute of Limitations, therefore, has nothing to do with that
- I** case, and the only question is: Who were the persons who really did concur in making that investment—a thing beyond the powers of the company? Any director who did concur in that misapplication of the funds of the company to the extent of £5,200 would be jointly and severally liable. Barnard and Dresser were the persons who were present at the meeting of July 1, 1889, when it was resolved to make this purchase of further shares in the Building Securities Co.; they have been declared liable, and I understand that there is no appeal on their part. Brock was at that time, and had been for some time previously, the chairman of the company. [His LORDSHIP reviewed the evidence]. Can anyone believe that the investment



was made without his concurrence? I have listened with interest to all the ingenious arguments of his counsel on the subject of the editorial "we" and so on. But the editorial "we" is not quite the same thing as the "we" of a director, who, being at the time the chairman of a company, is speaking of an investment, and says: "We have carefully considered the matter, and agree that an investment ought to be made." I cannot possibly allow him to escape under that extremely ingenious argument from the conclusion to which I have come by reason of this statement of his own, that he was one of the persons who, before the investment was made, concurred in the propriety of making that investment—carefully considered it and agreed that it should be done. That being so, I think it is clear that he must be made liable, together with Dresser and Barnard. As to Theobald, there is nothing to make him party to this further investment, except the fact that he was present at the meeting of Oct. 9, 1889, at which, among other things, the minutes of the meeting of July 1, 1889, were read and confirmed. I agree with LINDLEY, L.J., that there was not enough in that circumstance alone to make him liable, looking to the evidence that he himself has given. Therefore, I think that Theobald cannot be made liable as to this further investment.

**A. L. SMITH, L.J.**—My brethren who have preceded me have fully covered this case with regard to the different points which had to be adjudicated upon, and I entirely agree with them, and have nothing to add thereto. I wish, however, to say one word concerning the Trustee Act, 1888, about which so much has been properly said by counsel for the Official Receiver. As I understand the argument, it is this: "There may be an express trustee; there may be a trustee whose trust arises by implication of law; and there may be a tertium quid." The tertium quid suggested was a gentleman in a fiduciary position. I do not agree with counsel about that tertium quid. It seems to me that the tertium quid is a man who is not an express trustee, and whose trust does not arise by implication of law. If that be the true reading of this section, it is perfectly obvious—supposing these gentlemen come within what I term the tertium quid—that these gentlemen have not the Statute of Limitations to rely upon against the present claim. If, however, they are "express trustees" or "trustees whose trust arises by implication of law," then they have the Statute of Limitations to rely upon by virtue of the relief which is afforded by the Act of 1888, unless they are deprived thereof by reason of the three exceptions which are set out in s. 8 of that Act. Therefore, it seems to me, whichever way you take this case, the Statute of Limitations is available for these gentlemen.

I now come to another point, namely, the question of fraudulent concealment. That does not arise, it seems to me, under this Act of 1888 at all. It has nothing to do with it. It arises upon the fact that, although under both statutes the defendant may after six years plead the Statute of Limitations, yet, if there had been a sufficient fraudulent concealment, then he cannot set up the statutory defence which is given to him, namely, that the transaction occurred six years before the date of the writ. It seems to me, therefore, that, as regards this sum of £35,000, the directors may set up the Statute of Limitations, because they are trustees whose trust arises by implication of law. As regards Brock, I agree with what the lords justices have said. He did think he was acting in the best interests of the company, but he did that which was ultra vires—that which he cannot justify, and, therefore, he must be made liable with Barnard and Dresser.

Solicitors: *Phelps, Sidgwick & Biddle; Snow, Snow & Fox; Beaumont & Rigden; A. F. Church; E. C. Rawlings; W. D. Cunningham.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

**R. v. OXFORDSHIRE COUNTY COURT JUDGE.**  
**Ex parte ADDISON**

[QUEEN'S BENCH DIVISION (Cave and Henn Collins, JJ.), June 6, 20, 1894]

[Reported [1894] 2 Q.B. 440; 68 L.J.Q.B. 689; 70 L.T. 874;  
58 J.P. 752; 42 W.R. 603; 10 T.L.R. 547; 38 Sol. Jo. 565;  
10 R. 381]

*Solicitor—County court—Right of audience—Admitted managing clerk.*

By s. 72 of the County Courts Act, 1888 [replaced in almost identical terms by s. 89 of the County Courts Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 168)] a solicitor who is "acting generally in the action or matter" for a party thereto is given a right of audience in a county court and that right "shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor."

When a firm of solicitors is retained by a party to proceedings in the county court each member may be properly described as "acting generally in the action" for the party retaining the firm, but an admitted managing clerk employed by the firm, who is not himself retained, is not in that position, and, therefore, he has no right of audience in the court. Whether or not an admitted managing clerk has a right of audience depends on whether he is found as a fact to have been retained by the party to the action or matter and acting generally for him therein. For a solicitor to be said to be acting generally for a party the relation of solicitor and client must exist between him and that party.

**Notes.** As to a solicitor's right of audience, see 36 HALSBURY'S LAWS (3rd Edn.) 45-49; and for cases see 13 DIGEST (Repl.) 379.

Cases referred to:

- (1) *R. v. Spooner, Shreeve v. Charlesworth* (1868), 18 L.T. 325; 13 Digest (Repl.) 379, 80.
- (2) *Bookham v. Potter, Ex parte Rogers* (1868), L.R. 3 C.P. 490; 37 L.J.C.P. 276; 18 L.T. 479; 16 W.R. 806; 13 Digest (Repl.) 379, 81.
- (3) *Re Broadhouse, Ex parte Broadhouse* (1867), 2 Ch. App. 655; 36 L.J.Bey. 29; 17 L.T. 126; 15 W.R. 1154, L.J.J.; 42 Digest 43, 331.

**Order Nisi** calling upon His Honour JUDGE SNAGGE, the judge of the county court of Oxfordshire holden at Oxford, and Samuel Simmonds, to show cause why the said judge should not hear one Arthur Addison, a solicitor of the Supreme Court claiming to appear and address the court on an application for a new trial on behalf of one Silas Turner, the defendant in an action between the said Simmonds, plaintiff, and the said Turner, defendant, pending in the said county court.

In the action of *Simmonds v. Turner* the plaintiff claimed a quarter's rent of certain premises and a sum in respect of the repairs to the premises. The action was tried before the county court judge, who nonsuited the plaintiff. An application was made on behalf of the plaintiff for a new trial. The solicitors acting on behalf of the defendant were Thomas Mallam & Co., and the present applicant Arthur Addison, himself a solicitor of the Supreme Court, was in their permanent and exclusive employment. The applicant Addison appeared on behalf of the defendant to oppose the application for a new trial, and claimed the right to be heard on behalf of the defendant. The county court judge declined to allow the applicant to address the court as of right, but offered to grant him leave to do so. The applicant refused to apply for leave to address the court, and the application for a new trial was adjourned until the opinion of the Divisional Court had been obtained upon the question whether the applicant had a right to appear and address the county court.

*H. Sutton*, for the county court judge, showed cause.

*Sir Richard Webster, Q.C.*, and *Hollams* in support of the order.

June 20, 1894. The following judgments were read.

*Cur. adv. vult.*

**HENN COLLINS, J.**—This is an order calling upon the judge of the county court of Oxfordshire to show cause why he should not hear one Arthur Addison, a solicitor of the Supreme Court, claiming to appear and address the court on behalf of one Silas Turner, the defendant in an action in the said county court. Mr. Addison is a fully-qualified solicitor, and is the managing clerk to Messrs. Mallam & Co., who were the solicitors retained by the defendant in the action. At the hearing on Jan. 25, he, as he states in the affidavit on which the order was obtained, "on the instructions of his principals, Messrs. Mallam & Co., appeared for the defendant," in whose favour the action was decided, and on Feb. 22 he appeared to oppose a motion for a new trial "by the direction of his employers, the said Messrs. Mallam & Co., and with the assent of the said defendant." He further avers that he has had the entire management on behalf of the defendant of the proceedings in the action from the commencement. It was on this last occasion—viz., Feb. 22, on the motion for the new trial—that the question for our decision arose. Mr. Addison then claimed to be heard as of right to show cause on behalf of the defendant, and the learned county court judge, while offering to hear him by leave, declined to admit his claim to be heard as of right. The learned county court judge finds as a fact—and this was a matter of fact for his decision—that Mr. Addison was not the solicitor acting generally in the action for the defendant, and that the firm of Mallam & Co. were the solicitors so acting.

The question turns upon s. 72 of the County Courts Act, 1888, which runs as follows :

"It shall be lawful for any party to an action or matter or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained by or on behalf of any party on either side, but without any right of exclusive audience, or, by leave of the judge, for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor."

The question is whether, under the provision of the above section and on the facts as found by the learned judge, Mr. Addison was entitled as of right to be heard. The learned judge has held that he was not. With the exception of the concluding words, the section is identical with that of the earlier County Courts Act, 1852, s. 10. Counsel for Mr. Addison did not indeed admit that under the former Act his client would have no right of audience, but his main contention was that the new words, at all events, made it clear that the right now existed. It is to be observed that the new words do not in terms confer any right on any person not theretofore entitled. They merely provide for the removal of a possible bar to a right otherwise complete. This throws us back on the first part of the section to see whether it conferred a *prima facie* right on Mr. Addison to address the court. If so, he was not disabled from exercising such right by the fact that he was in the permanent and exclusive employment of Messrs. Mallam & Co.

What, then, is the standard laid down by the section by which to determine whether a solicitor is entitled to address the court? It is that he must be

"a solicitor acting generally in the action or matter for a party in the action or matter."



A Does this embrace a solicitor who is not retained by the party, but who appears only as the servant or agent of the solicitor or firm so retained under orders received from him or them? There is weighty authority under the former statute that it did not. BLACKBURN, J., dealing with the same words in *R. v. Spooner* (1) (18 L.T. at p. 326), L.T.Rep.N.S. 325, said:

B "There can only be one attorney for a party at a time";

and in *Bookham v. Potter, Ex parte Rogers* (2) MONTAGUE SMITH, J., says (L.R. 3 C.P. at p. 494):

C "Under s. 10 of 15 & 16 Vict., c. 54 [County Courts Act, 1852] the only attorney who is entitled to be heard in the county court is the attorney acting generally in the action for the party. . . . If he was acting as attorney generally in the action the fact of his being clerk to another attorney would not preclude his right to be heard. But the matter of fact was for the consideration and determination of the judge. If he found that he was not acting as the attorney generally in the action, his refusal to hear him was quite right."

D BOVILL, C.J., with whom WILLIS, J., concurred, clearly explains the circumstances which would under that statute have entitled a managing clerk to audience. He says (*ibid.*, at pp. 493, 494):

E "Although it turns out that that point is not raised by the affidavit upon which the rule is founded, I think it right to say that, in my opinion, there is nothing in the fact of a gentleman being a clerk to another to prevent his being heard as the attorney in the cause. He must, however, satisfy the requirement of the statute 15 & 16 Vict., c. 54, s. 10, by showing that he is the attorney acting generally in the cause. . . . Who is to determine whether or not the attorney is acting generally in the action? The judge before whom the party appears has the best means of determining that question. . . . he seems to have held that Mr. Rogers was acting merely as clerk to Mr. Stenning, and was not engaged generally as attorney in the cause."

F It is obvious, therefore, that the judges in that case thought that, though a managing clerk might be retained by and act for the party generally in the action, it would be a question of fact whether he was acting as such or merely as clerk for somebody else, and that both the principal and the clerk could not at the same time be the attorney acting generally in the action. But it is suggested that all these learned judges did not realise or remember that the words of the statute are "an attorney" and not "the attorney" acting generally in the action. G BOVILL, C.J., however, begins by quoting the exact words of the statute, and it seems clear to me that they must have been present to the minds of all the judges. I think the indefinite article is used in the statute because it is dealing with any action and any party to an action and with any one of certain classes—viz., solicitors and barristers—and the indefinite article is, therefore, more appropriate; H but when in a given case a solicitor or firm of solicitors is retained, he or it becomes the solicitor or firm of solicitors acting generally in the action or matter.

I I think a solicitor cannot be said to be a solicitor acting generally in the action or matter for a party unless the relation of solicitor and client exist between him and such party. It may well be that when a firm is retained each member of the firm may be described as a solicitor acting generally in the action for the party who retains him, but I think the same could not be said of a managing clerk who was not retained. The position of managing clerk, when held by a solicitor, though it does not exclude him, does not qualify him to claim audience. That must depend, I think, on whether he is found as a fact to be a solicitor retained by a party and acting generally for him in the action or matter. I think that the observations of LORD CAIRNS, L.J., in *Re Broadhouse, Ex parte Broadhouse* (3) are applicable to this case. In speaking of s. 212 of the Bankruptcy Act, 1861, which authorised solicitors to appear and plead without employing counsel, he says (2 Ch. App. at pp. 658, 659):

"That section . . . did not, in any way, alter the ordinary character in which alone a solicitor is entitled to appear in any court, viz., as the solicitor of a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is, that the court should have before it a person who on the one hand is under an obligation to the court because he is one of its officers, and on the other hand is under an obligation to the suitor because he is in privity with him, and is the actual person who represents him. Unless that chain of connection is maintained and kept complete, the object of allowing solicitors to appear on behalf of other parties is entirely defeated."

Acting upon this view, the court (LORD CAIRNS and ROLT, L.JJ.) upheld the refusal of the commissioners [in bankruptcy] to hear a gentleman whose position was very similar to that of Mr. Addison in this case, viz., a qualified solicitor acting as managing clerk for the firm actually retained. I think the standard by which the court try the right of audience in that case is virtually the same as that laid down by the statute in the case before us. The test put by LORD CAIRNS was: "Is the person who claims audience the solicitor of a particular client?" The condition required by the statute is that he shall be "a solicitor acting generally for a party in the action or matter," and it seems to me that the same reasons which prevented him having audience in that case as solicitor for the bankrupt would prevent him from having audience in this case as a solicitor acting generally for the defendant in the action. In both cases the objection of want of privity between him and the client equally applies. The only difference between the two cases lies in the use of the indefinite article in the statute which I have already considered. I think the legislature cannot have intended, merely by using the indefinite instead of the definite article, to create a class of advocates open to the objections pointed out by LORD CAIRNS.

If this is the proper view of the words—"a solicitor acting generally in the action or matter for such party," have the added words of the new section altered the law? I think not. I think they only remove a possible doubt, and expressly enact the proposition covered by the simile in *Bookham v. Potter, Ex parte Rogers* (2) viz., that the fact that a qualified solicitor is managing clerk to someone else shall not of itself debar him from having audience as solicitor for a party, provided he can show that he is such solicitor, which in this case he cannot. This is the view taken by JUDGE HEYWOOD in his able work *ANNUAL COUNTY COURT PRACTICE*, 1894 Edn., at p. 236, and by the learned judge in the present case, with the conclusion and reasoning of whose judgment I agree. I am, therefore, of opinion that this order must be discharged.

**CAYE, J.**—If this had been *res nova*, I should have found great difficulty in coming to the conclusion that the words in the County Court Act, 1852, s. 10:

"It shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record, being an attorney acting generally in the action for such party"

mean: "It shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record, being the attorney acting generally in the action;" and I should have been at a loss to suggest any reason why the Act should use this roundabout expression instead of saying simply, "It shall be lawful for the party to the suit or other proceeding, or for his attorney, being an attorney of one of Her Majesty's Superior Courts of Record." But, upon consideration of the language used by the judges in *Bookham v. Potter, Ex parte Rogers* (2), and in the face of the opinion of my brother HENN COLLINS, I feel that it is not open to me to consider that question, and that I must deal with the construction of that section as if the words used had been, "An attorney, etc.,

**A** being the attorney acting generally in the action." When I come to interpret those words I respectfully concur in the opinion of LORD BLACKBURN that there can only be one attorney for a party at a time, and that the words "the attorney for the party" do not include the managing clerk of the attorney in whose name the proceedings in the action are conducted. If, as under these circumstances I am bound to hold, that is the true construction of the County Courts Act, 1852, s. 10,

**B** I do not see how I can put a different construction on what are practically, if not identically, the same words in the statute of 1888.

It has been contended, however, that the words of the statute of 1888—

"The right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor"

**C** enable us to decide this case in favour of the applicant. If I could read the words as they stand: "A solicitor being a solicitor acting generally in the action or matter for such party"—I should think that there was great force in this contention. The words naturally apply to a managing clerk for a solicitor who is himself a solicitor, and who, as managing clerk, has had the management and control of the action, and I do not understand what the expression "exclusive employment" means, unless it means that he is excluded from carrying on business on his own account. As I have said, I think I am precluded from reading the words as they stand. The clause says that

**D**

"the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor."

**E**

But the right of a solicitor who is a managing clerk of the solicitor in the action, and who has had the management and control of the proceedings in the action, is not excluded on the ground specified in the clause, but on the ground that he is not the solicitor acting generally in the action. I am, therefore, compelled to come to the somewhat absurd conclusion that this clause has no meaning at all, and does not in any way affect the construction of the Act. It is said that it refers to a managing clerk to a solicitor who is allowed to carry on business in the county court without limit in his own name and for his own benefit. But I confess I do not see how such a man can be said to be in the exclusive employment of the solicitor whose managing clerk he is, and I very much doubt whether such arrangements exist to any considerable extent in the profession. I have a strong suspicion that the clause in question was intended to put an end, in favour of managing clerks who are also solicitors, to the question whether they could address the court in matters in which they had been acting generally for the party. If this is so, I am afraid the words used are not sufficient, so long as I am obliged to construe the words "being a solicitor acting generally in the action" as meaning the same thing as the words "being the solicitor acting generally in the action."

**F**

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**H** I agree, therefore, that this order must be discharged.

*Order discharged.*

Solicitors : *E. Williamson*; Solicitor to the Treasury.

[*Reported by W. H. HORSFALL, Esq., Barrister-at-Law.*]



# Re SMITH. HANDS v. ANDREWS AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Lindley and Lopes, L.JJ.), January 18, February 3, 1893]

[Reported [1893] 2 Ch. 1; 62 L.J.Ch. 336; 68 L.T. 337; 57 J.P. 516; 41 W.R. 289; 9 T.L.R. 238; 37 Sol. Jo. 247; 2 R. 360]

*Attachment—Debt—Trustee—Discretion of court—Exercise—Appeal—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 4 (3)—Debtors Act, 1878 (41 & 42 Vict., c. 54), s. 1.*

Where an order for an attachment is made against a debtor under s. 4 of the Debtors Act, 1869, the Court of Appeal will not interfere with the exercise of the discretion of the judge making the order unless it can be shown that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground.

One of two trustees under a will so trusted his co-trustee that he handed over to him trust money which the co-trustee misapplied. A judge ordered an attachment to issue against the first trustee on the ground that a trustee who trusted his co-trustee and remitted trust money to him without satisfying himself that it was being properly dealt with was dishonest and fraudulent.

**Held:** the judge had wrongly exercised his discretion under the Act of 1874, and the order would be discharged.

**Notes.** Followed: *Re Berwick, Berwick v. Lane* (1899), 81 L.T. 722. Applied: *Re Edgcome, Ex parte Edgcome*, [1900-3] All E.R.Rep. 862. Considered: *Church's Trustee v. Hibbard*, [1902] 2 Ch. 784; *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697.

As to attachment against a defaulting trustee, see 8 HALSBURY'S LAWS (3rd Edn.) 23, 24, and cases there cited. For the Debtors Acts, 1869 and 1878, see 2 HALSBURY'S STATUTES (2nd Edn.) 292, 302.

Cases referred to:

- (1) *Middleton v. Chichester* (1871), 6 Ch. App. 152; 40 L.J.Ch. 237; 24 L.T. 173; 19 W.R. 369, L.C. & L.JJ.; 5 Digest (Repl.) 1094, 8817.
- (2) *Crowther v. Elgood* (1887), 34 Ch.D. 691; 56 L.J.Ch. 416; 56 L.T. 415; 35 W.R. 369; 3 T.L.R. 355, C.A.; 5 Digest (Repl.) 1098, 8863.
- (3) *Preston v. Etherington, Etherington v. Preston* (1887), 37 Ch.D. 104; 57 L.J.Ch. 176; 58 L.T. 318; 36 W.R. 49; 4 T.L.R. 47, C.A.; 5 Digest (Repl.) 1098, 8862.
- (4) *Cobham v. Dalton* (1875), 10 Ch. App. 655; 44 L.J.Ch. 702; 23 W.R. 865, L.JJ.; 4 Digest (Repl.) 197, 1777.
- (5) *Re M<sup>c</sup>Williams* (1803), 1 Sch. & Lef. 169, 175; 4 Digest (Repl.) 188, \*628.
- (6) *Lees v. Newton* (1866), L.R. 1 C.P. 658; 1 Har. & Ruth. 734; 35 L.J.C.P. 285; 14 W.R. 938.
- (7) *Marris v. Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1094, 8818.
- (8) *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch.D. 190; 58 L.J.Ch. 162; 60 L.T. 355; 37 W.R. 151; 5 T.L.R. 89; 5 Digest (Repl.) 1096, 8839.
- (9) *Earl of Aylesford v. Earl Poulett*, [1892] 2 Ch. 60; 61 L.J.Ch. 406; 66 L.T. 484; 40 W.R. 424; 8 T.L.R. 446; 36 Sol. Jo. 363; 5 Digest (Repl.) 1096, 8838.
- (10) *Re Ryley, Ex parte Official Receiver* (1885), 15 Q.B.D. 329; 54 L.J.Q.B. 420; 33 W.R. 656; 1 T.L.R. 468; 2 Morr. 171; 4 Digest (Repl.) 186, 1693.
- (11) *Re Manning* (1885), 30 Ch.D. 480; 55 L.J.Ch. 613; 54 L.T. 33; 34 W.R. 111, C.A.; 4 Digest (Repl.) 186, 1694.
- (12) *Mitchell v. Simpson* (1890), 25 Q.B.D. 183; 59 L.J.Q.B. 355; 63 L.T. 405; 55 J.P. 36; 38 W.R. 565; 6 T.L.R. 341, C.A.; 5 Digest (Repl.) 1116, 9012.

- ▲ (13) *Re Deere* (1875), 10 Ch. App. 658; 44 L.J.Bey. 120; 33 L.T. 115; 23 W.R. 866, L.J.J.; 5 Digest (Repl.) 1104, 8917.

Also referred to in argument:

*Nowell v. Nowell*, [1876] W.N. 248.

*Re Simes, Simes v. Newbery* (1890), 62 L.T. 721; 38 W.R. 570; 5 Digest (Repl.) 1097, 8849.

B

*Re Knowles, Doodson v. Turner* (1883), 52 L.J.Ch. 685; 48 L.T. 760; 5 Digest (Repl.) 1096, 8836.

*Re Wray* (1887), 36 Ch.D. 138; 56 L.J.Ch. 1106; 57 L.T. 605; 36 W.R. 67; 3 T.L.R. 708, C.A.; 5 Digest (Repl.) 1103, 8901.

*Re Edye* (1891), 63 L.T. 762; 39 W.R. 198; sub nom. *Re A Solicitor*, 7 T.L.R. 183; 5 Digest (Repl.) 1103, 8902.

C

*Re Mackintosh, Ex parte Mackintosh*, (1884), 13 Q.B.D. 235; 51 L.T. 208; 33 W.R. 140; 5 Digest (Repl.) 1084, 8734.

*Davis v. Galmoye* (1889), 40 Ch.D. 355; sub nom. *Re Davis, Davis v. Galmoye*, 58 L.J.Ch. 338; 37 W.R. 399; 16 Digest (Repl.) 74, 753.

*Evans v. Bear* (1874), 10 Ch. App. 76; 31 L.T. 625; 23 W.R. 67, L.J.J.; 5 Digest (Repl.) 1097, 8848.

D

*Re Grey*, [1892] 2 Q.B. 440; 61 L.J.Q.B. 795; 57 J.P. 246; 41 W.R. 3; 8 T.L.R. 694, C.A.; 42 Digest 359, 4097.

**Appeal** against a decision of KEKEWICH, J., ordering writs of attachment to issue against the two defendants, Andrews and Hooton, trustees and executors under the will of Albert Smith, deceased, who died in September, 1891.

E

On Feb. 11, 1892, an action for the administration of the estate of the deceased was commenced by one of his creditors, and judgment was given in the usual form. On taking the accounts under the judgment the registrar found that a sum of £426 was due to the estate from the defendants jointly, and this sum they were ordered by KEKEWICH, J., on further consideration, by an order dated Aug. 6, 1892, to pay into court within seven days after service of the order. The order was served on Andrews on Oct. 10, and on Hooton on Oct. 11, and was disobeyed by both defendants. On Sept. 8 a receiving order in bankruptcy had in the meantime been made against Andrews. On Oct. 19 notice of motion for an attachment against both the defendants was served on them by the creditor, to whom the conduct of the proceedings had been committed by order of the court. On Nov. 1 Andrews was adjudicated bankrupt.

F

G

On Nov. 19 KEKEWICH, J., ordered writs of attachment to issue against both the defendants, and from this order they appealed. The learned judge made this order on the ground that Andrews, having accepted the office of trustee, and having simply neglected it, had acted dishonestly, and made himself a fraudulent trustee, and punishable as such. He also found that Hooton's evidence was unsatisfactory, and that his position was worse than that of Andrews.

H

By s. 4 (3) of the Debtors Act, 1869:

"... no persons shall . . . be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment . . . 3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control."

I

By the Debtors Act, 1878:

"In any case coming within s. 4 (3) of the Debtors Act, 1869 . . . any court or judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, 'may inquire into the case, and (subject to the provisos contained in the said section) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment . . .'"

*Renshaw, Q.C., and Durandu for the defendants.*

*S. Hall, Q.C., and Rowden for the applicant creditor.*

*Cur. adv. vult.*

Feb. 13, 1894. **LINDLEY, L.J.**, read the following judgment of the court.—This is an appeal by two executors and trustees against an order directing a writ of attachment to issue against them under the authority conferred by the Debtors Act, 1869, s. 4 (3), as amended by the Debtors Act, 1878.

On Aug. 6, 1892, an order was made in an action for the administration of their testator's estate on both the appellants to pay into court £426 found due from them jointly; and an order was also made on the appellant Hooton to pay into court £90 found due from him separately. There was no summons to vary the chief clerk's certificate, and the liability of the defendants to pay these sums into court as ordered must be treated as indisputable. On Sept. 8 a receiving order in bankruptcy was made against Andrews. The moneys not being paid, notice of motion for an attachment against both appellants was served on Oct. 19, 1892. Before this motion came on to be heard, viz., on Nov. 1, 1892, Andrews was adjudicated bankrupt. On Nov. 19 the order appealed from for the issue of an attachment against both defendants was made. No proceedings in bankruptcy have been taken against Hooton. It becomes necessary, therefore, to consider their cases separately.

It will be convenient to take Hooton's case first, as it is the simpler of the two. He was an executor and trustee; he was ordered to pay money by a judge of the High Court exercising the jurisdiction formerly exercised by courts of equity. The money which he was ordered to pay was the balance of moneys come into his hands, and not accounted for by him. He had not got the money in his possession, nor under his control when the order for the payment of it into court was made, for he had misapplied the money which had come into his hands. But this circumstance did not excuse him from his liability to pay, nor prevent an order for attachment from being made under the Debtors Act, 1869. Courts of equity refuse to allow a man to derive any benefit from his own wrongful conduct, and treat a trustee as still having that which he once had and ought still to have, although he may in fact have wrongfully parted with it.

Acting on this principle, it was decided by the Court of Appeal in Chancery, as early as 1871, that an attachment might issue under s. 4 (3) of the Debtors Act, 1869, against a trustee who made default in obeying an order to pay into court money which he had received as trustee, but had misapplied before the order for payment was made: *Middleton v. Chichester* (1); and the construction then put upon the Act has been followed ever since: see *Crowther v. Elgood* (2); *Preston v. Etherington* (3). It was pointed out in *Middleton v. Chichester* (1) by LORD HATHERLEY that all the debts specified in s. 4 of the Debtors Act, 1869, in respect of which imprisonment was not abolished, were different from ordinary debts, and were "debts the incurring of which were in some degree worthy of being visited with punishment," and he said: "In every case there is something in the character of delinquency pointed out." In 1869, if an order for payment was made under s. 4 and was disobeyed, an attachment was issued as a matter of course. But this was altered by the Debtors Act, 1878, under which a judge applied to for an order for an attachment is entrusted with a discretion to grant or refuse the order. If, therefore, an order for attachment is made in a case falling within s. 4 of the Debtors Act, 1869, this court will not interfere with the exercise of the discretion of the judge making the order, unless it can be shown that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground: see *Crowther v. Elgood* (2). Nothing of the kind is shown in Hooton's case, and his appeal, therefore, ought to be dismissed.

The same principles are applicable to Andrews' case, save so far as they are affected by his bankruptcy. The Bankruptcy Act, 1883, contains a section, viz.,



**A** s. 9 (1) [see now Bankruptcy Act, 1914, s. 7], which is as follows :

“On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court, and on such terms as the court may impose.”

**B**

This section is in substance the same as the corresponding section in the earlier Bankruptcy Act, 1869 (s. 12). This last section was held by the Court of Appeal, in *Cobham v. Dalton* (4), to prevent an arrest without the leave of the Court of Bankruptcy, even in cases falling within s. 4 (3) of the Debtors Act, 1869.

**C**

It becomes necessary, therefore, to examine this case, and to determine whether it can be regarded as an authority which ought still to be followed, regard being had to subsequent legislation and to more recent decisions. The subsequent legislation which is important consists, first, of the Debtors Act, 1878, which has been already noticed; and, secondly, of the Bankruptcy Act, 1883, which has

**D**

replaced the Bankruptcy Act, 1869. The operative words in s. 9 (1) of the Bankruptcy Act, 1883, are the same as those in s. 12 of the previous Act of 1869; and, although the two sections are not exactly the same, there is no difference between them material for the present purpose. Under both Acts, money due from a trustee in respect of a breach of trust, whether fraudulent or not, is a debt provable against his estate in the event of his bankruptcy.

**E**

But there is a very remarkable difference between the two Acts as regards the effect of an order of discharge; for while under s. 49 of the Bankruptcy Act, 1869, an order of discharge does not release a bankrupt from any breach of trust, under s. 30 of the Bankruptcy Act, 1883 [see now Bankruptcy Act, 1914, s. 26], an order of discharge does release a bankrupt from all breaches of trust except fraudulent breaches of trust to which he was a party.

**F**

In *Cobham v. Dalton* (4), a defaulting trustee had been ordered to pay money into court; and, on the same day that the order was made, he was adjudicated bankrupt. An order for his attachment was afterwards made ex parte, and he was arrested. He then applied in Chancery to be discharged. His application was refused. He appealed, and his appeal was allowed. The Court of Appeal treated s. 12 of the Bankruptcy Act, 1869, as applicable to the case, and treated the money ordered to be paid into court as a provable debt, although it was not a debt due to the person who obtained the order to pay and the order for the attachment. The court further held that, the debt being a provable debt, the bankrupt was protected until discharged from arrest in respect of it; but that, as the Act then in force did not discharge him from the debt, he could be attached for it after his discharge.

**G**

If the principle of this case is to be applied to the present case, it will follow that Andrews ought not to be arrested pending his bankruptcy, nor after his discharge, unless his liability to pay the £426 arose from some fraudulent breach of trust to which he was a party, which is not the case. Although *Cobham v. Dalton* (4) was decided in 1875, and *Middleton v. Chichester* (1) was decided in 1871, and the lords justices who decided *Cobham v. Dalton* (4) were members of the court which decided *Middleton v. Chichester* (1), the view there taken and expressed with reference to the punitive character of s. 4 of the Debtors Act, 1869, seems to have been overlooked by them. JAMES, L.J., does not allude to it. MELLISH, L.J., said (10 Ch. App. at p. 657):

**I**

“Now, arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged.”

This observation was true of ordinary debts (*Re M'Williams* (5); *Lees v. Newton* (6)); but not of obligations to pay under orders made under s. 4 (3) of the Debtors Act, 1869.

The punitive character of s. 4 of the Debtors Act, 1869, which was pointed out in *Middleton v. Chichester* (1), has been since so often recognised that it cannot now be questioned: see *Marris v. Ingram* (7); *Re Gent, Gent-Davis v. Harris* (8); although the court has, under the Act of 1878, a discretion to grant or refuse an attachment in cases falling within it, and in one of the latest cases, viz., *Earl of Aylesford v. Earl Poulett* (9), an attachment against a defaulting trustee was refused. *Re Ryley, Ex parte Official Receiver* (10), *Re Manning* (11), *Preston v. Etherington* (3), and *Mitchell v. Simpson* (12), were referred to in the course of the argument; but they are not decisions upon the effect of s. 9 of the Bankruptcy Act, 1883, upon commitments under s. 4 of the Debtors Act, 1869. In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised.

Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply MELLISH, L.J.'s observation in *Cobham v. Dalton* (4), above quoted, to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4 (3). KEKEWICH, J., therefore, had, in our opinion, jurisdiction under the Debtors Act, 1869, to order an attachment against Andrews, notwithstanding his bankruptcy. But in this case the learned judge exercised the discretion reposed in him by the Debtors Act, 1878, upon a ground which, in our opinion, was erroneous. Andrews trusted his co-trustee Hooton, and handed money to him, and this money was misapplied. Andrews is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust. KEKEWICH, J., ordered an attachment to issue against him on the broad ground that every trustee who trusts his co-trustee and remits trust money to him, and does not look sharply after him, is dishonest and fraudulent. We cannot agree in this view, and, consistently with the principles upon which this court acts in reviewing discretionary orders, we have come to the conclusion that Andrews' appeal ought to be allowed.

In doing so, we are not acting contrary to *Re Deere* (13). In that case, a solicitor who had become bankrupt was attached by a baron of the Court of Exchequer, under s. 4 of the Debtors Act, 1869, and he applied to the Court of Bankruptcy to release him, but the court refused. The Court of Bankruptcy had, under the Bankruptcy Act, 1869, which was then in force, a discretion in the matter; but it declined to interfere, and MELLISH, L.J., said (10 Ch. App. at p. 660):

"I think it is not right that this court should decide the question whether the attachment was issued for punishment, or merely to enforce compliance with the order for payment of money. That question ought to be decided by the court which made the order."

This decision and passage is not in point in the present case, for by "this court" was meant, in *Re Deere* (13), the Court of Appeal sitting in bankruptcy. That court was not entertaining, and had no jurisdiction to entertain, an appeal from the order for arrest. The present appeal is an appeal from the order for the attachment, and we have to re-hear that order, and *Re Deere* (13), therefore, is not really in point.

The result, therefore, of the appeal is that it succeeds in Andrews' case, but not in Hooton's. The order appealed from must, therefore, be discharged so far as it affects Andrews, but this is not a case for giving him any costs. As regards Hooton, the order will stand; but nothing will be gained by making him pay the costs of the appeal, nor has he materially put his opponents to expense by joining Andrews in his appeal.

*Order varied.*

Solicitors: Wynne, Holme & Wynne for W. F. Gorst, Liverpool; H. Stanley Smith for Nicholson & Pemberton, Liverpool.

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

A

## MONSON v. MADAME TUSSAUD, LTD. AND ANOTHER

[COURT OF APPEAL (Lord Halsbury, Lopes and Davey, L.JJ.), January 23, 24, 29, 1894]

B

[Reported [1894] 1 Q.B. 671; 63 L.J.Q.B. 454; 70 L.T. 335; 58 J.P. 524; 10 T.L.R. 227; 9 R. 177]

*Libel—Injunction—Interlocutory injunction—Grant only when clear that matter complained of libellous.*

C

To justify the court in granting an interim injunction in a libel action it must come to a decision on the question of libel or no libel before the jury have decided whether it was a libel or not. Therefore, the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.

*Libel—Wax model of plaintiff.*

D

Libels are generally in writing or printing, but this is not necessary. The defamatory matter may be conveyed in some other permanent form. A statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel. In the present case a wax model **held** to be capable of being libellous.

E

**Notes.** Considered: *Yousouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581. Referred to: *Trollope v. London Building Trades Federation* (1895), 72 L.T. 342; *Newton v. Amalgamated Musicians' Union* (1896), 12 T.L.R. 623; *Oppenheim v. Mackenzie* (1898), 42 Sol. Jo. 748; *Ellis v. National Union of Conservative and Constitutional Associations, Middleton and Southall* (1900), 44 Sol. Jo. 750; *Corelli v. Wall* (1906), 22 T.L.R. 532.

F

As to what is defamatory and as to injunctions to restrain publication of libels, see 24 HALSBURY'S LAWS (3rd Edn.) 19–29, 122–124; and for cases see 32 DIGEST 10, 11, 180 et seq.

Cases referred to:

G

- (1) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- (2) *Leyman v. Latimer* (1877), 3 Ex.D. 15; 46 L.J.Exch. 765; 37 L.T. 360; on appeal (1878), 3 Ex.D. 352; 47 L.J.Q.B. 470; 37 L.T. 819; 26 W.R. 305; 14 Cox, C.C. 51, C.A.; 32 Digest 51, 634.
- (3) *Bonnard v. Perryman*, ante p. 965; [1891] 2 Ch. 269; 60 L.J.Ch. 617; 65 L.T. 506; 39 W.R. 435; 7 T.L.R. 453, C.A.; 32 Digest 180, 2220.
- (4) *Hermann Logg v. Bean* (1884), 26 Ch.D. 306; 53 L.J.Ch. 1128; 51 L.T. 442; 32 W.R. 994; sub nom. *Hermann Logg v. Bean*, 48 J.P. 708, C.A.; 32 Digest 181, 2228.
- (5) *Parmiter v. Coupland* (1840), 6 M. & W. 105; 9 L.J.Ex. 202; 4 Jur. 701; 151 E.R. 340; 32 Digest 73, 1019.
- (6) *Saxby v. Easterbrook and Hannaford* (1878), 3 C.P.D. 339; 27 W.R. 188; 32 Digest 181, 2225.
- (7) *William Coulson & Sons v. James Coulson & Co.* (1887), 3 T.L.R. 846, C.A.; 32 Digest 181, 2232.
- (8) *Liverpool Household Stores Association v. Smith* (1887), 37 Ch. D. 170; 57 L.J.Ch. 85; 58 L.T. 204; 36 W.R. 485; 4 T.L.R. 93, C.A.; 32 Digest 183, 2254.
- (9) *Collard v. Marshall*, [1892] 1 Ch. 571; 61 L.J.Ch. 268; 66 L.T. 248; 40 W.R. 473; 8 T.L.R. 265; 32 Digest 181, 2223.

I

Also referred to in argument:

*MacDougall v. Knight* (1886), 17 Q.B.D. 636; 55 L.J.Q.B. 464; 55 L.T. 274; 51 J.P. 38; 2 T.L.R. 797; on appeal (1889), 14 App. Cas. 194; 58 L.J.Q.B.



537; 60 L.T. 762; 53 J.P. 691; 38 W.R. 44; 5 T.L.R. 390, H.L.; 32 Digest 138, 1698.

*Stevens v. Sampson* (1879), 5 Ex.D. 53; 49 L.J.Q.B. 120; 41 L.T. 782; 44 J.P. 217; 28 W.R. 87, C.A.; 3 Digest 155, 1874.

*Thomas v. Williams* (1880), 14 Ch.D. 864; 49 L.J.Ch. 605; 43 L.T. 91; 28 W.R. 983; 32 Digest 210, 2611.

*Salomons v. Knight*, [1891] 2 Ch. 294; 60 L.J.Ch. 743; 64 L.T. 589; 39 W.R. 506, C.A.; 32 Digest 180, 2218.

*Lee v. Gibbings* (1892), 67 L.T. 263; 8 T.L.R. 773; 36 Sol. Jo. 713; 32 Digest 23, 136.

*Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch.D. 501; 51 L.J.Ch. 874; 46 L.T. 746; 30 W.R. 583, C.A.; 32 Digest 182, 2242.

**Appeal** by the defendants from a decision of a Divisional Court (MATHEW, J., and HENN COLLINS, J.) granting, in an action for libel, an interlocutory injunction to restrain the defendants, their agents or servants, from publishing, exhibiting, or causing to be exhibited, the portrait model of the plaintiff, or from advertising, announcing, and placarding the same, in any way to the injury of the plaintiff, pending the trial of an action.

The plaintiff, Alfred John Monson, was tried at Edinburgh in December, 1893, for the murder of Lieutenant Hambrough, at Ardlamont House, Argyllshire. The trial resulted in a verdict of not proven, and the case came to be known as the "Ardlamont Mystery." In January, 1894, the defendants, Madame Tussaud, Ltd., waxwork exhibitors in London, and Louis Tussaud, who had a similar, but smaller, exhibition in Birmingham, placed in their exhibition a portrait model in wax of Monson. Both exhibitions contained a room called the Chamber of Horrors, reserved exclusively for portraits and relics of notorious criminals. In neither case was the plaintiff's figure placed in that chamber. In the case of Madame Tussaud, Ltd., it was placed in a room above and communicating with the Chamber of Horrors by a flight of stairs, and approached through a turnstile, at which an extra payment was made, where there was a notice, "To the Chamber of Horrors." In this room, besides the model of Monson, were relics of Napoleon and Wellington, and three other figures in wax, viz., Mrs. Maybrick, who was convicted of the murder of her husband by poisoning him with arsenic; Pigott, a witness in the Parnell Commission, who committed suicide; and Scott, a man who was associated with Monson in the charge of murdering Mr. Hambrough, but fled from justice and was not tried. In the Chamber of Horrors itself was a representation of the scene of the "Ardlamont tragedy." In the case of Louis Tussaud the plaintiff's figure was placed near a turnstile leading to the Chamber of Horrors, and in the same room with models of Her Majesty the Queen, the Archbishop of Canterbury, and other eminent personages. The defendants in this case advertised in the newspapers and by sandwich-men, inviting the public to come and see "The Chamber of Horrors, and the instruments of torture; see Vailant the Anarchist, and Monson of Ardlamont."

*Finlay, Q.C., Gye, Wace and Nepean* for Madame Tussaud, Ltd.

*Willes Chitty and Ernest Pollock* for Louis Tussaud.

*B. Coleridge, Q.C. and Cooper Wyld* for the plaintiff.

*Cur. adv. vult.*

Jan. 29, 1894. The following judgments were read.

**LORD HALSBURY.**—Although I believe there is no difference of opinion among us as to the result of this appeal, I am not so certain that the grounds upon which we act are the same, and the questions raised at the Bar are of such serious general importance that I feel it necessary to explain distinctly the reasons which operate on my mind in the course to be pursued. If the case were to be argued upon the materials which alone were before the Divisional Court I should be of

**A** opinion that the judgment of the Divisional Court ought to be affirmed. I entirely agree in the reasoning of my brothers MATHEW and HENN COLLINS, JJ., but, for a reason I will state presently, I desire to treat separately the question of the summary intervention of the court by way of interlocutory injunction, and the question of the character of the exhibition, the continuance of which until the trial it is sought to restrain.

**B** What stands at the head of the inquiry is the character of the exhibition itself. Is it libellous or not?—and in expressing my opinion upon it I am not afraid of prejudicing any right by so doing. The jury will have upon the trial of the action to decide the question ultimately, and I have much too high an opinion of the intelligence of juries to suppose that they would be influenced in their judgment if they learned that a judge or a court had thought that the continuance of an exhibition charged as libellous ought to be restrained until the matter came before them for decision. Indeed, it is a little singular to suppose, considering the controversies which used to arise before the Libel Act, 1792 (Fox's Act), that a jury would on such a question be unduly influenced by the opinion of a judge or a court.

**D** This exhibition consists of a portrait model of a person recently tried for murder [at Edinburgh, a verdict of Not Proven being returned]. The gun with which the murder was said to have been perpetrated is placed in immediate proximity to the figure, and in another part of the same establishment a model or scenic representation of the place where it was alleged the murder took place. If it stopped there I should have thought that there was enough to make it a very grave and defamatory exhibition. It seems to be thought that, because it could

**E** be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that it is no answer at all. Because the applicant was tried for murder, because the circumstances of the trial are necessarily preserved by the report of proceedings in a court of justice (privileged, be it observed, because they are such reports), this does not justify the unauthorised and unprivileged repetition or narration of circumstances of suspicion or of evidence,

**F** which certainly were urged by the proper authorities as proving that he was guilty of murder. In order to justify a libel the justification must justify in the sense attributed by the innuendo [but see 24 HALSBURY'S LAWS (3rd Edn.) 123]. It is not the mere words of a written statement being true, or the accuracy of fact in a model or scene, that will render it justifiable. The circumstances of time or place may raise such inferences as will render either libellous, though the words

**G** may be true and the model exact.  
LORD BLACKBURN, in giving judgment in *Capital and Counties Bank v. Henty* (1) deals with this very question. After expressing his reluctance to express his opinion on cases not before him, he continues (7 App. Cas. at p. 786):

**H** "I think I may safely say that in a time of panic a statement published in a City article of one of our newspapers that such a one had withdrawn his account from such a bank might have a tendency to shake the credit of the bank, and that those who published such a statement in such a way would know or ought to know that it would be read by persons who, came to the paper for information to guide them as to whom they would trust; and therefore the statement would very probably be understood by such persons as conveying an imputation on the credit of that bank."

**I** In the same case it was laid down that the test whether a writing is a libel or no is whether, under the circumstances in which the writing was published, reasonable men would be likely to understand it in a libellous sense. It is urged here that no meaning can be attached to this representation calculated to bring the person whose portrait model is exhibited into hatred, contempt, or ridicule, and that, therefore, inasmuch as everybody, or most people, knew that Mr. Monson was tried for murder, it is justifiable to exhibit his portrait as that of the man who was so tried, with the weapon with which the murder was alleged to have been

committed and the scene of its commission—that the exhibition amounts to no more than writing: “This is the man who was tried for murder said to be committed by this weapon and in this place.” A

I will assume for the moment that this is a fair representation of what the exhibition means, but I wholly dispute that, if that were the meaning, it would not be libellous. Is it true that you may write with impunity that a person in the course of his career has been tried for some offence? Is it no reflection upon a man's character to say that he has been tried for murder? Will people as readily associate with and accept the companionship of a person of whom such things are said? Let it be observed I am speaking now of the character of the imputation, and not for the moment dealing with the question whether it could be justified on the ground that it was true. If I understand the argument correctly, it comes to this—that the exhibition in question is dedicated to the gratification of public curiosity concerning every person or event which may for the moment be interesting. I confess I regard such a claim with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture, every incident of a criminal or other trial be produced, and its publication justified? Not only trials but every incident which has actually happened in private life furnish material for an adventurous exhibitor, dramatised peradventure, and justified because, in truth, such and such an incident did really happen. That it is done for gain does not in itself make it unlawful if it be in other respects legitimate; but it is not altogether immaterial as excluding such a publication from the category of those which are made in the fulfilment of some moral or legal duty. B C D

It seems to be assumed that there is no alternative between an innuendo which shall charge the commission of the murder and the admission that no real imputation is conveyed. I think that is an erroneous view. Suppose the innuendo to be that he was a person of ill repute. The justification must allege, not that he was tried for murder, but must justify, if it justifies at all, that he was of ill repute. If it were otherwise the singular result would follow that, if a man has been convicted and undergone his punishment for crime, the law will protect his reputation: see *Leyman v. Latimer* (2), but if he has been acquitted his reputation is at the mercy of idle gossip for the rest of his life. I have hitherto said nothing of the associations which, to my mind, are almost necessarily connected with the imputation of crime. I have nothing to do with the intention of the exhibitors. It is the impression which would be created on the minds of reasonable men by the juxtaposition of Mr. Monson's model, Mrs. Maybrick's, Scott's, and Pigott's. I think no answer was attempted to be given to the question of counsel for the plaintiff whether there is any one instance of a victim of an accident or an innocent man being exhibited in this part of the establishment. It is, indeed, suggested that a recumbent figure of the Emperor Napoleon is in the same room, but the answer seems to me to be wholly insufficient. If Mr. Monson were a public character, with respect to whom it might be said his public life or his great position is calculated to create an interest, the answer might be plausible; but who knows, or ever did know, anything about Mr. Monson except his connection with the alleged murder at Ardlamont? Why then is he placed near a convicted poisoner, one fugitive from justice not yet captured, and another who escaped justice by suicide? If one adds to that that the scene of the alleged murder is also represented, and admission gained to it by the same fee, and in the place wherein are stored the effigies of many convicted criminals and some scenes of crime, it is a bold assertion to maintain that to the ordinary mind such an association of circumstances suggests no imputation of guilt. E F G H I

But I have now to deal with the question of the summary interposition of the court restraining the continuance of this exhibition until the trial of the action. Two points arise upon it. In the first place, it is said that the court ought not to pronounce anything to be a libel when that very question must afterwards be submitted to the judgment of a jury; and secondly, that the question has already



A been concluded by authority in this court. Sitting here, I admit that I am bound by a former decision of this court. With respect to the first point, my answer is, that the legislature in 1873 and 1875 gave the power by the unqualified language of its enactment to do the very thing in question wherever the court should deem it "just and convenient" [see Supreme Court of Judicature Act, 1873, s. 25 (8), replaced by s. 45 of Supreme Court of Judicature (Consolidation) Act, 1925].

B Had it thought right to limit the exercise of such power to cases where no question should be afterwards determined by a jury, it might have so limited the exercise of such a power to such cases. It cannot be assumed to be ignorant of the state of the law or the practice, and it has enacted in the widest terms the jurisdiction in question. It is not necessary to enumerate, but there are other examples of jurisdictions where judges must exercise, in the first instance, a judgment which

C must, nevertheless, afterwards be submitted to a jury.

The second objection is one with which I have more delicacy in dealing. As I have already said, I am bound by a former decision of this court, but it is by the decision of the court—by what in fact the court did decide. That is the authority to which I must submit. I have some difficulty in following the argument that a decision of the court on one set of facts is an authority upon another

D and a totally different set of facts. Of course, if the two sets of facts are governed by some principle of law, the principle of law affirmed by the court is equally authoritative to whatever facts the principle may be applied. But where the strength and cogency of the facts themselves, or the inference derived therefrom, is in debate, I cannot, as a matter of reasoning, compare one set of facts with another and bring them within any governing principle. Nor am I helped by a

E conjecture as to what a jury would then do in a supposed case, and what a court of review would do if the jury did it.

In *Bonnard v. Perryman* (3), affirming the former authority before the Master of the Rolls, it was laid down, and I cheerfully accept the proposition, that the court ought not to interfere by interlocutory injunction unless it was "a clear case." Different forms of expression are used by different judges to indicate the degree of clearness which ought to be brought home to the mind of a judge before he exercises the power now in question. But it is a canon of construction too familiar to render more than an allusion to it necessary, that expressions, however general, and phrases, however wide, are cut down and qualified by the subject-matter with respect to which they are uttered. If I were to understand the test suggested to be applicable to all cases, so that it practically excluded actions of

F libel from the operation of the Judicature Acts with respect to granting interlocutory injunctions, it would be to overrule the legislature—a power which is not possessed by this or any other court. But, as I have said, I do not so understand the decisions relied upon. The last one speaks of the procedure in question as being only "just and convenient" in exceptional cases—that is, exceptionally clear cases. Something was said as to the procedure being only applicable to trade

G libels. I think the suggestion is quite unfounded. The Court of Chancery had no jurisdiction in libel cases; but they had jurisdiction to issue injunctions to restrain injuries to trade, and efforts were occasionally made to treat libels as injuries to trade, so as to bring them within the jurisdiction which the Court of Chancery was empowered lawfully to exercise. I should have thought the protection of a man's character was more important than the protection of his trade: see

H *Hermann Loog v. Bean* (4).

I But whatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the court shall think it "just and convenient" the remedy exists. I do not deny that it is a difficult task for any court to determine when the case is so clear that the remedy ought to be applied. In this case it is for the jury, and always would have been for the jury, to determine the question, libel or no libel, since in the unanimous opinion of the judges given to the House of Lords in 1792, while adhering to LORD MANSFIELD's opinion as to the construction of a written document, they frankly admitted

that wherever the sense of a paper was to be collected from matter dehors the paper the matter was for the jury, and it need hardly be stated here that "libel or no libel" in this case must be absolutely for the jury. A rule, however, which should place the question of libel or no libel absolutely in the hands of the court so as to control the operation of an Act of Parliament would go far to revive a controversy which has now been laid to rest for upwards of a century: see the observations by PARKER, B., in *Parmiter v. Coupland* (5), and for this among other reasons I cannot think that the decisions referred to are to be understood in the sense contended for.

In the view, therefore, that I take of the facts, I should have thought this was a clear case of libel, and an equally clear case for the prompt interference of the court to restrain it until the trial of the action. The question, however, remains whether the new evidence adduced, and which was not before the Divisional Court at all, alters that view; and I am of opinion that it does. Of course, if the exhibition in question is made with the consent, expressed or implied, of the applicant for the injunction, there is no ground for the application. The facts may be very shortly stated. The confidential friend of the applicant entered into a written bargain with the proprietors of the exhibition (Madame Tussaud's) to supply them with the clothing and the gun which Mr. Monson was using at the time of Lieutenant Hambrough's death, and an agreement to give a sitting by Mr. Monson to aid the portrait modeller. If this was done with Mr. Monson's authority, there is, of course, an end of the question. In discussing this matter, I am anxious not to prejudice any inquiry which may hereafter be held into these matters. It is enough to say that upon the correspondence and the affidavits of Mr. Monson and Mr. Tottenham it is very doubtful, indeed, to my mind how a jury would find, or what further investigation might disclose. I think that in this state of the evidence the views expressed in the two cases referred to above are binding upon me, and I think, therefore, that this injunction must be dissolved.

**LOPES, L.J.**—These are two appeals from orders of the Divisional Court granting interlocutory injunctions to restrain the defendants from exhibiting or advertising the exhibition of a wax model representing the plaintiff. The facts of the Ardlamont case are too well known to require recapitulation. Suffice it for the purposes of this appeal to say that the plaintiff was tried in the Ardlamont case at Edinburgh before the Lord Justice Clerk and a jury, and the jury found a verdict of Not Proven. Shortly after the trial the defendants exhibited wax models representing the plaintiff at their establishments. I propose to deal only with the facts in the first case. The facts in the second are practically the same, and the second case must follow the decision in the first.

The ground of the application for an interlocutory injunction was that the exhibition of which the plaintiff complains was calculated to disgrace him and to expose him to public obloquy and contempt, and was, therefore, a libel upon him. The facts with regard to the exhibition of the wax model so far as material are as follows. The figure of the plaintiff was in a room called "Napoleon Room, No. 2," within a turnstile where an extra 6d. was demanded. In this room there were five figures—a large recumbent figure of the Emperor Napoleon, a figure of Mrs. Maybrick, another of Pigott, another of Scott, and one of the plaintiff, with their respective names. There were other objects of interest in the same room—for instance, relics of the Emperor Napoleon and the Duke of Wellington. From the room you could descend a staircase, and then find yourself in what is called "The Chamber of Horrors," where there was a representation of what is called "The Scene of the Ardlamont Mystery."

Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel. The plaintiff's case, therefore, is libel, and the application for an interlocutory injunction must be determined upon the principles which are

A applicable to the granting of injunctions in cases of libel. But it must be borne in mind that the question is not whether what is done is libellous, but whether a case for an interlocutory injunction is made out. Prior to the Common Law Procedure Act, 1854, no court could grant any injunction in libel. The court of Chancery could grant no injunction in libel, because it could not try a libel. Neither could a court of common law until the Act of 1854, because they had no power to grant injunctions. Whether they had power to grant an interlocutory injunction after 1854 I think doubtful. As a matter of practice they never did; the first instance of their exercising the power in a case of libel was *Saxby v. Easterbrook* (6), and that after trial.

The Judicature Act, 1873, s. 25 (8) confers a larger power to grant injunctions than existed before. It says:

C "... an injunction may be granted . . . by interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made."

It is upon this section that the plaintiff rests his case. It is not necessary to consider cases that occurred before the coming into operation of the Judicature Acts. *William Coulson & Sons v. James Coulson & Co.* (7) was decided in 1887, and contains a judgment by the present Master of the Rolls (LORD ESHER) which underlies every subsequent decision on the subject. The Master of the Rolls said in that case (3 T.L.R. at p. 846) that it could not be denied that the court had jurisdiction to grant an interim injunction before trial.

E "It was, however, a most delicate jurisdiction to exercise, because, though Fox's Act only applied to indictments and informations for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the court to construe the document, and to say whether it was a libel or not. To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury had decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion, that there was malice on the part of the defendant. It followed from these three rules that the court could only on the rarest occasions exercise their jurisdiction."

In the same year *Liverpool Household Stores Association v. Smith* (8) came before COTTON, L.J., and myself in this court, and *William Coulson & Sons v. James Coulson & Co.* (7) was followed and approved.

H The matter of restraining libels on interlocutory motions for injunction was thought of such importance that the question was, in *Bonnard v. Perryman* (3), argued before the full Court of Appeal, and LORD COLERIDGE, in delivering the considered judgment of the court, said (ante p. 968):

"We entirely approve of, and desire to adopt as our own, the language of LORD ESHER in *William Coulson & Sons v. James Coulson & Co.* (7):

I "To justify the court in granting an interim injunction it must come to a decision upon the question of libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable."

I cannot help thinking that a principle was laid down in that case applicable to all libels without a limitation. Comment has been made on the words "in the



clearest cases," and it has been asked what those words mean. I think the criticism would be well founded, and they might be complained of as indefinite if they had not been explained, in my judgment in the most exhaustive way, by what follows: "Where any jury would say the matter was libellous, etc."

This is the rule by which we are bound, and I ask myself, if the jury found a verdict for the defendants in this case, would the court set it aside as unreasonable? I propose first to deal with the case as it came before the Divisional Court, and, secondly, as it has come before this court with the additional evidence. I do not think that the Divisional Court were justified in coming to the conclusion that the libel was so clear that, if a verdict passed for the defendants, it must be set aside as "unreasonable." Counsel for the plaintiff contended that the exhibition, under the circumstances, of the plaintiff's figure necessarily involved the imputation that he was criminally connected with the death of Lieutenant Hambrough. Counsel for the defendant contended that the defendant imputed nothing disgraceful or injurious to the character of Monson, and that all that the exhibition meant was: "Here is the likeness of Monson, who was tried in the Ardlamont case, and was not convicted. Here is the likeness of a person who has recently excited much public attention in connection with a trial, the issue of which everyone knows." Is not the inference to be drawn from what was done a proper question for the jury? Suppose a jury came to the conclusion that what was done imputed nothing disgraceful or injurious to the character of Monson, but only that he had become, owing to the notoriety of the case, a subject of public interest, and the defendants exhibited his likeness as likely to bring people to their exhibitions, adding nothing to what was known of him before, and not even associating him with the Ardlamont case, except so far as the scene of the "Ardlamont mystery" was in the room below and the figure in the room above. Would a court say that such a conclusion was so unreasonable that it ought not to be permitted to stand? Might not a jury without being unreasonable consider that any discredit attaching to Monson resulted from the trial, and was not affected by the exhibition of his figure at Madame Tussaud's? Might they not think, without being unreasonable, that the action was brought more in aid of his purse than his personal character?

Put aside the surroundings, and what is there more in this wax figure than the publishing of Monson's likeness in a newspaper, with his name under it, or the display of his likeness in a shop window? Grotesque pictures of individuals may, I doubt not, be in certain circumstances actionable if anyone thought fit to notice them; but I should think it would require an uncommonly strong case to make them the subject of an interlocutory injunction. But it is said: Look at the surroundings. Mrs. Maybrick, Pigott, and Scott (another celebrity in the Ardlamont case), and the Chamber of Horrors below. No doubt this is important and essentially for a jury. Counsel for the plaintiff did not, so far as I recollect, attach much importance to the companionship, for, in answer to me, he said that if Monson's figure had been placed between royal personages it would have been the same. I am unable to agree with the decision of the Divisional Court, and think this case is not brought within the rule laid down in *Bonnard v. Perryman* (3).

Except for future cases that may occur, I should not have thought it necessary to express disagreement with the decision of the court below, because there is new evidence brought before us which makes it impossible to allow the injunction to issue. As the case will have to be tried, I propose to say little about the evidence. Suffice it to say that there is such a conflict of evidence with regard to Monson's conduct, one side saying he consented to the exhibition of his figure, and the other, in a not very satisfactory way, denying any consent, as to render it imperative that the facts should be investigated by a jury before any injunction is granted. Libel or no libel has, since Fox's Act, whether in civil or criminal cases, been always regarded as essentially a question for the jury. I was much impressed by an observation of DAVEY, L.J., during the argument when he said that at the Chancery Bar he had always contemplated libel with awe. I, as a member of the common law Bar, have always had the same feeling. Criticism is easier

A than composition, and, speaking for myself, I should deeply regret that by any subtle distinctions or ingenious criticism the authority of *Bonnard v. Perryman* (3), decided by the full Court of Appeal, should be impaired or "whittled" away, and thus some additional fetters be imposed on liberty of speech, and the functions of a jury, which are, in my judgment, unauthorised by that decision. The appeals, therefore, must be allowed.

B

DAVEY, L.J.—In *William Coulson & Sons v. James Coulson & Co.* (7) the Master of the Rolls is reported to have said:

C

"To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable."

I understand the Master of the Rolls to have intended the expression,

D

"where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable,"

E

as an explanation or expansion of what he meant by the words "in the clearest cases." The Master of the Rolls was so understood by COTTON, L.J., in *Liverpool Household Stores Association v. Smith* (8), and in *Bonnard v. Perryman* (3) the Lord Chief Justice, delivering the judgment of the full Court of Appeal, approved of and adopted the language of the Master of the Rolls. I understand the court in that case to have judicially laid down for themselves a rule of practice which is binding upon me with regard to the circumstances under which the court ought to grant an interlocutory injunction pending the trial in cases of libel, or, in other words, to have defined the conditions subject to which it is "just and convenient" to grant an injunction in such cases. In *Collard v. Marshall* (9) CHITTY, J., granted an interlocutory injunction in a case which appeared to him to satisfy those conditions, and it is to be observed that in that case the defendant was willing to treat the motion as the trial of the action, and, therefore, did not require the case to be submitted to a jury.

F

G

I am of opinion that the principles laid down in the cases referred to are applicable to the present case, and the question, therefore, which the court has to answer is whether the affidavits which have been read and commented on before us disclose a case on which the jury at the trial of the action could properly find only a verdict for the plaintiff. I should have much hesitation in differing from the opinion of two judges of so much experience if the case came before us only on the same affidavits as were used in the court below. But affidavits have been used before us which raise a question of acquiescence and active consent against the plaintiff, and indeed suggest that he sold the right to exhibit his effigy with his own clothes and gun, though he afterwards changed his mind. Of course, these affidavits fall far short of proving such a case against the plaintiff, but they certainly suggest it in a manner and with circumstances which show that there is a case for consideration by a jury, and one on which I decline to speculate or express any opinion what their verdict ought to be when they have complete evidence by examination and cross-examination of the witnesses before them. I may observe that in *Bonnard v. Perryman* (3), though the libellous character of the publication was, in the language of the Lord Chief Justice, beyond dispute, the court refused to grant an injunction on a mere suggestion by affidavit, without any particulars of a case of justification.

I

I ought to add that I see no logical distinction for this purpose between a case of libel affecting trade or property and one affecting character only. In basing my judgment on the ground which I have stated, I must not be taken to say whether

I should or should not have agreed with the learned judges in the views expressed by them on the materials before them. Whether an exhibition of Mr. Monson's effigy under the circumstances in the place and with the surroundings mentioned in the affidavits suggests such innuendo as may be assigned to it in the pleadings is a question which will have to be determined by the jury on the trial of the action. I think, therefore, without expressing any opinion on the merits of the case or on the opinions expressed in the court below, it is not a case in which it is proper to grant an interlocutory injunction. A  
B

*Appeal allowed.*

Solicitors: *Browne & Co.*, for *J. W. Phillips*, Birmingham; *E. F. & H. Landon*; *Blachford, Riches & Co.*

[Reported by *E. MANLEY SMITH*, Esq., *Barrister-at-Law.*] C

## REYNOLDS *v.* SMITH D

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), February 16, 17, 1892]

[Reported 66 L.T. 808; 8 T.L.R. 391]

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Halsbury, Lord Watson, Lord Macnaghten, Lord Morris and Lord Shand), June 6, 1893]

[Reported 9 T.L.R. 494]

*Stock Exchange—Rules—Reasonableness—Rule providing seller of shares responsible for genuineness of documents—Broker's right of indemnity.* E  
F

A person who employs a broker to sell shares on the Stock Exchange is bound to indemnify the broker for any liability he may incur in consequence of carrying out his principal's instructions under any rules of the Stock Exchange, provided that such rules are reasonable.

A rule providing that the seller of shares is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received until reasonable time has been allowed to the transferee to execute and duly lodge such documents for verification and registration, and that, when an official certificate of registration of such shares or stock has been issued, the committee of the Stock Exchange will not (unless bad faith is alleged against the seller) take cognisance of any subsequent dispute as to title, until the legal issue has been decided, **held** to be a reasonable rule. G  
H

**Notes.** Referred to: *Hichens Harrison Woolsten & Co. v. Jackson & Sons*, [1941] 2 All E.R. 704.

As to finality of decision of Council of Stock Exchange whether contract fulfilled in accordance with its Rules, see 36 HALSBURY'S LAWS (3rd Edn.) 505-506; as to liability of members of Stock Exchange when dealing with one another, see *ibid.* 508; as to incorporation of Rules in contract, see *ibid.* 511-512; as to broker's right of indemnity, see *ibid.* 521, 571. For cases see 42 DIGEST 800-802, 816, 826-827. As to reasonableness of customs, see 11 HALSBURY'S LAWS (3rd Edn.) 186-187, 198; and for cases see 17 DIGEST (Repl.) 51. I

Case referred to in argument:

*Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q.B.D. 188; 49 L.J.Q.B. 392; 42 L.T. 37; 44 J.P. 280; 28 W.R. 290, C.A.; 9 Digest (Repl.) 405, 2592.



**A** **Application** by the defendant for judgment or a new trial, on appeal from the verdict and judgment given at the trial before DENMAN, J., with a jury.

In 1879 the defendant, a dealer in stocks and shares in London, but not a member of the London Stock Exchange, employed the plaintiff, a stockbroker and a member of the London Stock Exchange, to sell £1,250 London and North-Western Railway 4 per cent. preference stock subject to the rules of the Stock Exchange.

**B** Rule 92 of those rules provided :

**C** "The seller of shares or stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received, until reasonable time has been allowed to the transferee to execute and duly lodge such documents for verification and registration. When an official certificate of registration of such shares or stock has been issued, the committee will not (unless bad faith is alleged against the seller) take cognisance of any subsequent dispute as to title, until the legal issue has been decided, the reasonable expenses of which legal proceedings shall be borne by the seller."

The plaintiff sold £922 of that stock to Brunton, Bourke & Co., inside brokers, who were acting for Lord Hillingdon. Transfers purporting to be executed by

**D** Thomas and Ann Barton were sent by the defendant to the plaintiff and handed to Brunton, Bourke & Co., and the purchase money was paid to the defendant. In 1887 litigation arose when it was discovered that the signature of Ann Barton on the transfers had been forged by Thomas Barton, who had instructed the defendant to sell, and in *Barton v. London and North-Western Rail. Co.* (24 Q.B.D. 77) the Court of Appeal ordered the railway company to replace Ann

**E** Barton's name on the register as holder of the stock. Lord Hillingdon was a third party in this action. The company then took Lord Hillingdon's name off the register, and on his application Brunton, Bourke & Co. obtained a resolution from the committee of the Stock Exchange that the plaintiff should make good the loss which Lord Hillingdon had suffered. The plaintiff acted in accordance with the resolution, and brought the present action against the defendant for an

**F** indemnity. DENMAN, J., held that the defendant was liable to indemnify the plaintiff, and the defendant moved for judgment or a new trial.

*Bigham, Q.C.*, and *Bankes* for the defendant.

*Finlay, Q.C.*, and *Upjohn (W. F. Webster with them)* for the plaintiff.

*Cur. adv. vult.*

**G** Feb. 27, 1892. **LORD ESHER, M.R.**—In this case an action has been brought by a member of the London Stock Exchange against an outside broker, that is to say, a broker who is not a member of the Stock Exchange. The defendant directed the plaintiff to sell certain shares, and the plaintiff carried out his instructions, but, says the plaintiff, the transfers being forged and he being obliged by the rules of the Stock Exchange to indemnify the purchasing broker, the defendant ought to indemnify him. The defendant chose to have the shares sold on the Stock Exchange. That is a well-known market and subject to rules, so that, if a stranger employs a broker to buy or sell in that market, he takes the consequences of what may happen by reason of the application of the rules, if the consequences are caused by his instructions, and are the result of carrying them out, provided

**H** that the rules are reasonable. That is a consequence of dealing in any market.

**I** In such a case the plaintiff will be entitled to recover against the defendant, not because the Stock Exchange can bind by its rules anyone who is not a member—that clearly cannot be so; but because the defendant is bound by virtue of the common law, if at all, for the reasons I have mentioned.

The first question, therefore, is, whether this r. 92 is a reasonable one. I am not prepared to say that it is not. If, then, it has been acted on so as to make the plaintiff liable under it, the defendant will be liable by the common law to indemnify him. But it is said that, though it may be reasonable, it has not been

properly acted on or followed, and that the Stock Exchange never made the plaintiff A  
liable; in other words, that the committee acted beyond their powers. That  
question depends on the construction of the rule. It is a very difficult one to  
understand. The first part of the rule is clear enough: the selling broker is to be  
responsible for the genuineness and regularity of all documents delivered. But the  
rule goes on to provide that,

"when an official certificate of registration of such shares or stock has been B  
issued the committee will not (unless bad faith is alleged against the seller)  
take cognisance of any subsequent dispute as to title until the legal issue has  
been decided."

It is not said between whom the legal issue is to be. Is it between the two brokers? C  
If so, no legal issue has been decided here, and, therefore, a condition upon which  
the committee has power to act has not been fulfilled. If so, the Stock Exchange,  
by its own rules, had no power to take cognisance of the dispute. Grammatically,  
the legal issue would mean one between the two brokers; but, looking at the other  
rules, I think that the strict grammatical meaning is not to be taken, and "the D  
legal issue" must mean one decided between the real principals to the transaction,  
that is to say, the persons for whom the shares were sold and bought, who in this  
case were the defendant and Lord Hillingdon. Whether "decided" means by trial  
or by admission between them it is not necessary to consider now, as the condition  
has clearly been fulfilled. Therefore, the committee had jurisdiction to settle the  
matter in dispute between the two members of the Stock Exchange, and, as I  
have said already, the defendant is liable by the common law to indemnify his  
agent. The decision of DENMAN, J., was right, and this appeal must be dismissed. E

**FRY, L.J.**—The plaintiff, a member of the Stock Exchange, is suing his principal  
in a transaction on the Stock Exchange for an indemnity which he claims in  
respect of the liability which he has incurred under a resolution of the committee  
of the Stock Exchange, made in accordance with the rules of the Stock Exchange.  
The defendant says that the resolution was not properly made under the rule F  
which it professes to have been made under, and he also says that the rule is  
unreasonable and was not known to him, and therefore that it is not binding  
on him. The first point is, whether the resolution passed by the committee was  
within the power conferred on the committee by the rules of the Stock Exchange.

The rules provide for the appointment of a committee, and give it supervision G  
over all transactions which take place on the Stock Exchange. The decisions of  
the committee are to be final, and the sanction by which their decisions can be  
enforced is the expulsion of a member who disregards them. The rule under which  
the committee purported to act in this case is r. 92. It is obvious that the latter  
sentence in that rule implies the existence of the liability which was asserted  
in the former sentence, but it puts fetters on the exercise of the jurisdiction which  
the words of the first sentence created; and it, therefore, implies that the first H  
sentence created a liability larger than what would at the first glance seem to  
be created. But on reading more closely we see that there is a third period of time  
referred to, namely, the period between the lapse of the reasonable time for  
lodging the documents for verification and registration and the time when the  
official certificate of registration has been issued. Supposing a dispute arises during  
that period, does the responsibility mentioned in the rule exist or not? It appears I  
to me that it would be unreasonable to say that the responsibility exists in the  
first and third periods of time but not in the intermediate period. I think that  
the responsibility is not limited in time, and I feel bound to hold that throughout the  
whole rule the existence of the responsibility of the seller is implied. I, therefore,  
think that the defendant is wrong in contending that there was no responsibility  
after the official certificate was issued.

When an official certificate has been issued, the rule provides that the committee  
will not (unless bad faith is alleged against the seller) take cognisance of any

- A** subsequent dispute as to title, until the legal issue has been decided. The rule is obviously one to be invoked by the purchaser of shares, not the seller, and means that, in case of a dispute between two such members of the Stock Exchange, after the official certificate has been issued and if no question of bad faith is raised, the purchasing member is to have no remedy against the selling member until the legal issue between their principals has been decided. Then the rule applies a
- B** decision between the principals to a dispute before the committee between members. By the last part of the rule it seems that if the purchaser succeeds at law against the seller, the selling member is liable to make good the expenses of litigation to the purchasing member's principal, but it is unnecessary now to decide that matter. The rule is a very crabbed piece of English and difficult to understand.
- C** The second question is whether the rule is unreasonable. The defendant contends that it is, because the person who would be affected through the implied contract of indemnity in respect of it is not heard before the committee. I cannot agree with that view. When A. has agreed to indemnify B. against a claim by C., the claim is naturally fought out between B. and C.; but when B. makes his claim for indemnity against A., the latter may show, if he can, that B. has not
- D** done his duty in defending properly the claim made against him by C. I see nothing unreasonable in the rule, and the judgment of DENMAN, J., must be affirmed.

**LOPES, L.J.**—I agree with the other members of the court in the construction they have put on the words of this rule, and I do not see anything unreasonable

**E** in such a rule.

The defendant appealed to the House of Lords, where the parties were represented by the same counsel as in the Court of Appeal.

**LORD HERSCHELL, L.C.**—The sole question involved is whether the committee of the Stock Exchange acted within their jurisdiction in ordering the respondent to make this payment and incur this liability for the purpose of his discharging his obligation to Messrs. Brunton, Bourke & Co. It is immaterial whether the appellant was or was not acquainted with the terms of the particular rule of the Stock Exchange under which the committee acted, because he knew when he instructed the respondent to act for him that there were rules of the

**F** Stock Exchange under which the committee had power to settle disputes between

**G** members of the Stock Exchange, and that the respondent was a member of the Stock Exchange, and, therefore, was subject to those rules, unless it can be shown that those rules are unreasonable. The object of the rule in question is to insure as between members of the Stock Exchange that every document passing between them shall be genuine and regular. It was alleged on the part of the appellant

**H** that the committee had no jurisdiction because there was, at the time they passed the resolution, a dispute subsisting as to the title, and that the legal issue had not been decided, and that, therefore, under the rule itself the committee had no jurisdiction. I do not say that the rule was framed as perfectly as it might be because some matters were left to implication which it would have been better to express; but at the same time it appears to me that, as regards any question

**I** arising between the parties to this action, the construction of the rule appears to be plain and to be free from difficulty. It is evident that as soon as the legal issue between the parties interested, which does not necessarily mean the brokers only, has been decided the jurisdiction of the committee commences. It is said that the respondent may have obtained some title against the railway by estoppel, and that in that case he will not be damnified, and that, therefore, under the rule the committee has no jurisdiction until that legal issue has been decided. I, however, do not think that that will be a reasonable construction of the rule. The committee may make it a condition that the seller shall have the benefit of any



claim which the purchaser may have against the company, but that question does not arise in the present case. **A**

I rest my judgment upon what appears to me to be the plain language of the rule. I think that in the present case the legal issue has been decided within the meaning of the rule, that the committee has power to take cognizance of the question, that they have acted within their jurisdiction, and that, therefore, the appellant has no answer to the claim of the respondent, which is founded upon their decision. I beg to move that the judgment of the court below be affirmed, and the appeal be dismissed, with costs. **B**

**LORD HALSBURY, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS and LORD SHAND** concurred. **C**

*Appeal dismissed.*

Solicitors: *Field, Roscoe & Co.*, for *Evans Morris & Co.*, Wrexham; *Clulow & Gould*.

[Reported by E. MANLEY SMITH, Esq., and S. M. DENISON, Esq., Barristers-at-Law.] **D**

## BODEN v. HENSBY **E**

[CHANCERY DIVISION (North, J.), December 21, 1891]

[Reported [1892] 1 Ch. 101; 61 L.J.Ch. 174; 65 L.T. 744;  
40 W.R. 205; 36 Sol. Jo. 153] **F**

*Solicitor—Lien—Change of solicitor—Delivery of documents to new solicitor.*

In the course of proceedings relating to certain property, the plaintiff changed her solicitors. She had not paid her former solicitors, but she applied for an order for the delivery to her new solicitors of documents in the possession of her former solicitors over which they claimed a lien. **G**

**Held:** an order would be made for the delivery to the new solicitors of all documents which were necessary to the conduct of the action and had come into the possession of the former solicitors since the commencement of the proceedings or for the purpose of such proceedings.

*Re Boughton, Boughton v. Boughton* (1) (1883), 23 Ch.D. 169, applied.

**Notes.** The order made in *Re Boughton, Boughton v. Boughton* was the same as that set out in the headnote of this case. **H**

Considered: *Re Hawkes, Ackerman v. Lockhart*, [1895-9] All E.R.Rep. 964. Applied: *Dessau v. Peters, Rushton & Co., Ltd.*, [1921] All E.R.Rep. 566. Referred to: *Re Rapid Road Transport Co.*, [1909] 1 Ch. 96; *Hughes v. Hughes*, [1958] 2 All E.R. 366. **I**

As to solicitor's lien, see generally 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 42 DIGEST 305-306.

Cases referred to:

- (1) *Re Boughton, Boughton v. Boughton* (1883), 23 Ch.D. 169; 48 L.T. 413; 31 W.R. 517; 42 Digest 306, 3404.
- (2) *Re Capital Fire Insurance Association* (1883), 24 Ch.D. 408; 49 L.T. 697; 32 W.R. 260; sub nom. *Re Capital Fire Insurance Association, Ex parte Beall*, 53 L.J.Ch. 71, C.A.; 18 Digest (Repl.) 84, 699.

**A** Also referred to in argument :

*Re Faithfull, Re London, Brighton and South Coast Rail. Co.* (1868), L.R. 6 Eq. 325; 18 L.T. 502; 42 Digest 259, 2927.

*Re Austin, Ex parte Yalden* (1876), 4 Ch.D. 129; 46 L.J.Bey. 59; 35 L.T. 720; 25 W.R. 134, C.A.; 42 Digest 260, 2942.

**B**

*Hutchinson v. Norwood* (1886), 54 L.T. 842; sub nom. *Re Hutchinson, Hutchinson v. Norwood*, 34 W.R. 637; 42 Digest 306, 3405.

*Batten v. Wedgwood Coal Co. and Iron Co.* (1886), 31 Ch.D. 346; 55 L.J.Ch. 396; 54 L.T. 245; 34 W.R. 228; 2 T.L.R. 236; 42 Digest 108, 1033.

**C** **Motion** by Messrs. Barton and Pearman, the former solicitors of Ann Boden, the plaintiff, to discharge an order made in chambers that they should deliver up to the plaintiff's new solicitors documents necessary for the conduct of the action commenced by the plaintiff.

The action was brought by Ann Boden, widow, as sole plaintiff, against Ernest Hensby as sole defendant, on June 8, 1891, for a sale in lieu of partition of the real estate devised by the will of John Boden to his wife for life, and after her death to the plaintiff and his other children in equal shares. The statement of claim stated that the testator's widow died in 1883, and that the plaintiff and defendant were his only children. Messrs. Barton and Pearman acted as the plaintiff's solicitors in the action, and had also acted as her solicitors in other matters, including an action of *Hensby v. Hensby* for the administration of John Boden's estate, in which the interests of the plaintiff and defendant had been declared by the chief clerk's certificate, dated Feb. 10, 1877, which also described the property subject to the trusts of the will. On July 25, 1891, an order was made in the action of *Boden v. Hensby*, on the motion of the plaintiff, for an inquiry "who are the persons interested in or entitled to the property referred to in the statement of claim and described in the chief clerk's certificate in the said action of *Hensby v. Hensby*, and in what shares and proportions such persons are so interested or entitled, and whether such persons are parties to this action or have been served with notice of this motion," and the court not requiring any further trial of the action, further consideration was adjourned. The plaintiff resided in New South Wales, and Messrs. Barton and Pearman had acted upon the retainer of A. W. Clarke, her attorney in England. By a deed-poll, dated Aug. 26, 1891, the plaintiff revoked the power of attorney she had given to A. W. Clarke, and appointed Messrs. P. J. Gordon & Sons her attorneys in his place. On Nov. 6, 1891, Messrs. P. J. Gordon & Sons gave notice to Messrs. Barton and Pearman that they had been instructed to act as the plaintiff's solicitors in the action of *Boden v. Hensby*, and on the same day they filed a notice of the change of solicitors. On Nov. 30, 1891, Messrs. P. J. Gordon & Sons took out a summons asking that Messrs. Barton and Pearman might be ordered to deliver up to them such deeds, papers, and writings in their custody and power as might be necessary for the conduct of the action, and that the question of necessity for the production of the same in case of difference might be settled by the judge in chambers. On Dec. 10, 1891, an order was made in chambers in the terms of this summons. The former solicitors now moved to discharge this order.

*H. B. Howard* for the motion.

*Serrell* for the plaintiff.

**I** **NORTH, J.**—I think there is a distinction in this case between the documents which came into the possession of the applicants before and independently of this action, and those which came into their possession since its commencement, or for the purpose of carrying it on.

The chief clerk has followed the order in *Re Boughton* (1). It is argued that that was an administration action, and the order asked for ought not to be made in any other action. But it is not restricted to administration actions. The rule does not merely apply to actions for the administration of the estate of a deceased

person; it is applicable to an action for the administration of the trusts of a deed and to other proceedings of a representative character. In this case an inquiry has been ordered as to what persons are interested in the property. If it were as clear as counsel for the motion says it is that only the plaintiff and the defendant are interested, no inquiry would have been necessary. I agree that it is clear that only two persons were interested at the date at which the will came into operation, but other persons may have acquired an interest since. There has been a decree which might be proceeded with and worked out by the plaintiff or by the defendant, or upon a proper application by the encumbrancers of either. A

I think, therefore, that this is a case to which *Boughton* (1) applies. But *Re Capital Fire Insurance Association* (2) draws a distinction between documents which have come into the solicitors' possession since the commencement of the proceedings, or for the purposes of such proceedings, and those which were in their possession before and for other purposes, and decides that no order should be made as to the latter class. The order will be for the delivery up, on the terms laid down in *Re Boughton* (1), of all documents which have come into the possession of Messrs. Barton and Pearman since the commencement of this action, or for the purposes thereof. As to any documents which do not come within that description there will be no order. The order made in chambers was too wide, and, therefore, I make no order as to costs. B

Solicitors: *Barton & Pearman*; *P. J. Gordon & Sons*.

[Reported by J. R. BROOKE, Esq., Barrister-at-Law.] C

E

## Re PEARSON. Ex Parte PEARSON F

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.JJ.), May 28, 1892]

[Reported [1892] 2 Q.B. 263; 61 L.J.Q.B. 585; 67 L.T. 367;  
40 W.R. 532; 8 T.L.R. 622; 36 Sol. Jo. 573; 9 Morr. 185]

*Bankruptcy—Jurisdiction—Foreigner—Foreigner resident abroad—Leave to serve notice abroad—Bankruptcy Act, 1883* (46 & 47 Vict., c. 52), ss. 4, 6 (1) (d). G

An act of bankruptcy can only be committed by a "debtor" within the Bankruptcy Act, 1883, s. 4, which means a debtor subject to English law and does not include a foreigner who is not in England and has not committed any act of bankruptcy in England, and so the court cannot grant leave to serve a bankruptcy notice abroad on such a person.

*Re Sawers, Ex parte Blain* (1) (1879), 12 Ch.D. 522, applied. H

**Notes.** Because of the description of "debtor" which did not appear in the Bankruptcy Act, 1883, but is incorporated in the Bankruptcy Act, 1914, s. 1 (2), the word "debtor" now has a wider sense than formerly: see *Theophile v. Solicitor-General*, [1950] A.C. 186, 200.

The Bankruptcy Act, 1883, ss. 4, 6 have been replaced by the Bankruptcy Act, 1914, ss. 1, 4. I

Distinguished: *Re Clarke, Ex parte Beyer, Peacock & Co.*, [1896] 2 Q.B. 476; *Re Clark, Ex parte Clark* (1897), 77 L.T. 417. Followed: *Re A. B.*, [1900] 1 Q.B. 541. Applied: *Cooke v. Charles A. Vogeler Co.*, [1900-3] All E.R. Rep. 660. Considered: *Theophile v. Solicitor-General*, [1950] All E.R. 405.

As to bankruptcy jurisdiction over foreigners, see 2 HALSBURY'S LAWS (3rd Edn.) 255; and for cases see 5 DIGEST (Repl.) 25. For the Bankruptcy Act, 1914, ss. 1, 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 324, 330.



**A** Case referred to :

(1) *Re Sawers, Ex parte Blain* (1879), 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334, C.A.; 4 Digest (Repl.) 24, 203.

## Also referred to in argument :

*Re Crispin, Ex parte Crispin* (1873), 8 Ch. App. 374; 42 L.J.Bey. 65; 28 L.T. 483; 37 J.P. 391; 21 W.R. 491, L.C. & L.J.; 4 Digest (Repl.) 24, 202.

**B**

**Appeal** by J. F. Pearson from an order of Mr. Registrar GIFFORD refusing to set aside a bankruptcy notice served by the International Bank of London on him in America.

The debtor, J. F. Pearson, was an American, and resided at Buenos Aires, where he carried on the business of the firm of S. B. Hale & Co., of which he was a partner. He had at one time resided for a short period in England, but that was some time previous to the date of the transactions in respect of which the present bankruptcy proceedings were taken. An action was brought by the International Bank of London against the members of the debtor's firm in respect of an alleged debt, and leave was obtained for service out of the jurisdiction upon the debtor. In default of appearance, the plaintiffs signed judgment against him.

**D** Afterwards the bank obtained leave to serve him in Buenos Aires with a bankruptcy notice. The registrar having refused an application to set this notice aside, an appeal was now made to this court.

By the Bankruptcy Act, 1883, s. 4 (1) (g), it is provided that a debtor commits an act of bankruptcy in the following case :

**E**

"If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the court, and he does not within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off, or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

**F****G**

By s. 6 (1) (d) it is provided that :

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England."

**H**

*Levett, Q.C.*, and *Yate Lee* for the debtor.

*Bigham, Q.C.*, *Herbert Reed* and *F. H. Mellor* for the International Bank.

**LORD ESHER, M.R.**—In this case an American, living in Buenos Aires, has been served there with a bankruptcy notice, and, as he has not complied with the demand in the notice, it is alleged that he has committed an act of bankruptcy, and is liable to have a receiving order made against him in England.

**I**

In this appeal it has been objected that the English court, which gave leave to serve this notice out of the jurisdiction, had no power to give leave in such a case as this with the object of making a foreigner residing abroad liable to English bankruptcy law. The question, therefore, for our consideration is, whether, under such circumstances, the English court had jurisdiction to give leave. The American certainly at one time carried on business in England, and it is said that he was once ordinarily residing in England; but it is admitted that he had not committed any act of bankruptcy in this country up to the time when leave was

given to serve the bankruptcy notice upon him. The question is, therefore, whether a foreigner, who has not committed any act of bankruptcy in England, and who is not in England, can be served while he is abroad with a bankruptcy notice for the purpose of making him a bankrupt in England. A

Unless s. 6 of the old Bankruptcy Act of 1869 has been altered by the Act of 1883, which is at present in force, *Re Sawers, Ex parte Blain* (1) is direct authority that, under the terms of the old Act, such a notice as this could not be served on a foreigner abroad for the purpose of making him a bankrupt here unless he had committed an act of bankruptcy in this country. The reasons of that judgment were given by JAMES, L.J., and I shall not go through them again. But it is said that there are some new words in the present Bankruptcy Act, and that s. 6 has altered the effect of s. 4. If s. 4 stood alone, it seems to me that there are no words in it so clear as to show that the legislature meant to extend the jurisdiction of the court so as to affect a foreigner not residing in England. Therefore, taking s. 4 by itself, I am of opinion that the same construction is to be put upon it as upon s. 6 in the Act of 1869, and that *Ex parte Blain* (1) governs that construction. As to the effect of s. 6. Section 4 shows affirmatively what is necessary to constitute an act of bankruptcy, and s. 6 is a negative section; so that, unless a case is within s. 4, there is no need to consider s. 6. Taking the construction of s. 4 to be, as I have said, the same as that of s. 6 under the old Act, this person is not brought within it, because *Ex parte Blain* (1) decided that a foreigner domiciled and resident abroad cannot be made a bankrupt in England; therefore, leave to serve this bankruptcy notice ought not to have been given. Since the case is not within s. 4, it is immaterial to consider whether or not the debtor is within s. 6. B  
C  
D

It would be impossible to say that, because a foreigner might have been residing for a few years in England, the English Bankruptcy Court could several years afterwards give leave to serve upon him abroad a bankruptcy notice in order to make him subject to English bankruptcy law. The mere statement of such a proposition is enough to show that it cannot be maintained. I think the decision of the registrar was wrong, and that this appeal must be allowed. E

**FRY, L.J.**—I am of the same opinion. The question turns principally on the construction of s. 4 (1) (g) of the Bankruptcy Act, 1883. It has been argued that "debtor" there means only one who is subject to English law. That argument seems to me to be well founded, and I agree that this case is really concluded by the decision in *Ex parte Blain* (1), which turns not merely on the words of the Act, but also on the general principles of law. In that case JAMES, L.J., said (12 Ch.D. at p. 526): F  
G

"It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a short or long time, have made themselves during that time subject to English jurisdiction." H

BRETT, L.J., adopted the same principle and said (*ibid.* at p. 528):

"The governing principle is that all legislation is *prima facie* territorial; that is to say, that the legislation of any country binds its own subjects and the 'subjects' of other countries who for the time bring themselves within the allegiance of the legislating power." I

Therefore, there is no doubt in my mind that s. 4 of the Bankruptcy Act, 1883, applies only to debtors who are subject to English law.

Is there anything in the statute raising a presumption that the legislature intended to extend the jurisdiction of the English court to foreigners not otherwise subject to English law? Our attention has been called to sub-s. (1) (g) of s. 4, which provides for the service by the creditor on the debtor of a bankruptcy notice in England, or by leave of the court elsewhere. But there is no difficulty in those

**A** words, because a debtor who is an English subject may be out of England, in which case the leave of the court is necessary before a bankruptcy notice can be served on him.

Then reliance is placed on s. 6, and we are asked to say that, in a case where the negative words of that section do not apply, then the court has jurisdiction. To draw such a conclusion would be monstrous. The negative words only mean  
**B** that in some cases the bankruptcy law applies. We have to inquire whether there has been in this case an act of bankruptcy, and on that inquiry s. 6 throws no light at all.

I think s. 4 ought to be interpreted according to the general principles of law, and s. 6 shows no intention on the part of the legislature to extend the jurisdiction of the English bankruptcy court beyond what it was under the former Bankruptcy  
**C** Act. I, therefore, think that this appeal must be allowed.

**LOPES, L.J.**—I am of the same opinion. The word "debtor" in s. 4 means a debtor who is subject to English law, and there is then no difficulty in deciding the case. It is really governed by *Ex parte Blain* (1), and I will refer especially to the judgment of **COTTON, L.J.** He said (12 Ch.D. at pp. 531, 532):

**D** "I take it the limitation is this, that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. Of course, it is not necessary that a person to be subject  
**E** to an English Act should be domiciled here. If he is resident here temporarily, and does an act which comes within the intent and purview of a statute, he, as regards that statute, as does every alien who comes here in regard to all the laws of this realm, submits himself to the law, and must be dealt with accordingly. As regards an Englishman, a subject of the British Crown, it is  
**F** not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject; though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would have brought him within the Act, has that effect when he is not resident here.  
**G** As regards a British subject, whether he is here or not, he can be made bankrupt if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is *prima facie* no right to bind them if they are not here."

Turning to sub-s. (1) (g), we find that to serve a bankruptcy notice elsewhere than in England the leave of the court must be obtained. In the present case the court  
**H** has no jurisdiction to give leave, and, therefore, no act of bankruptcy has been committed by the debtor. The appeal must, therefore, be allowed.

*Appeal allowed.*

Solicitors: *Norton, Rose & Norton; Harwood & Stephenson.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]



## Re HIGGINBOTTOM

[CHANCERY DIVISION (Kekewich, J.), July 1, 8, 1892]

[Reported [1892] 3 Ch. 132; 62 L.J.Ch. 74; 67 L.T. 190; 3 R. 23]

*Trustee—Appointment—Appointment by court—Application by majority of beneficiaries—Person with power of appointment wishing to exercise it.*

One of the persons beneficially interested in property subject to the trusts of a will applied to the court for the appointment of new trustees of the will. The legal personal representative of the last surviving trustee of the testator's will subsequently proved her testator's will, and, although she was not beneficially interested in the trust property, claimed to exercise the power of appointment of new trustees conferred by the Conveyancing Act, 1881, s. 31. An order was made by the judge in chambers, with the concurrence of a majority of the persons beneficially interested in the trust estate, appointing new trustees. Upon motion to discharge this order,

**Held:** whether because the court had no jurisdiction or because it would not exercise it, it would not appoint new trustees where there was a subsisting statutory or other power of appointing new trustees, and the donee of the power was willing to exercise it; and accordingly, the order made in chambers should be discharged.

**Notes.** The Trustee Act, 1852, s. 9, has been repealed and is now replaced by the Trustee Act, 1925, s. 41. The Conveyancing Act, 1881, s. 31 (1), has been repealed and is now replaced by the Trustee Act, 1925, s. 36 (1).

Considered: *Re Brockbank, Ward v. Bates*, [1948] 1 All E.R. 287. Referred to: *Re Whichelow, Bradshaw v. Orpen*, [1953] 2 All E.R. 1558.

As to the appointment of new trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 915 et seq.; and for cases see 43 DIGEST 680-681. For the Trustee Act, 1925, ss. 36, 41, see 26 HALSBURY'S STATUTES (2nd Edn.) 107, 118.

Cases referred to:

- (1) *Re Gadd, Eastwood v. Clark* (1883), 23 Ch.D. 134; 52 L.J.Ch. 396; 48 L.T. 395; 31 W.R. 417, C.A.; 43 Digest 674, 1041.
- (2) *Tempest v. Lord Camoys* (1882), 21 Ch.D. 571; 51 L.J.Ch. 785; 48 L.T. 13; 31 W.R. 326, C.A.; 43 Digest 674, 1040.
- (3) *Re Hodson's Settlement* (1851), 9 Hare, 118; 68 E.R. 439; sub nom. *Re Hodgson's Settlement*, 20 L.J.Ch. 551; 17 L.T.O.S. 241; 15 Jur. 552; 43 Digest 684, 1141.
- (4) *Re Soldby*, unreported.
- (5) *Re Gibbons Trusts* (1882), 45 L.T. 756; 30 W.R. 287; 43 Digest 684, 1145.

Also referred to in argument:

*Re Hall, Hall v. Hall* (1885), 54 L.J.Ch. 527; 51 L.T. 901; 33 W.R. 508; 43 Digest 674, 1043.

*Re Sutton*, [1885] W.N. 122, L.J.J., 43 Digest 684, 1142.

**Motion** by Mary Jane Broadbent, the legal personal representative of the last surviving executor of the will of Joseph Higginbottom, and by two beneficiaries under the said will, to discharge an order made in chambers upon the application of the majority of the beneficiaries under the said will appointing certain persons to be trustees thereof.

Edward Lees died on Dec. 1, 1842, and John Higginbottom died on Jan. 16, 1853. By his will, dated Jan. 15, 1853, John Higginbottom appointed his wife Sarah Higginbottom the sole executrix thereof, and devised to her all his trust estates. Sarah Higginbottom died on Mar. 18, 1885, having by her will, dated Mar. 16, 1885, appointed Mary Jane Broadbent the sole executrix thereof, and devised her trust estates to the said M. J. Broadbent. On May 2, 1892, M. J. Broadbent proved the will of the said Sarah Higginbottom.

- A On Feb. 23, 1892, an originating summons, intituled in the matter of the trusts of the will of Joseph Higginbottom, deceased, and in the matter of the Trustee Acts, 1850 and 1852, was taken out by one of the persons beneficially entitled under the trusts of the said will, for the appointment of certain persons as trustees of the said will, and for the vesting of the real estate in such trustees, and, on May 20, 1892, an order was made by the judge in chambers accordingly, with the concurrence of beneficiaries entitled in all to about five-sixths of the trust estate.

This was a motion on behalf of Mary Jane Broadbent and two of the remaining beneficiaries that the order of May 20, 1892, might be discharged. Mary Jane Broadbent was not herself beneficially entitled to any part of the trust estate.

By the Trustee Act, 1852, s. 9 :

- C “That in all cases where it shall be expedient to appoint a new Trustee, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said court to make an Order appointing a new Trustee or new Trustees, whether there be any existing Trustee or not at the time of making such Order.”

By the Conveyancing Act, 1881, s. 31 (1) :

- D “Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable as aforesaid.”

- F A. G. Roby for the applicant, Mary Jane Broadbent.  
J. Roskill for the applicants upon the summons.

*Cur. adv. vult.*

- G July 8, 1892. KEKEWICH, J.—Mary Jane Broadbent, the legal personal representative of the last surviving executor of the testator's will, insists that, she being willing to exercise such powers as are vested in her by statute or otherwise, including that of appointing new trustees, no order for the appointment of new trustees can properly be made by the court. The question was argued as one of jurisdiction, and probably that is the proper view of the question which has to be decided. It is immaterial, however, whether the court has no jurisdiction, or, having it, declines to exercise it; and my judgment proceeds upon grounds equally applicable to either position.

- H The non-interference with the legal power of appointment of new trustees is established by several cases. *Re Gadd* (1) is now generally quoted, but I take the principle to be stated clearly in *Tempest v. Lord Camoys* (2), *Re Gadd* (1) only adapting that principle to the particular case. The same principle is seen in I *Re Hodson's Settlement* (3), as to which I have a note that in *Re Soldby* (4) the Master of the Rolls (probably LORD ROMILLY) followed it when the legal bar was given by Lord Campbell's Act (Fatal Accidents Act, 1846). The remarks of KAY, J., in *Re Gibbon's Trusts* (5) which was a consent petition, do not militate against this, the facts and the arguments to which they were addressed being of an entirely different character.

There are many points for consideration in this particular case before me, such as the devolution of the legal estate, and the construction as regards the beneficial interest, which may be passed over now with the single observation that

they present difficulties sufficient to make one pause, and I will deal only with the one question I have already noticed. No objection has been taken to either of the trustees proposed by the applicants. They have been selected by a number of persons who are largely interested in the estate, and to whose voice weight ought to be given. Mary Jane Broadbent is not herself a beneficiary, and probably her zeal is due to the influence of others rather than to any honest desire on her own part to act as trustee. In any further proceedings in this matter—and I apprehend that further proceedings are probable—the influence to which I have alluded will require to be carefully watched. It will be the duty of any judge before whom the matter comes to take such care as his power enables him to do that the zeal to which I have referred does not cast more than a proper proportion of costs on this small estate. She can, however, in my opinion use her legal bar to prevent an advantageous appointment of new trustees, and to that extent, at any rate, increase the cost of administering the estate.

Therefore, now that I have had an opportunity of fully considering it, the order made at chambers, the pronouncement of which was, I think, dictated rather by an earnest desire to do what was the best for all concerned than by strict adherence to legal results, must be discharged. In discharging it I have no power whatever to order any costs to be paid out of the estate. I might, of course, order the applicants to pay the costs, either here or in chambers, or on both occasions, but I think that would be extremely unfair to them. They have brought forward two unobjectionable trustees, approved, as I have already mentioned, by a large number of beneficiaries, and, when they originally made the application, Mary Jane Broadbent had not completed her legal title, and was not in a position to raise the legal objections which she has now raised. Therefore, it would be wrong, in my judgment, to order these applicants to pay any costs, though unfortunately I must leave them to bear their own.

I cannot deal with Mary Jane Broadbent's costs now. I do not say that she will not be entitled to them at any future time. The order intended to be made in chambers was that the costs should not be dealt with by that order. Unfortunately, I think, a form, which I am told is a new one—it is certainly new to me—was adopted and raised a question whether the order did not in terms say that she was not to be allowed any costs. That was distinctly adverse to my own express view in chambers. In now giving no costs I wish it to be understood that I do so in the ordinary form. I make no order respecting the costs of the application; that decides nothing about them whatever. The order, therefore, will simply be that the order made in chambers be discharged.

*Motion allowed.*

Solicitors: *H. Barber*, Ashton-under-Lyne; *Lord & Son*, Ashton-under-Lyne.

[*Reported by J. H. BAKEWELL, ESQ., Barrister-at-Law.*]



A

## Re LORD GERARD'S SETTLED ESTATE

[COURT OF APPEAL (Lindley, Lopes and A. L. Smith, L.JJ.), July 17, 18, 1893]

[Reported [1893] 3 Ch. 252; 63 L.J.Ch. 23; 69 L.T. 393;

9 T.L.R. 587; 37 Sol. Jo. 648; 7 R. 227]

B

*Settled Land—Improvement—Application of capital money—Matters of amenity and luxury—Structural alterations and additions to mansion house—Residence for agent—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 21, s. 25—Settled Land Act, 1890 (53 & 54 Vict., c. 69), s. 13.*

C

By a scheme submitted by the tenant for life to the trustees of a settled estate which had recently been purchased for £198,000, it was proposed—(i) to build two towers at the north-east and south-east angles of the mansion-house, to match those standing at the corresponding angles; (ii) to build a new vestibule with a portico in keeping with the style of the building; (iii) to build an addition to the east wing to correspond with that of the west wing; (iv) to face the north front of the house with stone and to introduce mullioned windows; (v) to build a chapel for Roman Catholic services; (vi) to renew the stone copings and finials of the west wing; (vii) to build new stables, the existing stables being unsuitable and wholly insufficient for the requirements of the mansion; (viii) to build a small house for the residence of the estate agent, there being no proper accommodation for the agent on the property. There was an additional scheme for putting a new roof on the house. The total cost of these proposed improvements was estimated at £18,250. The question was whether this sum was to be personally paid by the tenant for life, or whether the court had power, under the Settled Land Acts, to authorise the payment to be made out of capital money subject to the settlement. The tenant for life was expending upon other improvements a further sum of over £34,000 out of his own moneys. The trustees were willing to accede to the wishes of the tenant for life if the court should be of opinion that they could do so consistently with their duty.

D

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**Held:** as regards items (i) to (vi) inclusive, the Settled Land Acts, 1882 and 1890, did not authorise the application of capital money to matters of mere amenity or luxury, such as the indulgence of architectural taste and as regards items (vii) and (viii) the proposals did not fall within any category of improvements authorised by those Acts; and, therefore, the court could not sanction the application of capital money for any of the proposed improvements.

G

*Re Houghton Estate* (1) (1885), 30 Ch.D. 102 questioned.

H

*Re De Teissier's Settled Estates, Re De Teissier's Trusts* (1) (1885), *De Teissier v. De Teissier* (2), [1893] 1 Ch. 153, approved.

**Notes.** The Settled Land Act, 1882 (except s. 30) and the Settled Land Act, 1890, have been repealed by the Settled Land Act, 1925. For s. 21 of the 1882 Act see now s. 73 of the 1925 Act and for s. 25 of the 1882 Act and s. 13 of the 1890 Act see s. 83 and Sched. 3 to the Act of 1925.

I

Considered: *Stanford v. Roberts* [1901] 1 Ch. 440; *Re De Crespigny Settled Estates*, [1914] 1 Ch. 227; *Re Insole's Settlement*, [1938] 3 All E.R. 406. Referred to: *Re Tucker's Settled Estates*, [1895] 2 Ch. 468; *Re Wright's Settled Estates* (1900), 83 L.T. 159.

As to improvements payable out of capital money, see 23 HALSBURY'S LAWS (3rd Edn.) 116; and for cases see 30 DIGEST (Repl.) 324 et seq. For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

(1) *Re Houghton Estate* (1885), 30 Ch.D. 102; 55 L.J.Ch. 37; 33 W.R. 869;

sub nom. *Marquis of Cholmondeley's Settled Estate*, 53 L.T. 196; 30 Digest (Repl.) 314, 36. A

- (2) *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153; 62 L.J.Ch. 552; 68 L.T. 275; 41 W.R. 184, 186; 9 T.L.R. 62; 87 Sol. Jo. 46, 47; 3 R. 103, 111; 30 Digest (Repl.) 326, 164.
- (3) *Drake v. Trefusis* (1875), 10 Ch. App. 364; 33 L.T. 85; 23 W.R. 762, L.J.J.; 30 Digest (Repl.) 313, 23. B

Also referred to in argument:

*Re Leigh's Estate* (1871), 6 Ch. App. 887; 40 L.J.Ch. 687; 25 L.T. 644; 19 W.R. 1105, L.J.J.; 11 Digest (Repl.) 252, 1247.

*Re Speer's Trusts* (1876), 3 Ch.D. 262; 24 W.R. 880; 30 Digest (Repl.) 314, 33.

*Re Lytton's Settled Estates*, [1884] W.N. 193; 11 Digest (Repl.) 253, 1251. C

*Re Johnson's Settlements* (1869), L.R. 8 Eq. 348; 11 Digest (Repl.) 253, 1259.

**Appeal** by the tenant for life of settled land from an order of CHITTY, J., dated June 1, 1893.

An originating summons was taken out on behalf of the Right Hon. William Cansfield Baron Gerard, the tenant for life in possession of the Garswood estates, situate in the county of Lancaster, and the Eastwell Park estate, situate in the county of Kent (respectively settled by or by reference to a settlement made by an indenture dated Mar. 24, 1875), against Frederick Gerard and Sir John Lawson, the trustees for the purposes of the Settled Land Acts of that settlement. The summons asked that it might be declared that all the improvements and works specified in the two schemes, dated respectively Feb. 16, 1893, and April 17, 1893, submitted by the applicant to the trustees of the settlement for their approval, and proposed to be executed to and on the Eastwell Park Estate, were respectively improvements authorised by the Settled Land Acts, 1882 to 1890; and alternatively that it might be ascertained and declared which of the improvements and works specified in the schemes were improvements authorised by the Settled Land Acts. The estimated total cost of the proposed improvements amounted to £18,250. D

The summons was adjourned into court, and came on to be heard before CHITTY, J., who held that none of the proposed improvements were such as the Acts authorised to be paid out of capital money. E

*Byrne, Q.C.*, and *Upjohn* for the tenant for life.  
*T. C. Wright* for the trustees. F

**LINDLEY, L.J.**—This is an appeal from a decision of CHITTY, J., made on the application of the tenant for life of certain settled estates. The trustees for the purposes of the Settled Land Acts desire to have the opinion of the court. The summons taken out by the tenant for life asks for a declaration that all the improvements and works specified in two schemes mentioned in the summons submitted by the applicant to the trustees of the settlement for their approval, and proposed to be executed to and on the Eastwell Park Estate are respectively improvements authorised by the Settled Land Acts, 1882 to 1890. Alternatively it asks that it may be ascertained and declared which of the improvements and works specified in the schemes are improvements authorised by the Settled Land Acts. CHITTY, J., has made an order in these terms: G

"This court being of opinion that none of the improvements and works specified in the said two schemes are improvements authorised by the Settled Land Acts, or which ought to be paid for out of capital moneys doth order that the said summons do stand dismissed and that the respondents, the trustees, take their costs." H

The appeal from that order is brought before us, and we are asked to say that if all the improvements and alterations suggested are not within the Settled Land Acts at all events some of them are. I

- A** In order to deal with that we must look and see, of course, what the schemes are. [His LORDSHIP read and commented on the schemes, and continued:] The first question that arises is on the true construction of the Settled Land Acts, and I proceed at once with the construction contended for on behalf of the tenant for life, which lies at the root of nine-tenths of this case. The argument is that the decisions on the Lands Clauses Act, 1845, of which *Drake v. Trefusis* (3) may be taken as a type, are decisions to be applied to the Settled Land Act, 1882, s. 2 (vii).
- B** The Settled Land Act, 1882, including the Acts which have been since passed to amend it, notably the Act of 1890, forms a code applicable to the subject-matter with which those Acts deal. Looking at the scheme of the Settled Land Act, 1882, and especially at s. 21 and s. 25, it appears to me that it would be a distinct mistake to apply to s. 21 (vii), the construction which has been placed on similar words in another Act of Parliament having totally different objects. Section 21 of the Act of 1882 enacts as follows: [His LORDSHIP read the section, and continued:] Then we come to a series of modes, including investment in government securities, the discharge, purchase, or redemption of incumbrances, improvements authorised by this Act (which refers us to s. 25 and s. 26), payment for equality of exchange, purchase of the seignory, and purchase of the reversion. Then comes sub-s. (vii), "In purchase of land in fee simple," and so on. Then sub-s. (viii) empowers the purchase either in fee simple or for a term of sixty years or more, of mines and minerals. Sub-s. (ix) relates to the payment to any person becoming absolutely entitled. Sub-section (x) relates to the payment of costs, and sub-s. (xi) authorises capital money to be applied in any other mode in which money produced by the exercise of a power in the settlement is applicable thereunder.
- E** That is an enumeration of the purposes for which capital money may be applied, and having regard to that enumeration and to the enlargement of it in s. 25 and s. 26 I cannot construe s. 21 (vii) as including matters which the court has held may be included under the Lands Clauses Act, 1845. We are not dealing with the Lands Clauses Act. It has nothing to do with the present case whatever; and it is not a code addressed to the same subject-matter as the Settled Land Acts.
- F** Although the court has seen its way under the Lands Clauses Act, 1845, to allow money paid into court under that Act, and taken under a special Act of Parliament to be employed in erecting buildings, but not in improvements, it appears to me that to hold that that line of cases is to be incorporated into s. 21 (vii) is inconsistent with what is enacted in s. 25. If that line of cases is to be so applied there would be no use whatever in having enumerated in s. 25 such objects as building cottages for labourers, farmhouses, saw mills, and other things of that kind.
- G** One must treat it as a whole and not bring into this Act of Parliament authorities on other Acts of Parliament passed for different purposes altogether.
- That lies at the root of this case, and it throws us on the Settled Land Act, 1882, itself. Looking at the Settled Land Act itself, we must see which of these improvements or alterations are authorised by the Act and not by cases on other Acts.
- H** Without going through them at any length, I may at once dispose of them by heads. First of all take the mansion-house. With regard to the mansion-house it strikes me that the present owner has an ugly house—I dare say it is—and he wants to get a handsome house. It is a natural thing for him to do so. But when he is seeking to do it out of money which is not his own, he must show the authority for so doing it. We are driven, therefore, naturally and necessarily
- I** on the sections in the various Settled Land Acts, and when we come to examine those sections, we cannot find anything which goes the length of authorising the expenditure of capital money simply in beautifying an ugly house. It is not to be found there, and we cannot authorise it to be done. That disposes of a good many of the items.

The same observation really applies with respect to the chapel. There is nothing which authorises us to allow the expenditure of capital money in the erection of that chapel, and if the tenant for life wants a chapel he must pay for it himself.

Coming now to the agent's house, precisely the same observations apply. As



regards the agent's house we have been referred to the authority of *Re Houghton Estate* (1) where BACON, V.-C., thought he might authorise such an expenditure. I rather gather from the argument addressed to the Vice-Chancellor by Mr. Marten that the agent's house there was a farmhouse in which the agent lived, because Mr. Marten put it that it might come under s. 25 (i), viz: "Farmhouses, offices, and outbuildings and other buildings for farm purposes." The Vice-Chancellor seems to have thought so too. Of course if that were so—if the agent's house there was a farmhouse in which the agent was living—there is no difficulty about it. But if the agent's house in that case was what the agent's house in this case is to be—if the Vice-Chancellor meant to go that length—then I cannot say that that case is in conformity with the Act of Parliament. I cannot find that it is. The building of a new agent's house is not within any of the subsections of the Act which is before us.

That disposes of a good deal of this application, but there remains the question of the stables. The argument as to the stables is extremely ingenious. There is nothing about stables in the Act of Parliament. If it is to be got in at all, it must be got in under such general words as buildings, outbuildings, or something of that kind. It is said that this sum of £6,500 for new stables can be authorised not so much under the Act of 1882—there seems to be confessedly a difficulty in getting it under that Act—but under the enlarged section s. 13 of the Settled Land Act, 1890. Section 13 of the Act of 1890 undoubtedly enlarges s. 25 of the Act of 1882, and it adds certain things which may be authorised, viz.,

"(i) Bridges; (ii) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let."

I think that might justify the expenditure of capital moneys in additions or alterations in stables, if such additions or alterations were reasonably necessary or proper to enable the same to be let. But then I also agree with the view which has been taken by the courts of first instance in other cases than this, viz., that where there is no question of letting, one cannot spend capital moneys for such purposes. Lord Gerard is not going to let this property. He is going to inhabit it himself. I cannot differ from the construction put on that s. 13 (ii) in *Re De Teissier's Settled Estates* (2) by CHITTY, J., in which he says in effect ([1893] 1 Ch. at p. 159):

"You talk to me about authorising capital moneys to be spent in addition to or in the alterations of buildings which are reasonably necessary for the purpose of enabling the mansion to be let. You must show me that there is some probability of letting the place or some desire to let it. Until you do that, you cannot enforce that section."

I think that is a perfectly right and proper construction to be placed on that particular clause. Then s. 13 (iii) of the Act of 1890 relates to the erection of buildings in substitution for buildings within an urban sanitary district. I need not refer more fully to that provision, for it is inapplicable. Then comes s. 13 (iv) which provides:

"The re-building of the principal mansion-house on the settled land: Provided that the sum to be applied under this subsection shall not exceed one-half of the annual rental of the settled land."

It is argued that, although nothing is said about stables in the Act, the stables are part of the principal mansion-house, and, therefore, the court may authorise the spending of anything up to the statutory limit in re-building the stables.

Whether stables can or cannot be regarded as part of the principal mansion-house is a question of fact in each particular case. In some cases I think they might be. In some cases, I am clear that they could not. It depends on where the stables are, and what they are for. All stables could not be regarded as part of the principal mansion-house. On the other hand, the stables may be so connected

- A** with the principal mansion-house— not merely physically, but by occupation, enjoyment, and propinquity—as to fall within the expression “re-building the principal mansion-house.” In this particular case, it may be that the old stables were so used for the purposes of the mansion-house and so near it that they must be fairly regarded as part of the principal mansion-house. But what is the scope of s. 13 (iv)? It applies to the re-building of the principal mansion-house. Could
- B** one justify the expenditure of capital moneys in re-building the principal mansion which is pulled down simply because it is ugly and is to be re-built to suit the tenant for life? I do not think that at all. That is really the case with regard to these stables. These stables were old stables. They were very good except that they wanted better ventilation and better draining. They were not out of repair. They were not destroyed; but the tenant for life wanted to make a magnificent
- C** house, and did not want to have ugly stables; and this necessity for pulling down these stables is a piece of artistic fancy.

I cannot bring myself to hold that there is a re-building of the principal mansion-house within the true meaning of this subsection. Even assuming that if these stables had been burnt, and had been in a ruinous condition, capital moneys might have been spent on re-building them within s. 13 (iv). I am not prepared to hold

**D** that it would be right for us to sanction this outlay on stables with which there is no real fault to be found except that they are old-fashioned and ugly. It seems to me, therefore, that the view that has been taken by CHITTY, J., is correct. The point about the Lands Clauses Act, 1845, I felt was important, and, therefore, I have dealt with the case at some length. The appeal must be dismissed with costs.

- E** **LOPES, L.J.**—I am of the same opinion. With regard to the point that has been made in respect to the Lands Clauses Act, 1845, I think the answer to that point is a simple one. It is this, that the application which we are now dealing with is an application under the Settled Land Acts and not under the Lands Clauses Act, 1845. Therefore, it seems to me that the authorities which have been cited to us having reference to the Lands Clauses Act, 1845, have no application
- F** to the present case.

The Settled Lands Acts, 1882 and 1890, contain a most complete and exhaustive code of the different matters in respect of which capital money may be applied for improvements. That code is most specific. It is as particularly and carefully drawn as any code for such a purpose could well be. Speaking generally of that code I think that all the improvements authorised under the code (I mean that code contained in those two Acts in respect of improvements) were intended by the legislature to be improvements which were calculated to render the settled land more remunerative. I think that the legislature considered that the capital money under this Act was to be employed only in improvements calculated to increase or calculated to maintain the income of the settled land. The more carefully that code is examined the more clear it will be that such was the intention of the

**G** legislature. I do not think that the legislature intended that the capital money was to be employed in respect of matters which I will describe as mere amenities— matters which really are matters of mere luxury. I do not think, for instance, that capital money can be authorised to be expended in the indulgence of architectural taste. Many of the things in this case really may be summarised under matters involving architectural taste.

- I** If I am correct in that view, that disposes of several of the things in respect of which capital money ought to be applied here. It disposes for instance of the chapel. It disposes of the towers. It disposes of the wings. It disposes of the vestibule. To my mind these are all matters of architectural taste or architectural amenity. However, there are two other matters which cannot be so easily brought under that head. The two matters I refer to are the agent's house and the stables. With regard to the agent's house, one asks oneself this question: Is that an improvement which is authorised by that code? I look carefully through the code contained in s. 25 of the Act of 1882, and then to the supplemental code

contained in the Act of 1890, s. 13. I can find no words in either of those sections which would include the agent's house. An endeavour is made to bring the agent's house within s. 25 (x) of the Act of 1882. I quite feel that, if the agent's house can be brought under any words, it is under the words contained in that provision. The words are, "cottages for labourers, farm servants, and artisans employed on the settled land or not." Certainly, an agent is not a labourer; nor is he a farm servant; nor is he an artisan. I think, therefore, that he is clearly excluded from that subsection. But then I am met with the decision in *Re Houghton Estate* (1), which has been referred to. It was a judgment of BACON, V.-C. At first sight I was much impressed by that case. But I think the case, when carefully examined, may be explained in the way in which LINDLEY, L.J., has explained it, viz., that the house there was a farmhouse. Of course, if that is correct, it would then come under s. 25 (xi), "Farmhouses, offices, and outbuildings and other buildings for farm purposes." There would be no difficulty in bringing that within the code. But I am not at all clear myself, after reading the judgment of the Vice-Chancellor, whether he is not, if I may respectfully say so, somewhat confused between the position of an agent and the position of a farm-bailiff. If he thought the agent's house in question was the house of a farm-bailiff, then I think it might be brought within the term "farm servants" contained in s. 25 (x). But an agent, to my mind, is a very different person from that; and when you look at the house, which it is sought to have built in this case for the agent, the description of the house itself leads one to the conclusion that a farm bailiff is not intended, but some very superior person. I find that the house is to contain two sitting-rooms, five bedrooms, and a bathroom. I do not think, in all probability, that one would supply a bathroom for a farm bailiff. My view, therefore, of that case is that either the learned Vice-Chancellor thought he was dealing with that which was practically a farmhouse or otherwise that the person for whom that house was intended was not so much in the character of an agent—such as the person would be whom Lord Gerrard would appoint—but rather in the character of a farm bailiff. However, I cannot think for one moment that the agent's house in the present case can be brought in any way within the code contained in either of these Acts of Parliament.

The stables stand on an entirely different footing. It is perfectly clear to my mind that the stables cannot in any possibility be brought within any of the terms or the words contained in s. 25 of the Act of 1882. I do not think it is pretended that they can. But then recourse was had to the supplemental code contained in the Act of 1890, s. 13, and an endeavour was made to bring it within s. 13 (ii). "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." It is clear to my mind that that will not do. In *Re De Teissier's Settled Estates* (2) CHITTY, J., held that the meaning of that section was that the property in question must at the time be in contemplation to be let. The words he used were these ([1893] 1 Ch. at p. 156):

"This is not the kind of case that subsection was intended to provide for. It often happens that trustees have on their hands an old house which they come and tell me they cannot let because it has no billiard-room, or is without certain conveniences which all tenants, according to modern ideas, would insist upon. Additions and alterations such as these I usually consider proper, and allow under this sub-s. (ii), but before this section can apply there must be an actual letting in contemplation. In the present case the tenant for life proposes to occupy the house and some of the proposed repairs and alterations are already done, and the money spent."

All those latter words in that sentence apply to the case here. In this case the tenant for life intends to occupy the house and stables himself, and here too, as I understand, a very large portion of these alterations have been already made, and the money expended on them.

Therefore, according to my view, the stables cannot be brought within s. 13 (ii)



**A** of the Act of 1890. Then counsel for the tenant for life says that he brings it in under s. 13 (iv) of the Act of 1890. The words there are these, "The re-building of the principal mansion-house on the settled land." Several points arise under those words, which it is not necessary according to my view to decide in this case. It may be, and probably would be, that stables in certain cases would be held to be part of the principal mansion-house, when they are near the house, and I suppose practically amount to a necessary adjunct to the house. On the other hand there may be hunting stables at some distance off, which I think would not be held to be part of the principal mansion-house. I am inclined to concur in what has already been said in that respect, that as to whether the stables are part or not part of the principal mansion-house must in each case depend on the particular circumstances. The words on which I rely are these, "The re-building of the principal mansion-house on the settled land." I ask myself this question: "Is this a re-building?" and I say distinctly "It is not." What was the state of things before Lord Gerard pulled down these stables, as no doubt he was entitled to do, being a tenant for life without impeachment of waste. It is not suggested that they were not in excellent repair. It is said that they were old, that they were primitive, that they were unsuitable, and may be more or less uncomfortable. It is also alleged that they were not so well drained as they should be, and not so well ventilated as they should be. But the structure, as I understand was good and substantial. Even assuming that in this case they may be held to be part of the principal mansion-house, I cannot for one moment think that the legislature ever intended that simply and solely because old stables that were in good and substantial repair did not altogether suit the requirements and fancies of any particular tenant for life, on that account a pulling down and re-building was to be authorised by these Acts. Therefore, I come to the conclusion that neither the agent's house nor the stables are matters in respect of which those provisions of those Acts to which I have referred ought to be applied.

**F** There is only one other observation that I desire to make, and it was made by CHITTY, J., that is with regard to s. 53 of the Act of 1882. The section is familiar, but I had better first call attention to the terms of it, because I think it is not immaterial.

"A tenant for life shall in exercising any power under this Act have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

**G** As I understand the authorities, the interpretation to be put on that section is this, that while it does not impose on the tenant for life the rights of a trustee, it does more or less impose on him the responsibilities of a trustee. If that is so, what I ask myself is this: If the capital money which is sought in this case to be applied for the purposes which have been brought to our notice were so applied, might it not be justly said that it would be a breach of trust on the part of the trustee if he so applied trust money? On the whole, I am clearly of opinion that the judgment of CHITTY, J., was right.

**I** **A. L. SMITH, L.J.**—In this case Lord Gerard has within a recent period purchased Eastwell Park, for which he paid £198,000, borrowing the principal part of the money on mortgage. He found a house, which, although old, was a house which the Duke and Duchess of Edinburgh and their family had taken on lease and resided in for five or six years. It is not suggested that since the Duke left, the house has been burnt, or that it had come into any great dilapidation. But Lord Gerard, having bought this house for his own whim and fancy, thought fit to improve and modernise it, and commenced by laying out for that purpose on this house an amount which is stated to be more than £34,000; but the amount is not material. He now comes to this court to be allowed to apply capital moneys which are in settlement to carry out these operations to the amount of

£18,000 odd. The question is, whether for these purposes, and under these circumstances, this court should allow what he asks for. A

In the first place, I wish to state that my own opinion is that it is not the right way to construe an Act of Parliament passed in 1882 for a specific purpose, and which constitutes a code by itself, to go back to another Act which was passed nearly forty years before for another purpose altogether, viz., the Lands Clauses Consolidation Act, 1845. I am myself quite willing to leave cases which have been decided on the Lands Clauses Consolidation Act to themselves, with this remark, that it does seem to me that BACON, V.-C., in *Re Houghton Estate* (1) went to the extreme limit when he held that under the Act a person was entitled to employ capital moneys to build a new house. That is all I wish to say. The way in which the Vice-Chancellor arrived at it was this: He said: B

"He may buy land; he may buy land, therefore, with a house on it: and therefore, he may build a new house on it himself." C

I do not say that that is wrong. All I say is that that was going to the extreme verge. That, however, is what the learned judge did. But that does not apply to the present case.

Undoubtedly, as has been pointed out by LINDLEY, L.J., under s. 21 (vii) and (viii) of the Act of 1882 investments may be made of capital moneys in the purchase of land and in the purchase of mines and minerals. But that, in my opinion—particularly taking into consideration the subsequent legislation—does not authorise the investment of that money in building houses unless they are specifically mentioned as two classes of houses are mentioned in s. 25 of that Act to which I will now turn. D

Section 25, as it seems to me, deals with the improvements and protection of the estate. I need not go through the whole of the subsections—twenty in number—but they are all for the improvement, and it seems to me might be said to be for the protection and improvement of the estate. They could in one way be protecting it, for they embrace matters which certainly would benefit the estate if moneys were about to be laid out. E

I come to s. 25 (xi), and I will deal with *Re Houghton Estates* (1), in which BACON, V.-C., decided that within this s. 25 is to be found authority to build an agent's house with capital moneys. On whatever basis it was that the learned Vice-Chancellor decided that case I cannot myself see that an agent's house comes within this section. All s. 25 (x) deals with is "Cottages for labourers, farm servants, and artisans employed on the settled land or not." That does not include an agent's house. The cottages are limited to the purposes for which they are to be built. Then s. 25 (xi) is "Farm houses, offices, and outbuildings and other buildings for farm purposes." That does not include an agent's house. And there is no other provision in s. 25 which deals at all with the building of either cottages or farmhouses, or houses of any kind; therefore, I think that the agent's house which is now asked for (money being asked to the amount of between £700 and £800 to build it) does not come within s. 25. F

I now pass on to the later Act, namely, the Settled Land Act, 1890. It is said, I understand, that s. 13 (ii) would apply to the agent's house if it applied at all. To what does s. 25 (ii) relate? Only "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." That would not apply to the agent's house at all. It would only apply to the question of stables. But before I come to that, I wish to read what is said about the stables in the scheme. It is said that the block of stable offices is of the same date as the original mansion, and is in a very uncomfortable and unsuitable condition and wholly insufficient for the requirements of the mansion. I dare say that that may be so after the mansion has been embellished and modernised as it is being embellished and modernised by Lord Gerard at the present time. Then it is said that the plan of the stable and fittings is of the most primitive description; that the ceilings are low and the drainage and ventilation very defective; and that G H I

- A** it would be only a waste of money to attempt to do anything to the existing structure as no reasonable expenditure would ever make it suitable for the mansion. That is the governing phrase in the scheme. The cost, the scheme goes on to say, would be almost as much as that of re-building, and the result would not be satisfactory; and that it is, therefore, proposed to build a new stable. Now I come to this: Is the pulling down and re-building of a stable on a new site and
- B** on an enlarged area for the purpose of modernising the stable a re-building of a principal mansion-house? That is the question which I have got to answer. It takes some steps to get to that. I repeat it, is the pulling down and re-building of a stable on a new site, with a different elevation and more magnificent, as is pointed out by CHITTY, J., a re-building of a principal mansion-house within s. 13 (ii)? I will just make one further remark on s. 13 (ii) simply to say that I agree
- C** with what has fallen from CHITTY, J., and LINDLEY and LOPES, L.J.J., and that is, that s. 13 (ii) clearly to my mind only sanctions the making of any additions to or alterations in buildings. I will read three words into s. 13 (ii) to make my view of it abundantly clear. Those words are: "Which may be," so that the provision reads thus: "... Which may be reasonably necessary or proper to enable the same to be let." One must read those words in as if they were comprised in the provision as it is; and, unless there is a present intention for a letting which does not exist in this case, s. 13 (ii) does not apply.

- I come now to s. 13 (iv), which is, "The re-building of the principal mansion-house on the settled land." I think that that may be read as including the re-building of part of the principal mansion-house on the settled land. By that I mean this: Assuming a wing was burnt down, or assuming a part was blown
- E** down by storm or tempest, I should think it would be a wrong construction to put on this provision that unless it was all blown down, or all burnt down, you could not apply capital moneys to re-building it. I, therefore, think you may read the provision thus: "The re-building of the principal mansion-house or part of the principal mansion-house on the settled land." Then comes the question, are these stables part of the principal mansion-house? That is the only way in which the
- F** stables are dragged in I think. There may be stables which are part of the principal mansion-house. As LINDLEY, L.J., said, and in this I entirely agree, there may be and are stables which are clearly not part of the principal mansion-house. But I will take it in this case that these stables which are near and in such propinquity to the principal mansion-house may be taken as part of the principal mansion-house. Therefore, the applicant progresses so far. But in the
- G** circumstances of this case has there been a re-building of the stables, as there must be a re-building of the principal mansion-house to get it within s. 13 (iv)? In my judgment of the facts there has not been. The stables were not burnt down, the stables were not in decay. But all that was wanted to be done was to modernise and embellish them in the same way as the mansion has been modernised and embellished. The stables had become antiquated, and it is all done because the
- H** house was improved up to date. Under those circumstances, that is not a re-building within the meaning of this provision. It is not argued that what the tenant for life is doing to the mansion-house would come within s. 13 (iv). And, in my opinion, what he is doing to the stables does not come within that provision.

- I only wish to make one more remark on s. 13 (iv), because the matter was debated. At one time I thought differently, but counsel for the tenant for life
- I** has converted me. The words are, "The re-building of the principal mansion-house on the settled land: Provided that the sum to be applied under the subsection shall not exceed one-half of the annual rental of the settled land." I myself think, and I am only speaking for myself, that the settled land is not confined to Eastwell Park estate, but it includes the whole of the settled land which is in the settlement on the same trusts and the value of the income if rental, or interest of the money if invested. I agree that one would have to add together the value of the Lancashire estate and the Eastwell Park estate. I think the appeal should be dismissed.



**LINDLEY, L.J.**—I do not at all differ from the last observation of my learned brother. I think it is right. A

**LOPES, L.J.**—I also wish to say that I do not differ. I said nothing before upon the point, because I did not think it was necessary for this case.

*Appeal dismissed.* B

Solicitors: *Meynell & Pemberton.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

## Re MORGAN. MORGAN v. MORGAN

[COURT OF APPEAL (Lindley, Lopes and A. L. Smith, L.JJ.), June 9, 12, 1893] D

[Reported [1893] 3 Ch. 222; 62 L.J.Ch. 789; 69 L.T. 407;  
37 Sol. Jo. 581]

*Annuity—Rights of annuitant—Annual sum to grantee “or to his descendants”—Whether perpetual annuity.* E

A testator gave all his property to his executors and trustees on trust out of the interest and rents thereof to pay “the following sums of money.” He then gave to A. “or to his descendants £250 per year.” He also gave a similar sum in like terms to each of two other persons; a sum of “£50 per year” to P.; “10s. per week” to S.; and to each of other persons “a legacy of £10.” He gave the residue of the interest and rents to charities. The will contained no residuary devise or bequest of the corpus of the estate. F

**Held:** on the construction of the will the gift to A. was not a perpetual annuity, and A. was not entitled to the capital sum which would produce such annuity, but only to £250 per annum during his life, the gift to his descendants being only a substitutional gift.

Decision of **STIRLING, J.**, reported 69 L.T. 407, affirmed. G

*Bent v. Cullen* (1) (1871), 6 Ch. App. 235, doubted.

**Notes.** Distinguished: *Re Bawden*, *Bawden v. Cresswell*, *National Provincial Bank v. Cresswell* (1893), 63 L.J.Ch. 412. Considered: *Kirkby v. Phillips*, [1947] 2 All E.R. 777; *Re Levy* (deceased), *Barclays Bank, Ltd. v. Board of Guardians and Trustees for Relief of the Jewish Poor*, [1960] 1 All E.R. 42. Referred to: *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; *Re Jackson, Day v. Atkin*, [1946] 1 All E.R. 327. H

As to perpetual annuity, see 32 HALSBURY'S LAWS (3rd Edn.) 550; and for cases see 39 DIGEST 135 et seq.

Cases referred to:

- (1) *Bent v. Cullen* (1871), 6 Ch. App. 233; 40 L.J.Ch. 250; 19 W.R. 368, L.C.; 39 Digest 137, 308. I
- (2) *Blight v. Hartnoll* (1881), 19 Ch.D. 294; 51 L.J.Ch. 162; sub nom. *Re Blight*, *Blight v. Hartnoll*, 45 L.T. 524; 30 W.R. 513; 39 Digest 136, 299.

**Appeal** from an order dated Mar. 28, 1893, of **STIRLING, J.**

By his will, dated Nov. 20, 1889, Hosier Leslie Frederick Morgan, who died on Feb. 26, 1891, provided:

“I give and bequeath the whole of my property, both real and personal, in-

A reversion or expectancy, unto my executors and trustees hereinafter named and mentioned, upon trust to pay out of the interest and rents arising from the same the following sums of money: I give to my wife, Elizabeth Morgan, £250 per annum, also the use of the house in which I now reside, also the use of all therein contained; I give to Captain H. H. Morgan or to his descendants, £250 per year; also to Mr. Percy Morgan or his descendants £250 per year; B to Mrs. Annie Augusta Hardie or her descendants £250 per year; to Miss Susan Pratten £50 per year; to Mrs. Susan S. Seller 10s. per week; to each of the children of the late Mr. William Addis a legacy of £10. After the death of my wife I give the whole of the contents of my dwelling-house equally between Captain H. H. Morgan, Mr. Percy Morgan, and Mrs. Annie A. Hardie.

C As regards the residue of the interest and rents after the above payments have been made, I give one-tenth to the trustees of the Royal Ophthalmic Hospital, Moorfields, one-tenth to the trustees of the London Hospital, one-tenth to the trustees of St. Thomas' Hospital, one-tenth to the trustees of the Consumption Hospital, Victoria Park; one-twentieth to the City of London Truss Society, Finsbury Square; one-twentieth to the Shipwrecked Fishermen and Mariners' Royal Benevolent Society; one-tenth to be sent to Messrs. D Drexel, Morgan & Co., bankers, New York, for distribution amongst the poor in New York, or any other deserving charity; four-tenths to be sent to Messrs. Drexel & Co. or their representatives, bankers, Philadelphia, to be given by them in four equal shares amongst the poor or any deserving charities of the following four American cities of Philadelphia, Saint Louis, Chicago, and San Francisco."

E A question arose whether the yearly sums given to a named person "or to his descendants" were to be paid in perpetuity so as to confer the right to the capital sum representing the annuity or only during the life of the named person.

STIRLING, J., held that the gifts constituted annuities payable during the life of each named person. Two of the annuitants, Captain H. H. Morgan and Mr. P. Morgan appealed.

F *Cozens-Hardy, Q.C., Hastings, Q.C., and Warrington* for Captain H. H. Morgan and Mr. P. Morgan.

*Sir H. Davey, Q.C., and Ingle Joyce, Buckley, Q.C., and O. L. Clare* for the various charities.

*J. W. Clarke* for the Attorney-General.

G **LINDLEY, L.J.**—The question raised by this appeal turns on the true construction of a will which at first sight looks tolerably intelligible. I suppose, by the look of it, that the will was made by the gentleman himself, but, whoever made it, and whatever he may have meant, we have to deal with the language which he has used.

H The testator gives the whole of his property, real and personal, to his executors, and that is the only place where he talks of his property apart from the income of it, except as regards a small sum of £10, which I will allude to presently, and as regards some furniture. Having given all the property, real and personal, to trustees, the testator continues,

I "upon trust to pay out of the interest and rents arising from the same the following sums of money."

Why does he put in "interest and rents?" He has nothing to pay the following sums of money out of, except his property. He puts in, as it appears to me, "interest and rents," to exclude the idea that he is dealing with the corpus. However, he says,

"upon trust to pay out of the interest and rents arising from the same, the following sums of money: I give to my wife £250 per annum, also the use of the house in which I now reside, also the use of all therein contained."

He refers to "all therein contained" presently, but does not refer to the house again. A

"I give to Capt. H. H. Morgan or his descendants £250 a year; also to Mr. Percy Morgan or his descendants £250 per year; to Mrs. Annie Augusta Hardie or her descendants £250 per year."

We were told that the Morgans were nephews, and Mrs. Hardie a niece. "To Miss Susan Pratten £50 a year." There is nothing about descendants there. She was a spinster, and perhaps he did not expect she would marry. "To Mrs. Susan S. Sellar, 10s. a week." All those are governed by the words B

"Upon trust to pay out of the rents and profits arising from the same the following sums of money."

Those are all annuities of some sum. Then comes: C

"To each of the children of the late Mr. William Addis, a legacy of £10."

That is not an annuity, but cash, also not to be paid out of his capital according to the will, but out of the rents and interest arising from the property. Then after the death of his wife he gives

"the whole of the contents of my dwelling-house equally between Captain H. H. Morgan, Mr. Percy Morgan, and Mrs. Annie A. Hardie." D

Leaving out the furniture, etc., those are the payments which he has directed to be made out of the rents and interest of his property. Then he continues:

"As regards the residue of the rents, and interest after the above payments have been made, I give one-tenth to" E

one charity, and other shares to other charities; and many of those charities apparently have their principal places of work and offices in America. There is nothing else of any importance, and he appoints executors.

The question which arises is whether on the true construction of this will Captain Morgan and Mr. Percy Morgan are entitled to a capital sum which, if invested, I suppose, at  $2\frac{1}{2}$  per cent. now, will produce £250 a year. That is to say, are they entitled, putting it roughly, to £10,000 apiece? It is said they are on the construction of the will and on the authority of certain decided cases. I confess that, looking at the construction of the will, without troubling ourselves with cases, I cannot get out of this will any apparent intention to give these gentlemen anything more than an annuity. I cannot see any sign of an intention to give them a portion of the corpus of his property. On the contrary I think the indications are that the testator did not intend anybody to have the corpus, not even the charitable institutions. His notion was that they should have the income. He never thought anything about the corpus, and was not dwelling on the disposal of the corpus at all. He was giving them what he says is an annuity. I think as regards his wife, and I should say as regards Miss Pratten and Mrs. Susan Sellar, it is too plain for doubt. F

Associated with that, however, there are three annuities or sums or yearly payments of £250 apiece, which are given to his nephews and niece, or to their descendants. If the expression were "and" their descendants I think that there would be considerable force in the argument that they were to take perpetual annuities; but it is "or" their descendants, and there is no context which justifies us in reading "or" as "and." Reading it as we find it, the legal effect of it is that Captain Morgan takes £250 a year if he survives the testator; if he does not, but if he leaves descendants, which means children or grandchildren or great grandchildren, living at the death of the testator, those children, grandchildren, or great grandchildren will take £250 a year as joint tenants, and that will come to an end when they die. They do not take £250 apiece, that is evidently not intended, but they take £250. It is a substitutional gift in the event of Captain Morgan dying in the testator's lifetime. I do not doubt that is the true effect of the expression, "to Captain Morgan or his descendants £250 per year." G



- A Then it is said that inasmuch as the testator only disposed of property by reference to the interest and rents that expression was used by him as equivalent to or as another mode of dealing with the securities. I do not so read it. I cannot help thinking that the scheme of this will is to leave all that he has to charity, subject to such provisions as he has made for his nephews and niece. He gave them £250 a year, or their descendants if they died. Except to that extent he
- B intends everything to go to the charities.

- On that I should have thought the matter reasonably plain, but we are pressed with authorities. I do not see why, if we see what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases, or decisions in other cases. Of course there are principles of law which are to be applied to all wills, but if once one gets at a man's intention, and there is no
- C law to prevent one from giving effect to it, I think that effect should be given to it. The only case which is of any real importance is *Bent v. Cullen* (1), which no doubt was singularly like this. There are differences as there are differences between all wills. One difference I do not think is very important, but it is a difference which accords with the view which I have adopted. It is that these particular annuities are associated with others which are certainly annuities—there is no doubt of it at
- D all. That is an indication of intention, but I cannot help thinking that in *Bent v. Cullen* (1) LORD HATHERLEY, L.C., did for a moment fail to observe the difference between giving a person a portion of the income of a fund and something payable out of it. I cannot help thinking he did so from the language which was commented on in the course of the argument, and which is to be found in his judgment. In cases of this class the distinction is not very important, but in other
- E cases it becomes all important as was pointed out. Supposing the fund becomes deficient it makes all the difference in the world whether a legacy is a portion of a fund or a charge on that fund.

- I do not think that LORD HATHERLEY throws any doubt at all on the soundness of the view expressed more recently by FRY, J., in *Blight v. Hartnoll* (2) that if an annuity is a charge as distinguished from a gift of a portion of the fund, the
- F annuity is not a perpetual annuity. I do not think the law is really open to much doubt; the application of it is the difficulty. I will read from the decision of FRY, J., in *Blight v. Hartnoll* (2), what I take the law to be. He says (19 Ch.D. at p. 296):

- G “As a general rule there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more.”

- That seems to be uncommonly good sense. If I give a person an annuity I do not mean it is to last for ever. If I meant it to last for ever I should give my money in another shape. No doubt that is *prima facie* the legal effect. He also says (*ibid.*):

- H “It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity.”

- That is to say if the annuity is given not only to the person but afterwards to others, in language showing there is to be no end of it, of course it is a perpetual annuity. He continues (*ibid.*):

- I “It is equally without doubt that there are cases in which the court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the court holds that the unlimited gift of the income is a gift of the corpus from which the income arises.”

It cannot be said here that these annuities are the gift of a portion of a particular fund. The testator gives the whole of his property to executors, and he tells the executors to pay, out of the income, a certain sum of money to such and such

people. It appears to me that this is distinctly a charge on the income as distinguished from a gift of a definite portion of the income of the particular fund. If so, there is nothing in LORD HATHERLEY's judgment which prevents our giving effect to the view which I have adopted. A

It is very difficult to see how LORD HATHERLEY came to his decision in *Bent v. Cullen* (1) except on the footing that there was a momentary forgetfulness of the distinction to which I have referred. He had there a gift out of the income of a particular fund, and the gift of the residue was of income and interest, and I agree that it is very difficult to say that there are grounds for deciding this case one way and that case the other. But after all what have we to do? We have to deal with the will before us, and I cannot see that it was anything more than a gift of an annuity of £250 in the ordinary sense of those words. I think, therefore, the appeal must be dismissed, and the appellants must pay the costs. B

**LOPES, L.J.**—Having regard to the cases it appears to me that the true test to be applied in construing this will is this: Are these annuities, having regard to the language used, charges on a fund or are they gifts of a part of a fund? If they are the former they would be payments to be made during the life of the taker. If the latter, they would be perpetual payments. After very careful consideration I have come to the conclusion, having regard to the language used, that these payments are charges on a particular fund and not gifts of a portion of this particular fund. C

I am quite aware that in arriving at that conclusion I am to a certain extent placed in a difficult position with regard to *Bent v. Cullen* (1), because I candidly admit that I am unable to distinguish the language in this case from the language used in *Bent v. Cullen* (1); but I find that *Bent v. Cullen* (1) is a case about which very little has been said, although it has been referred to in subsequent cases. It appears to me to be a decision which has been repeatedly avoided. There has been, it appears to me, rather a desire in no way to deal with it. I cannot get over the language used in this case "out of the rents and interest" and so on. It seems to me that the language points not to a gift of any particular part of this fund, but to a charge on this particular fund. D

I was very much impressed with the words "or his descendants," which are used in the case of two of the annuities, and "or her descendants," which are used in the case of another of the annuities of £250. At one time I thought that rather pointed to the payments being perpetual, but it is to be observed that the words are not "and to his" or "and to her" but "or to his" and "or to her" descendants. If it had been "and" the case I think would have been very different; the probability is that it would almost have caused us to come to a different conclusion to that at which we have arrived. What is said about these words "or his descendants" is that it makes the thing an alternative one. It is perfectly true that if annuities are dealt with as existing and as likely to be existing and being operative beyond the lives of those who are to take them, that would show an intention to make them perpetuities. It would show an intention on the part of the testator that the annuities should be perpetual. There is no doubt that that is so as a general rule, but according to my view, the true interpretation of these words "or his descendants" is that they were used simply for the purpose of preventing a lapse. E

With regard to the intention of the testator it is very difficult indeed to my mind to determine what his intention was, but I agree with what has been already said, that he intended in all probability not to dispose of the corpus but to create a perpetual trust. I think that is what he contemplated. I am inclined to think that it is very probable indeed that he would be more likely to desire to benefit his relations, such as the Morgans are, than the charities which are mentioned in the latter part of his will. It is also perfectly true that if his intention is such as I have stated, namely, to create a perpetual trust, we are defeating his intention with regard to the different charities, though I think that, having regard to the F

**A** strength of the language, we cannot put any other interpretation than that which we have placed on the earlier part of the will, and, therefore, this appeal should be dismissed.

**A. L. SMITH, L.J.**—I am of the same opinion. It seems to me that certain principles have been laid down which it is too late now to quarrel with—certain  
**B** principles which the cases from those in the House of Lords downwards have followed. The court is called on to determine whether an annuity given in a will is an annuity for life or an annuity in perpetuity. I do not understand that this court in the judgment they are giving are trenching on those principles at all.

The principles deducible from the cases seem to me to be these: First of all, if an annuity is given per se, that is an annuity for life. It seems to me pretty clear  
**C** if the annuity is charged on the income or rents and profits of the estate that is an annuity for life. If, however, it is found that the intention of the testator is to charge the corpus or portion of the corpus of the property which he leaves, although he may do it in form by way of annuity, that is an annuity in perpetuity. It seems to me those three principles have been laid down, and nothing that has fallen from this court trenches on that. The difficulty arises in construing the instru-  
**D** ment keeping those three principles in mind; and in so doing one must make up one's mind under which of those three principles this instrument falls. LINDLEY, L.J., has said everything I could wish to have said, and better than I could have said it, on the true construction of this will, and I agree that if it is clear what is the true construction of a will and the intention of a testator this court ought not to be forced out of that opinion because some other court, on some other will, has  
**E** said that some other testator means otherwise.

As I said, LINDLEY and LOPES, L.J., have put a construction on this will with which I agree, and the only doubt which I have had has been caused by the decision of LORD HATHERLEY in *Bent v. Cullen* (1), because, as LINDLEY, L.J., says, and it is apparent to everyone who reads this will and then reads that will, that they are most uncommonly like each other, but there are differences. All the annuitants in  
**F** this will are put in a bunch, and there are certain annuitants who I think clearly are not intended by the testator to take more than an annuity for life. It is said that the others take more than an annuity for life, that they take an annuity in perpetuity. That state of things LORD HATHERLEY had not before him in the will which he had to construe. I have also come to the conclusion that *Bent v. Cullen* (1), as has been pointed out, has not been acted on, whether it is right or wrong.  
**G** In construing this will I am clearly of opinion that these annuities never were intended by the testator to be a gift of the corpus, or part of the corpus of the estate, and therefore they are only annuities for life.

*Appeal dismissed.*

Solicitors: *Burn & Berridge; Lee & Pembertons; Bircham & Co.; J. H. Lydall;*  
**H** *L. W. Bryne; J. J. Peddell; Hare & Co. for Treasury Solicitor.*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]



## R. v. TYLER AND ANOTHER

[COURT OF APPEAL (Bowen and Kay, L.J.J.), July 28, 1891]

[Reported [1891] 2 Q.B. 588; 61 L.J.M.C. 38; 65 L.T. 662;  
56 J.P. 118; 7 T.L.R. 720]

*Court of Appeal—Jurisdiction—“Criminal cause or matter”—Company—Failure to forward list of members to registrar—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 26, s. 27—Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 47.*

A joint-stock company having (it was alleged) made default in forwarding a list of its members to the Registrar of Joint Stock Companies as required by the Companies Act, s. 26, application was made to a magistrate for a summons charging the company with this default, for which a penalty was imposed by s. 27 of the Act. The magistrate refused to hear the application, and a rule nisi for a mandamus against him to hear and determine it was obtained, and afterwards discharged by the Queen's Bench Division. On an appeal to the Court of Appeal a preliminary objection was raised as to the jurisdiction of the court.

**Held:** default by a company in complying with the provisions of s. 26 of the Act of 1862 was a criminal offence, and so the judgment of the Queen's Bench Division was a judgment “in a criminal cause or matter” within the Supreme Court of Judicature Act, 1873, s. 47, and no appeal would lie to the Court of Appeal.

**Notes.** For ss. 26 and 27 of the Companies Act, 1862, see now ss. 124-127 of the Companies Act, 1948. Section 47 of the Supreme Court of Judicature Act, 1873, has been replaced by s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925.

Considered: *R. v. Garrett, Ex parte Sharf*, [1917] 2 K.B. 99; *R. v. Cory Bros. & Co.*, [1927] All E.R.Rep. 438; *D.P.P. v. Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119. Referred to: *R. v. Young, London County Justices* (1891), 61 L.J.M.C. 42; *Rayson v. South London Tramways Co.* (1893), 69 L.T. 491; *Southport Corpn. v. Birkdale U.D.C.* (1897), 76 L.T. 318; *Mousell Bros. v. London and North Western Rail. Co.*, [1916-17] All E.R.Rep. 1101; *Griffiths v. Studebakers*, [1924] 1 K.B. 102; *Brentnall and Cleland, Ltd. v. L.C.C.*, [1944] 2 All E.R. 552.

As to criminal liability of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 440; and for cases see 9 DIGEST (Repl.) 625. For the Companies Act, 1948, ss. 124-127, see 3 HALSBURY'S STATUTES (2nd Edn.) 554 et seq., and for the Supreme Court of Judicature Consolidation Act, 1925, s. 31 (1) (a), see 5 HALSBURY'S STATUTES (2nd Edn.) 357.

Cases referred to:

- (1) *Mellor v. Denham* (1880), 5 Q.B.D. 467; 49 L.J.M.C. 89; 42 L.T. 493; 44 J.P. 472, C.A.; 14 Digest (Repl.) 28, 9.
- (2) *R. v. Whitchurch* (1881), 7 Q.B.D. 534; sub nom. *Re Nottingham Justices, Ex parte Whitchurch*, 50 L.J.M.C. 99; sub nom. *Ex parte Whitchurch*, 45 L.T. 379; 46 J.P. 134; 29 W.R. 922; sub nom. *Re Whitchurch, Ex parte Nottingham Justices*, 45 J.P. 617, C.A.; 14 Digest (Repl.) 29, 11.
- (3) *Ex parte Schofield*, [1891] 2 Q.B. 428; 60 L.J.M.C. 157; 56 J.P. 4; 39 W.R. 580; 7 T.L.R. 615; sub nom. *Rook v. Schofield*, 64 L.T. 780; 17 Cox, C.C. 303, C.A.; 14 Digest (Repl.) 608, 6023.
- (4) *R. v. Birmingham and Gloucester Rail. Co.* (1842), 3 Q.B. 223; 3 Ry. & Can. Cas. 148; 2 Gal. & Dav. 236; 11 L.J.M.C. 134; 6 Jur. 804; 114 E.R. 492; 13 Digest (Repl.) 328, 1340.
- (5) *R. v. Great North of England Rail. Co.* (1846), 9 Q.B. 315; 16 L.J.M.C. 16; 7 L.T.O.S. 468; 11 J.P. 21; 10 Jur. 755; 2 Cox, C.C. 70; 115 E.R. 1294; 13 Digest (Repl.) 329, 1348.

- A** (6) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 13 Digest (Repl.) 327, 1334.
- (7) *London Joint Stock Bank v. London Corpn.* (1875), 1 C.P.D. 1; 33 L.T. 781; affirmed (1880), 5 C.P.D. 494; 42 L.T. 747; 28 W.R. 696, C.A.; affirmed sub nom. *London Corpn. v. London Joint Stock Bank* (1881), 6 App. Cas. 393; 50 L.J.Q.B. 594; 45 L.T. 81; 29 W.R. 870, H.L.; 13 Digest (Repl.) 334, 1388.
- B**

Also referred to in argument:

- Abrath v. North Eastern Rail. Co.* (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 2 T.L.R. 416, H.L.; 13 Digest (Repl.) 322, 1292.
- C** *Ex parte Beeching* (1825), 4 B. & C. 186; 6 Dow. & Ry. K.B. 209; 3 Dow. & Ry. M.C. 174; 107 E.R. 1010; 16 Digest (Repl.) 301, 757.
- A.-G. v. Siddon* (1830), 1 Cr. & J. 220; 2 Man. & Ry. M.C. 533; 1 Tyr. 41; 9 L.J.O.S. Ex. 7; 148 E.R. 1400; 14 Digest (Repl.) 29, 14.
- Rackham v. Bluck* (1846), 9 Q.B. 691; 16 L.J.Q.B. 82; 11 J.P. 389; 11 Jur. 325; 115 E.R. 1439; sub nom. *Re Bluck, Rackham v. Bluck*, 8 L.T.O.S. 275; 19 Digest (Repl.) 357, 1500.
- D** *Re Eggington* (1853), 2 E. & B. 717; 23 L.J.M.C. 41; 22 L.T.O.S. 77, 118; 18 J.P. 165; 18 Jur. 224; 2 C.L.R. 385; 118 E.R. 936; sub nom. *R. v. Eggington*, 2 W.R. 10; 16 Digest (Repl.) 301, 760.
- A.-G. v. Bradlaugh* (1885), 14 Q.B.D. 667; 54 L.J.Q.B. 205; 52 L.T. 589; 49 J.P. 500; 33 W.R. 673, C.A.; 14 Digest (Repl.) 29, 16.
- E** *R. v. Holl* (1881), 7 Q.B.D. 575; 50 L.J.Q.B. 763, C.A.; 14 Digest (Repl.) 608, 6024.
- Loughborough Highway Board v. Curzon* (1886), 17 Q.B.D. 344; 55 L.J.M.C. 122; 55 L.T. 50; 50 J.P. 788; 34 W.R. 621; 2 T.L.R. 678, C.A.; 14 Digest (Repl.) 610, 6042.
- R. v. Paget* (1881), 8 Q.B.D. 151; 51 L.J.M.C. 9; 45 L.T. 794; 46 J.P. 151; 30 W.R. 336, D.C.; 14 Digest (Repl.) 28, 7.
- F** *R. v. United Kingdom Electric Telegraph Co., Ltd.* (1862), 2 B. & S. 647, n.; 3 F. & F. 73; 31 L.J.M.C. 166; 6 L.T. 378; 26 J.P. 390; 8 Jur.N.S. 1153; 10 W.R. 538; 9 Cox, C.C. 174; 121 E.R. 1212; 26 Digest (Repl.) 329, 478.
- Cattell v. Ireson* (1858), E.B. & E. 91; 21 L.J.M.C. 167; 31 L.T.O.S. 80; 22 J.P. 672; 4 Jur.N.S. 560; 6 W.R. 469; 120 E.R. 441; 3 Digest (Repl.) 454, 430.
- G** *Osborne v. Milman* (1887), 18 Q.B.D. 471; 56 L.J.Q.B. 263; 56 L.T. 808; 51 J.P. 437; 35 W.R. 397; 3 T.L.R. 452, C.A.; 14 Digest (Repl.) 30, 22.

**Appeal** from an Order of the Queen's Bench Division (DAY and LAWRENCE, JJ.), discharging a rule nisi for a mandamus which had been obtained against Alderman Tyler, of the city of London, ordering him to hear and determine an application for a summons under the Companies Act, 1862, s. 27.

**H**

Thomas Noton laid an information before Alderman Tyler, a magistrate of the city of London sitting at the Mansion House, charging the International Commercial Co., Ltd., with having made default in forwarding a list of its members to the Registrar of Joint Stock Companies. By the Companies Act, 1862, s. 25, every company under the Act shall cause to be kept in one or more books a register of its members, and certain particulars as to the members are required to be entered therein.

**I**

By s. 26 it was provided:

"Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall

state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars. . . . The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies."

By s. 27 :

"If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty."

The magistrate refused to issue the summons, and a rule nisi for a mandamus requiring him to hear and determine the application which was obtained against him was afterwards discharged by the Queen's Bench Division. Thomas Noton appealed to this court.

A preliminary objection was raised that the judgment of the Queen's Bench Division was a judgment in "a criminal cause or matter" within s. 47 of the Supreme Court of Judicature Act, 1873, and that, therefore, the appeal would not lie.

*Pitt Lewis, Q.C.*, and *Jervis* for Mr. Noton.

*G. Humphreys* for Alderman Tyler.

*Murphy, Q.C.*, and *J. E. Palmer* for the company.

**BOWEN, L.J.**—This is an appeal from the judgment of the Queen's Bench Division discharging a rule nisi for a mandamus against Alderman Tyler, directing him to hear and determine a complaint against the International Commercial Co., Ltd., under the Companies Act, 1862, s. 27. The Queen's Bench Division having refused the mandamus, a preliminary objection has been taken here that this court has no jurisdiction to hear the appeal on the ground that the case is one of appeal from a judgment of the High Court "in a criminal cause or matter" within the Supreme Court of Judicature Act, 1873, s. 47. Proceedings before justices for the recovery of penalties under an Act of Parliament are shown in many cases before this court to be criminal matters, from *Mellor v. Denham* (1) and *R. v. Whitchurch* (2) down to *Ex parte Schofield* (3). We have now to inquire whether the proceedings against this company for penalties under s. 27 of the Act of 1862 are a "criminal cause or matter" or not.

First we must consider s. 26, for default in complying with the provisions of which these proceedings are taken under s. 27. It deals with a list of members of the company, and requires it, with a summary of certain particulars, to be kept in a certain way, and a copy of it forwarded to the Registrar of Joint Stock Companies. If s. 26 were not followed by s. 27, it could not be doubted that a duty would be created by it in the company, and that if the company did not comply with the provisions of the section there would be a breach of its duty which would amount to a disobedience of the law. It was at first suggested by counsel for Noton that no criminal proceedings can be taken against a corporation, and it is necessary in order to make the steps of our reasoning clear that we should examine that proposition. It would seem contrary to reason to hold that persons could evade a duty cast on them by statute by forming themselves into a company, and still more so when an Act of Parliament imposes a duty upon a company itself. In such a case how is the duty to be enforced otherwise than by indictment? The directors of the company are really responsible for the negligence of the company in not complying with the statute, but they perhaps might not be struck at. It



A may, therefore, I think, be taken that when a duty is imposed on a company in such a way that a breach of it amounts to disobedience of the law, such a breach can properly be the subject of an indictment against the company. That was the law laid down in *R. v. Birmingham and Gloucester Rail. Co.* (3) by PATTESON, J., when, in delivering the judgment of the court, he referred (3 Q.B. at p. 232) to

B "a number of cases which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony or for crimes involving personal violence, as for riots or assaults."

That was a case of nonfeasance, but the doctrine is the same in cases of misfeasance.

C In *R. v. Great North of England Rail. Co.* (5), LORD DENMAN, C.J., in delivering the judgment of the court, said (9 Q.B. at p. 325) :

D "The argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming in the first place that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause or ascribe them with more correctness to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguards."

E Moreover, he says that in *R. v. Birmingham and Gloucester Rail. Co.* (4) the court did not intend to lay down that it is only for nonfeasance that a corporation is indictable. COCKBURN, C.J., in *Pharmaceutical Society v. London and Provincial Supply Association* (6), considered the same point. He says there (4 Q.B.D. at p. 319) :

F "Although it is true that a corporation cannot be indicted for treason or felony, it was established by the case of *R. v. Birmingham and Gloucester Rail. Co.* (4) that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *R. v. Great North of England Rail. Co.* (5) that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway, though they could not be indicted for treason, or felony, or offences against the person."

G It is, therefore, clear that in an ordinary case of a duty imposed by statute, if a breach of it is indictable in the case of an individual, a corporation cannot escape the consequences of committing a breach through the fact of its being a corporation.

H It was further argued that a section in an Act of Parliament directing an act to be done does not necessarily make disobedience to it an offence if it afterwards imposes a penalty for such a breach. Cases may exist where no duty to the public is imposed by the statute, but only a pecuniary loss on the individual as the result of his non-compliance with the provisions of the Act. In such a case disobedience is not intended to be a misdemeanour; the object of the Act is only that a person not complying with it must submit to a penalty. This is a question of the construction of different Acts of Parliament. We must, therefore, inquire here whether this Act of Parliament, by s. 27, directs certain things to be performed by the company which the company may escape from doing if they like to pay the penalty, or whether it imposes an absolute duty on the company and gives a remedy to enforce obedience which does not relieve the company from the consequences of its disobedience to the duty imposed on it.

I So far from showing that the company need not comply with the provisions of s. 26 if it prefers to pay the penalty, s. 27 seems to me to show that a breach of these provisions is a disobedience to the law. The Act does not merely intend

that a breach is to be a condition precedent to the recovery of the penalty. Section 27 throws light on s. 26, and shows clearly that a breach of s. 26 is an offence, and that a proceeding under s. 27 is a criminal proceeding. It would be very remarkable if the legislature imposed on the company a duty the breach of which was not an offence, and yet if the directors of the company acquiesced in the breach they should be deemed guilty of an offence. Such a view would emancipate the company, on whom the duty was imposed, from being an offender and make its directors who acquiesced the only offenders. I do not think that that can be the true meaning of the section. The use of the words "knowingly and wilfully" in s. 27, where the company's directors and managers are referred to, implies that the duty is imposed on the company, not on the directors except as agents of the company. Though the directors or managers are to be punished for permitting the company to be in default, the company itself is not less in default, nor is the character of that default altered. This is the way, I think, in which the words "knowingly and wilfully" are to be explained, and if the section be so read it creates a duty, a breach of which is a disobedience to the law. If so, it is an offence to disobey the provisions of s. 26; and, though by s. 27 a summary pecuniary remedy is given as a punishment instead of an indictment, that is a matter which makes no difference.

It is possible that, in addition to the summary pecuniary remedy, an indictment might lie for this disobedience to the law, but that is a matter which it is unnecessary for us to discuss now. It is enough to say that the mere creation of a summary remedy does not show that disobedience to the provisions of s. 26 does not amount to an offence against the law. If this disobedience of the company is an offence, then the proceedings taken against the company under s. 27 for its punishment are proceedings in the nature of a criminal cause or matter. That appears to me to be the true meaning of the section. Not to come to such a conclusion as this would be drawing distinctions so fine as to be almost pedantic between the case of the company and the case of its directors or managers who would be guilty of an offence in knowingly and wilfully permitting that which in the company is no offence at all. The Act says that a company shall do certain things, and if it does not do them it is a criminal offender.

This appeal, therefore, cannot be entertained, because, under the Supreme Court of Judicature Act, 1873, this court has no jurisdiction to hear an appeal in a criminal cause or matter. The appeal must, therefore, be dismissed.

**KAY, L.J.**—I am of the same opinion. The more that this Act of 1862 is examined the plainer it appears that by these sections a duty is imposed on joint-stock companies. By s. 25 every company under the Act shall cause to be kept in one or more books a register of its members with certain particulars, and by s. 26 every such company shall make at least once in every year a list of all persons who are members of the company, such list containing a summary specifying certain particulars, which list and summary is to be contained in a separate part of the register, and a copy thereof shall be forwarded to the Registrar of Joint Stock Companies. The object of making this list is shown by s. 32, which provides that the register of members shall be open to the inspection of any member gratis, and of any other person on the payment of a small sum. This is a very important duty of the company in the interests not only of the shareholders but the public also. Then s. 25 and s. 26 being quite imperative in their terms, s. 27 provides that any company under the Act making default in complying with the provisions of the Act with respect to forwarding the list and summary to the registrar shall incur a penalty not exceeding £5 for every day during which such default continues. It is clear that that penalty is by no means intended to be an equivalent for the performance of the duty imposed on the company by s. 26, and the company cannot by paying the penalty continue to neglect to perform the duty because the penalty imposed is one for each day during which the default continues. It is important to notice this, as otherwise the company could not be compelled to make the list

**A** and do with it as they are directed. Therefore, it seems to me that s. 27 renders the company liable to a penalty of such a character that the only conclusion must be that it was intended to be a punishment for not complying with the duty imposed by s. 26.

**B** As to the question of taking criminal proceedings against a company, it is clear that where an Act of Parliament imposes on a company a duty of performing some act described in the statute, and at the same time does not provide any other remedy, an indictment will lie against the company for non-performance of its duty. In *R. v. Birmingham and Gloucester Rail. Co.* (4) the duty imposed by the statute on the company was to build certain arches to connect lands which had been severed by the railway, and they were ordered by justices to build the arches but omitted to do so. PATTESON, J., referring to the nonfeasance by the company of their duty to build these arches, said (3 Q.B. at p. 232):

"A corporation may be indicted for breach of a duty imposed on it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults."

**D** In that case an omission by the company to perform its statutory duty was held to be a criminal act for which it might be indicted. That case was approved of in *Pharmaceutical Society v. London and Provincial Supply Association* (6) and in *London Joint Stock Bank v. London Corpn.* (7), and it has been held that the law applies to corporations for misfeasance also, as well as nonfeasance. It was argued here that a criminal act involves a *mens rea*, and as a company can have no *mens* at all it can never be a criminal; but that argument is disposed of by those cases.

**E** As to that part of the argument by which it was maintained that it was intended by this statute not to make the disobedience of the company a criminal offence, but an offence which the company might make compensation for by paying the penalty, I agree that there may be cases of an alternative given by an Act of Parliament so that a corporation has the choice either of doing what the Act directs or paying a penalty, but I am satisfied that that is not the meaning of this Act. The penalty imposed by it is a penalty properly so called; it is inflicted by way of punishment, not by way of compensation for the breach. I am satisfied that this Act meant to impose on a company an important duty whose omission is in the nature of a criminal act; and even if this penalty be the only remedy for the breach, as to which I express no opinion, that does not show that the omission by the company to do what is required of it by the Act is not any the less a criminal omission.

**G** For these reasons I think that we cannot entertain this appeal, and that it must be dismissed.

*Appeal dismissed.*

Solicitors: *T. Noton; City Solicitor; T. Durant.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]



# GREAT WESTERN RAIL. CO. v. INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), December 1, 1893]

[Reported [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86;  
58 J.P. 397; 42 W.R. 211; 10 T.L.R. 128; 38 Sol. Jo. 96;  
9 R. 122]

*Stamp Duty—Conveyance on sale—Private Act of Parliament—Railway company acquiring undertaking of another railway company—Stamp Act, 1891 (54 & 55 Vict., c. 39) s. 54.*

By a private Act of Parliament a railway company was dissolved and its undertaking transferred to the Great Western Rail. Co., the latter company paying and issuing to the shareholders of the dissolved company consolidated guaranteed stock of the Great Western Rail. Co. Under the private Act a Queen's printer's copy of the Act was to be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act had been effected by an executed instrument in writing and the copy were the instrument.

**Held:** a Queen's printer's copy of the Act was chargeable with ad valorem duty, as on a conveyance on sale, on the value of the stock in the Great Western Rail. Co. issued to the shareholders of the dissolved company.

**Notes.** Applied: *J. and P. Coats, Ltd. v. I.R.Comrs.*, [1895-9] All E.R.Rep. 744. Considered: *A.-G. v. Felizstowe Gas Light Co.*, [1907] 2 K.B. 984. Applied: *Ridge Nominees, Ltd. v. I.R.Comrs.*, [1961] 2 All E.R. 354. Considered: *Henty and Constable, Ltd. v. I.R.Comrs.* [1961] 2 All E.R. 372. Referred to: *Foster v. I.R.Comrs.* (1893), 42 W.R. 259; *Jopling v. I.R.Comrs.*, [1940] 3 All E.R. 279; *Kirkness v. John Hudson & Co.*, [1955] 2 All E.R. 345; *Littlewoods Mail Order Stores, Ltd. v. I.R.Comrs.*, [1961] 3 All E.R. 258.

As to conveyance on sale, see 33 HALSBURY'S LAWS (3rd Edn.) 306 et seq.; and for cases see 39 DIGEST 280 et seq. For the Stamp Act, 1891, s. 54, see 21 HALSBURY'S STATUTES (2nd Edn.) 627.

Case referred to:

- (1) *Ulverstone and Lancaster Rail. Co. v. I.R.Comrs.* (1864), 2 H. & C. 855; 159 E.R. 354; sub nom. *I.R.Comrs. v. Furness Rail. Co.*, 5 New Rep. 92; sub nom. *Furness Rail. Co. v. I.R.Comrs.*, 33 L.J.Ex. 173; 10 L.T. 161; 10 Jur.N.S. 1133; 13 W.R. 10; 39 Digest 280, 645.

**Appeal** from an order of the Queen's Bench Division (CAVE and WRIGHT, JJ.), on a Special Case stated by the Inland Revenue Commissioners pursuant to the Stamp Act, 1891, s. 13.

The Special Case, so far as it is necessary to set it out, was as follows:

(i) The Great Western Railway Act, 1892 (55 & 56 Vict., c. xxxiii) which was passed on June 28, 1892, and intituled "An Act for conferring further powers upon the Great Western Rail. Co. in respect of their own undertaking, and upon that company and the London and North-Western Rail. Co. in respect of undertakings in which they are jointly interested, for amalgamating the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies with the Great Western Rail. Co., for vesting in that company the powers of the East Usk Rail. Co., for vesting the undertaking of the Ludlow and Clee Hill Rail. Co., in the Great Western and London and North-Western Railway Companies, and for other purposes," contains recitals:

"(A) that the undertaking of the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies, are under the authority of Parliament leased to or worked by the Great Western Rail. Co.,

**A** (in that Act and hereinafter called "the company") and that the third schedule to the Act contains in the first three columns thereof a statement of the particulars of the capitals issued by the said companies respectively. **(B)** That the company have under the authority of Parliament subscribed for, and now hold by themselves or their nominees, the shares, debentures, and debenture stock of the said companies specified in the fourth column of the same schedule, **B** and the company or their nominees have also subscribed for and now hold the shares and debentures of the said companies mentioned in the fifth column of the same schedule, and that it is expedient that the said companies should be amalgamated with the company in the manner provided by the Act. **(C)** That the East Usk Rail. Co. (in the Act hereinafter called "the East Usk Co.") were unable without the assistance of the company to raise the capital required **C** for the construction of their railway, and it was agreed between the company and the East Usk Co. that the traffic on the East Usk Railway should be worked by the company, and it is expedient that the powers of the East Usk Co. should be transferred to the company. **(D)** That the Ludlow and Clee Hill Railway is worked, managed, and maintained by the company and the London and North-Western Rail. Co. (in the Act, and hereinafter called "the North-Western Co."), and it is expedient that the said railway should be transferred to and vested in the said companies;" **D**

and makes provision in reference to the amalgamation and transfers of the said railways and their powers. **(ii)** By s. 2 of the said Act, relating to the Incorporation of General Acts, Part V (relating to amalgamation) of the Railways Clauses Act, 1863, is, except where expressly varied by the said Act, incorporated with and forms part of the said Act. **(iii)** By s. 3 of the said Act relating to the interpretation of terms and expressions used in the Act, it is provided that the expression "the amalgamated companies" means and includes the Calne Rail. Co., the Newent Rail. Co., the Ross and Ledbury Rail. Co., and the Wellington and Severn Junction Rail. Co., and that the expression "the amalgamated undertakings" means and includes the undertakings of the amalgamated companies respectively. These expressions are similarly used in this case. **E**

**F** **(iv)** Sections 32 to 42 of the said Act relate to the amalgamated companies. The material sections are as follows:

**G** "32. The several undertakings of the amalgamated companies shall, subject to the contracts, obligations, debts, and liabilities of those companies respectively, be amalgamated with and form part of the undertaking of the company, subject nevertheless to the provisions of this Act, and each such amalgamation shall take effect as on and from the first day of July, 1892, and as on and from that date the said companies are respectively dissolved, except for the purpose of winding-up their affairs. A Queen's printer's copy of this Act shall be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction, effected by an executed instrument in writing and the copy were the instrument, and that copy shall, within three months from the date of amalgamation, or from the passing of this Act, whichever shall last happen, be produced as such instrument to the Commissioners of Inland Revenue for their opinion as to the stamp duty chargeable thereon, under the provisions of the Stamp Act, 1891, and all the provisions of that Act shall apply thereto accordingly, except that the company, if dissatisfied with the assessment of the commissioners, shall not be required to pay duty in conformity with such assessment as a condition of appeal to the High Court. **H** Provided, that in case of delay of payment under the above exception the amount of duty assessed or determined by the court to be chargeable shall be a debt due to Her Majesty, and shall be paid with interest thereon at the rate of £5 per cent. per annum, from the expiration of the said three months until the day of payment. **I**

33. The amalgamated companies shall be respectively entitled to all their revenues up to and inclusive of the 30th day of June, 1892, and except as hereinafter mentioned the amalgamated companies shall discharge and relieve the company of all their contracts, obligations, debts, and liabilities not chargeable to capital account, which shall have accrued up to the time of amalgamation.

34. As from the time of amalgamation the shares, debentures and debenture stocks, mortgages, or bonds of the amalgamated companies, held by or on behalf of the company, and specified in the fourth and fifth columns of the third schedule to this Act, shall be, and the same are hereby cancelled.

35. All mortgages or bonds of the amalgamated companies existing at the time of amalgamation and not cancelled by this Act, shall, during the continuance of such mortgages or bonds respectively, be charges upon the undertaking upon which such mortgages or bonds are respectively secured, but the company shall be liable for all interest which shall accrue thereon after the time of amalgamation, and as such mortgages or bonds fall due they shall be paid off, or may be renewed by the company, or the company may issue new mortgages or bonds in respect thereof, and all such mortgages or bonds shall be charges upon the undertaking of the company, and the company may raise by mortgage of their undertaking, or by the creation of debenture stock, all such sums as they may require for paying off mortgages or bonds falling due as aforesaid. Provided that the aggregate borrowing powers of the company and the amalgamated companies be in no case exceeded under the powers contained in this section.

36. As at and from the time of amalgamation the several holders of the shares in the capital of the Wellington and Severn Junction Rail. Co. shall, in lieu of and in exchange for the shares held by them respectively, become and be the holders of consolidated guaranteed stock of the company in the proportion of £100 of such stock for every ten shares of £10 each in the Wellington and Severn Junction Railway Company held by them.

37. As at and after the time of amalgamation the capital which immediately before the time of amalgamation was the capital of the Great Western Rail. Co., shall be increased by addition thereto in the manner and to the extent necessary to give effect to the provisions of this Act with reference to the Wellington and Severn Junction Rail. Co. Provided always, that any additions to the Great Western Rail. Co.'s consolidated guaranteed stock, made under the authority or for the purposes of this Act, shall be deemed to be part of, and shall rank *pari passu* with, the other like stock of the company."

(v) Sections 43 to 48 of the said Act contain provisions for the dissolution of the East Usk Co., and the transfer of all the rights, powers, privileges, and authorities which are conferred on the East Usk Co., whose undertaking is to become after the transfer part of the undertaking of the company.

(vi) Sections 49 and 55 have reference to the winding-up of the Ludlow and Clee Hill Rail. Co., and provide for the transfer of the undertaking upon a sale thereof to the company and the North-Western Co. The transfer is to be evidenced by a duly stamped deed of conveyance. Paragraph (vii) contained the third schedule to the Act, which shows that the company held the whole of the issued capital of the Newent and of the Ross and Ledbury Co., as well as of the Calne Rail. Co., excepting an amount of £11,600, and of the Wellington and Severn Junction Co. excepting £59,830. Paragraph (ix) stated that no agreement in writing was entered into in respect of the several amalgamations, but the company and each of the amalgamated companies passed resolutions approving the Bill.

The commissioners were of opinion that the copy of the Act was chargeable with duty as a conveyance or transfer on sale under the Stamp Act, 1891: (i) in respect of the amalgamation of the Wellington and Severn Junction Rail. Co., with an *ad valorem* duty in respect of the value on July 1, 1892, of £59,830 consolidated



**A** guaranteed stock of the Great Western Co., to be issued to the shareholders of the Wellington and Severn Junction Rail. Co.; (ii) in respect of the amalgamation of the Calne Railway, with an ad valorem duty in respect of the sum of £11,600; and (iii) in respect of the amalgamation of the other two companies, with a duty, in each case, of ten shillings. The question for the consideration of the court was, whether the commissioners had rightly assessed the duty payable on the copy of the Act of Parliament. The Queen's Bench Division (CAVE and WRIGHT, JJ.) were of opinion that the Act was chargeable with duty as assessed by the commissioners. The Great Western Rail. Co. appealed.

*Cripps, Q.C., and Haldane, Q.C., for the railway company.*

**B** *The Attorney-General (Sir Charles Russell, Q.C.) and Danckwerts for the Inland Revenue Commissioners were not called on to argue.*

**C** **LORD ESHER, M.R.**—I share the opinion of CAVE and WRIGHT, JJ., that this is an extremely clear case. The smaller company, as it is called, had property which in railway language is called its "undertaking," and therefore was the owner, as WRIGHT, J., has pointed out, of several railway lines and a great deal of other property. Then a transaction took place, which is contained in a written instrument, viz., in a private Act of Parliament. That Act made a transfer—  
**D** no other word describes the transaction—of all the property of the smaller company to the Great Western Rail. Co. The Act does not in any way alter the Great Western Rail. Co., which after the Act had been passed remained exactly the same entity, exactly the same corporation, as it had been before, neither greater nor less. So, by this instrument in writing, by this Act of Parliament, the  
**E** property and powers of the smaller company are transferred to the Great Western Rail. Co. This Act of Parliament has sanctioned the consideration which is to be given by the Great Western Rail. Co. for the transfer to it of the property of the smaller company. The Great Western Rail. Co. is to give to the smaller company or to the shareholders of the smaller company—it does not signify which—a certain number of shares in the Great Western Railway. If such a transaction  
**F** as that had taken place between private persons, or between private companies, who, we must suppose, would not require the authority of an Act of Parliament, it would be carried out by an instrument in writing. The effect of the instrument would be to transfer the property from one party to the other for a certain consideration, and, whether or not it were drawn up in virtue of a previous contract of purchase and sale, its effect would be the same as if it were a conveyance  
**G** executed in pursuance of a contract of purchase and sale. The substance of that transaction would be the transfer or conveyance of property for a consideration as though upon a contract of sale.

Turning to the Stamp Act, 1891, we find that a duty is payable on a "conveyance on sale." Are those words used in the Stamp Act to mean only a conveyance carried out in pursuance of a definite contract of purchase and sale, or are they  
**H** not used in this Act to mean a conveyance carried out as though on a previous contract of sale? Used in the Stamp Act the words seem to me to bear the latter meaning. The transaction in this case being, in substance, of the nature which I have stated, it seems to me to come within the meaning of the phrase "conveyance on sale" in the Act. I, therefore, think that this transaction is directly within the Stamp Act, and that the decision of the Divisional Court in  
**I** favour of the Crown is perfectly right.

**LOPES, L.J.**—It is an established rule in considering cases of this kind, viz., whether any particular instrument is liable to duty under the Stamp Act, that the substance of the transaction is alone to be considered. It appears to me that, looking at the substance of this transaction, it is a clear case of a conveyance on sale. It was observed by CAVE, J., that there is in this case everything that constitutes a sale. There are two parties, one of whom is parting with something and the other giving something for it. The arrangement ultimately come to is

then carried out and embodied in an Act of Parliament. It was argued that the consideration, instead of passing to the smaller company, passed to the shareholders of that company. I fail to see that that can make any material difference, or make that which, on the face of it, is apparently a conveyance on sale anything else than a conveyance on sale. I think, therefore, that this appeal should be dismissed. A

**KAY, L.J.**—The Stamp Act, 1891, provides in Sched. 1 for certain ad valorem duties, payable on the “conveyance or transfer on sale of any property except” certain stock. Section 54 of the Act provides, that B

“for the purposes of this Act, the expression “conveyance on sale” includes every instrument, and every decree or order of any court, or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.” C

The Great Western Rail. Co., under the powers of a special Act of Parliament, has obtained all the property and undertaking of certain other companies and cl. 32 in the Act, which enabled them to do so, is as follows: [His LORDSHIP read it; see para. 4 of the Special Case.] The special Act incorporates Part V, a group of sections headed “Amalgamation,” of the Railways Clauses Act, 1863. Section 37 of that Act provides that D

“for the purposes of this part of this Act, companies shall be deemed amalgamated by a special Act in either of the following cases . . . (2) where by the special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company.” E

That is exactly what was done here by this special Act. The property and undertakings of the dissolved companies were transferred to and vested in the Great Western Rail. Co. without any change being made in its name. F

The argument, as I understand it, seemed to me to turn entirely on the meaning and effect of the word “amalgamation.” It was argued that in truth there was here a combination of two companies, but the difficulty that arises at once is, how can there be a combination of two companies one of which is dissolved? That is impossible. Then it was said that the Great Western Rail. Co., as the consideration for this so-called amalgamation, issued stock in certain proportions to the shareholders of the dissolved company, and thereby took into itself the shareholders of the dissolved company, and so an amalgamation was constituted between the two companies. Therefore, it was argued, there was no transfer as on a sale. The attempted analogy was this: that, if two partnerships carrying on the same kind of business were united, and all their business and property thrown into one, there would be no transfer as on a sale. To meet that argument let me put an instance. Supposing in this case that instead of shares the consideration for the transfer or so-called amalgamation had been cash, and that it had been handed directly to the company before it was dissolved, for the purpose of its being divided by the company amongst its shareholders. Would that be a sale or would it not? It seems to me impossible to say that it would not, though counsel would not admit it. I cannot understand what a sale means if that would not be a conveyance as on a sale. G  
H  
I

It is to be observed that the Stamp Act, 1891, has nothing to do with contracts or negotiations. It requires a stamp on a conveyance on a sale, and a conveyance on a sale is the instrument by which the property is transferred on a sale. In the case which I have put, it seems to me impossible to doubt that the transfer would be a transfer on a sale. Then take the case, instead of the roundabout proceeding, of the cash being paid direct to the shareholders of the dissolved company, and not paid to the dissolved company to distribute among its shareholders. What is

**A** the substantial difference? I can see none. Then take the case, which is this case a little altered, of handing to the dissolved company stock in the company which was taking over the property for the purpose of distribution amongst its shareholders. Would not that be a sale and purchase? Of course it is not admitted, but I cannot see the reason why.

**B** In the present case, instead of handing the stock to the dissolved company for distribution by it among its shareholders, the stock has been given straight to the shareholders of the dissolved company. Substantially that seems to me to be a purchase and sale of the property, business, powers, and everything else that is involved in the word "undertaking" of the company which was to be dissolved. The transfer was effected by this special Act of Parliament, and this Act is to receive the same stamp which an instrument in writing, carrying out the same arrangement, would have been subject to if the companies had had power to execute it without a special Act of Parliament. Supposing the companies had had that power, and the transfer had been made without an Act of Parliament, one company would, by the deed of conveyance, have conveyed over the whole of its property to the other company, the other company paying as a consideration the money's worth in stock, which it has practically handed over in the way I described to the smaller company.

**D** The reason why that has been treated as the consideration, and the only consideration, is that all the debenture stock and debts of the companies transferring belonged to the Great Western Rail. Co. already, so that all that the Great Western Co. had to buy was practically an equity of redemption, something subject to that debt. The ad valorem duty has not been computed on the debt, but has been computed on the price which the company has paid for what

**E** I, by way of analogy, call the equity of redemption which it had to buy. That seems to me perfectly right, and I think the appeal must be dismissed.

**LORD ESHER, M.R.**—I think that I ought to add that we cannot distinguish this case from *Furness Rail. Co. v. I.R.Comrs.* (1).

*Appeal dismissed.*

**F** Solicitors: *Nelson; Solicitor to the Inland Revenue.*

[*Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.*]



PERRY *v.* EAMES  
SALAMAN *v.* EAMES  
MERCERS' CO. *v.* EAMES

[CHANCERY DIVISION (Chitty, J.), January 23, 28, 29, February 17, 1891]

[Reported [1891] 1 Ch. 658; 60 L.J.Ch. 345; 64 L.T. 438;  
39 W.R. 602; 7 T.L.R. 297]

*Easement—Light—Ancient lights—Crown property vested in trustees—Sale by trustees—Prerogative of Crown—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 2, 3.*

The words "or other easement" in s. 2 of the Prescription Act, 1832, do not apply to an easement of light, which is exclusively dealt with by s. 3 and the subsequent ancillary sections.

The Crown is not bound by s. 3 of the Prescription Act, 1832, it not being named in that section.

In 1820 the site of the old Bankruptcy Court in Basinghall Street in the city of London was purchased by the government out of moneys provided by Parliament, the conveyance being made to trustees of the Crown and confirmed by Act of Parliament. The building on the site was used for the purposes of the Court of Bankruptcy until 1886, when it was sold to the corporation of the city of London. In 1890 the site became vested in the defendant under a building agreement with the corporation. The defendant having commenced to erect buildings on the site, the plaintiffs sought injunctions to restrain him from erecting them in such a way as to obstruct the access of light to their buildings which they had enjoyed prior to the pulling down of the old Bankruptcy Court. Owing to the custom of the city of London, no prescriptive right to light had been acquired by the plaintiffs prior to 1820, but the plaintiffs claimed that such a right had been acquired under the Prescription Act, 1832, s. 2 and s. 3.

**Held:** from 1820 to 1886 the equitable ownership of the property was in the Crown; the Crown, not being named in s. 3 of the Prescription Act, was not bound thereby and, as the Crown's rights continued up till 1886, the plaintiffs had not acquired a right to light as against the defendant.

**Notes.** Approved: *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48. Referred to: *Wirral Estates, Ltd. v. Shaw*, [1932] All E.R.Rep. 43; *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K.B. 294.

As to the acquisition of right to light, see 12 HALSBURY'S LAWS (3rd Edn.) 588 et seq.; and for cases see 19 DIGEST (Repl.) 136 et seq. For the Prescription Act, 1832, ss. 2 and 3, see 6 HALSBURY'S STATUTES (2nd Edn.) 671, 672.

Cases referred to:

- (1) *Dalton v. Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest (Repl.) 6, 4.
- (2) *Wynstanley v. Lee* (1818), 2 Swan. 333; 36 E.R. 643; 19 Digest (Repl.) 66, 367.
- (3) *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343; 41 L.J.Ch. 576; 26 L.T. 142; 20 W.R. 269, L.C.; 20 Digest (Repl.) 421, 1438.
- (4) *Magdalen College, Cambridge Case* (1615), 11 Co. Rep. 666; 77 E.R. 1235; sub nom. *Warren v. Smith*, *Magdalen College Case*, 1 Roll. Rep. 154; 42 Digest 689, 1039.
- (5) *Mersey Docks and Harbour Board v. Cameron*, *Jones v. Mersey Docks and Harbour Board* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.C.M. 1; 12 L.T. 643; 29 J.P. 843; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 42 Digest 745, 1706.

- A (6) *R. v. McCann* (1868), L.R. 3 Q.B. 141; 9 B. & S. 33; 37 L.J.M.C. 25; 17 L.T. 643; on appeal, L.R. 3 Q.B. 677; 9 B. & S. 44; 37 L.J.M.C. 123; 19 L.T. 115; 32 J.P. 579; 16 W.R. 985, Ex. Ch.; 38 Digest (Repl.) 546, 398.

Also referred to in argument:

- Yarmouth Corpn. v. Simmons (1878), 10 Ch.D. 518; 17 L.J.Ch. 792; 38 L.T. 881; 26 W.R. 802; 42 Digest 659, 675.
- B *Re Oriental Bank Corpn., Ex parte Guillemin* (1884), 28 Ch.D. 634; 54 L.J.Ch. 322; 52 L.T. 167; 1 T.L.R. 9; 10 Digest (Repl.) 905, 6145.
- Re Bonham, Ex parte Postmaster-General* (1879), 10 Ch.D. 595; 48 L.J.Bey. 84; sub nom. *Re Bonham, Ex parte Lords of the Treasury*, 40 L.T. 16; 27 W.R. 325, C.A.; 42 Digest 691, 1057.
- C *Weymouth Corpn. v. Nugent* (1865), 6 B. & S. 22; 5 New Rep. 302; 34 L.J.M.C. 81; 11 L.T. 672; 29 J.P. 451; 11 Jur.N.S. 465; 13 W.R. 338; 2 Mar.L.C. 163; 122 E.R. 1106; 42 Digest 690, 1048.
- Hawley v. Steele* (1877), 6 Ch.D. 521; 46 L.J.Ch. 782; 37 L.T. 625; 38 Digest (Repl.) 62, 353.
- Re Wood's Estate, Ex parte Works and Buildings Comrs.* (1886), 31 Ch.D. 607; 55 L.J.Ch. 488; 54 L.T. 145; 34 W.R. 375, C.A.; 42 Digest 691, 1063.
- D *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619; 51 L.J.Ch. 885; 47 L.T. 133; 30 W.R. 845, H.L.; 1 Digest (Repl.) 755, 2934.

### Motions.

- These actions were commenced by the plaintiffs for the purpose of restraining the defendant from erecting any buildings of a greater height than the old buildings standing on a site in Basinghall Street in the city of London, so as to darken any of the ancient lights of the plaintiffs as the same were enjoyed previously to the pulling down of the old buildings, and notices of motion for injunctions to this effect were served on the defendant. By consent, the motions were entered in the non-witness list, and the hearing of the motions were treated as the trial of the actions. The question was whether the plaintiffs could have acquired any prescriptive right to the access of light to the premises over the old buildings, they having been Crown property from 1820 to 1886.
- F

By the Prescription Act, 1832:

- "(2) . . . No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement . . . to be enjoyed or derived upon, over, or from any land . . . of our said Lord the King, his heirs or successors . . . when such way or other matter . . . shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter . . . shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.
- G
- H

- (3) . . . When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."
- I

*Whitehorne, Q.C.*, and *W. F. Hamilton* for the defendant.

*Seward Brice, Q.C.*, and *Baumont* for the plaintiff *Perry*.

*Seward Brice, Q.C.*, and *Stokes* for the plaintiff *Salaman*.

*Byrne, Q.C.*, and *Butcher* for the plaintiff the *Mercers' Company*.

Feb. 17, 1891. **CHITTY, J.**—Since the close of the argument I have been furnished with a statement compiled with great industry by junior counsel for the defendant showing in whom many of the public government buildings in London are vested, and the public statutes by which they are so vested. From this paper, as well as from inquiries I have made on the subject, it appears that there are several government buildings held in trust for the Crown under modern statutes. For instance, the General Post Office is vested in the Postmaster-General in trust for Her Majesty. The decision in these cases has, therefore, an importance extending beyond the interests of the parties engaged in this litigation. A

The plaintiffs claim a right to access of light to their dwelling-houses over the site of the old Bankruptcy Court, in Basinghall Street, in the city of London, subject only to the obstruction which was caused by that building. The site of the court was purchased in 1820, and the building was shortly afterwards erected thereon, the moneys required for the purchase and the erection of the building being provided by Parliament. On April 23, 1820, the site was conveyed to five subjects nominated by the Crown as trustees, and the conveyance was made to them in fee B

“in trust for His Majesty and his successors, and to the intent and purpose only that certain buildings might be erected on the said ground for the meetings of the Commissioners of Bankruptcy, and for the transaction of business in bankruptcy.” C

This conveyance was confirmed by the public statute 1 & 2 Geo. 4, c. 115. Section 4 enacted that the ground and buildings should thenceforth be vested in the five trustees named in trust for His Majesty, his heirs and successors, to the intent that the ground and buildings erected or to be erected thereon, might for ever thereafter be used and applied for the purposes and in the manner described in the Act (that is, putting it shortly, for the purposes of the Court of Bankruptcy), subject to such rules respecting the use thereof as the Lord Chancellor might make, and for no other purpose. By s. 60 of the Bankruptcy Act, 1849, the ground and building were vested in the commissioners of the court for the time being for the purposes of the Act. This left the Crown's title as beneficial owner unaffected. By s. 68 of the Bankruptcy Act, 1861, the ground and building were vested in the Commissioners of Her Majesty's Works and Public Buildings; and it was enacted that the same should be appropriated to such purposes as the Lord Chancellor should direct. This enactment also left the Crown's equitable title unaffected, unless and until the Lord Chancellor directed that the property should be appropriated to some purposes other than those to which the property had been previously dedicated. D

Even apart from the trust for the Crown in the conveyance and the statute of Geo. 4, it cannot be doubted that, where property is held for such public purposes as those described in the above Acts, the equitable title is in the Crown. The building was used for the purposes of the Court of Bankruptcy until after the passing of the Act of 1861, and also until it was sold and conveyed in 1886 to the Corporation of London, pursuant to a direction of the Lord Chancellor in exercise of the power conferred on him by s. 68 of the Act of 1861. On the execution of this conveyance the Crown's title was divested. The evidence does not disclose the purpose for which the building was used after it had ceased to be used for the purpose of the Court of Bankruptcy. It must be presumed, however, that it was in fact used for some public government purpose. E

The Crown's title thus continued down to the conveyance in 1886. The defendant claims under this conveyance. The result is, that from 1820 to 1886, a period of sixty-six years, the legal estate was vested in trustees, who were subjects and mere depositaries of the legal estate, but the sole equitable ownership was in the Crown for the public purposes of the Acts, and during the same period the Crown had, by its ministers of justice and other officers, the sole and exclusive possession of the property. F

The plaintiffs claim the access of light under s. 3 of the Prescription Act, 1832, the Act for shortening the time of prescription in certain cases, which came into G



A operation on the first day of Michaelmas Term, 1832. The Crown is not named in that section, but is named in ss. 1 and 2. Therefore, regard being had to the general rule that the Crown is not bound by a statute unless named, a very strong case arises for holding that the Crown is not bound by s. 3. It was, however, argued for the plaintiffs that the Crown is bound by necessary implication, because the servient tenement is not mentioned in s. 3. I am unable to follow this argument. It is true that the servient tenement is not expressly mentioned in the section, although it is referred to by the words "any local usage or custom to the contrary notwithstanding," words which apply to the servient tenement only. But it appears to me to be a wholly immaterial circumstance whether the servient tenement is mentioned or not. It is not a circumstance from which any intention on the part of the legislature to bind the Crown can be inferred; much less is it sufficient to raise a necessary implication, or to support an irresistible inference of intention to bind the Crown. I hold, then, that the Crown is not bound by s. 3.

It was further argued for the plaintiffs that the right to light falls within the meaning of the term "or other easement," in s. 2, in which the Crown is named; and in support of this argument the observations of LORD SELBORNE, L.C., in *Dalton v. Angus* (1) were cited. But, although LORD SELBORNE, L.C. (6 App. Cas. at p. 798), was of opinion that the right of support in the case of two adjoining buildings—a right he considered to be an easement not purely negative—fell within s. 2, he did not say that the negative right to light was within that section, nor is there anything in his observations to justify an argument that he held any such opinion. To whatever other easements the terms of s. 2 may extend, it is, I think, clear that they do not include light. The statute places the acquisition of the right to access of light on a footing entirely different from that on which it rests the other incorporeal hereditaments with which it deals. The right to light is dealt with exclusively by s. 3 and the subsequent ancillary sections, such as s. 4, which defines the period of the twenty years, and what is meant by interruption. By the Act, the right to light as between subject and subject is acquired indefeasibly by simple enjoyment for the statutory period of twenty years without the statutory interruption, unless the enjoyment be by consent or agreement expressly made or given by deed or writing. If s. 3 is contrasted with s. 2, it will be found to cover, and more than cover, every case that could possibly be included within the latter section. The statute provides a simpler mode for the acquisition of light than it does for the acquisition of other easements or rights. The statute has been in operation for considerably more than half a century, and hitherto no one, so far as I am aware, has ever contended that light falls within s. 2.

The plaintiffs further contended that, previously to the conveyance of 1820, the right of light to their tenements had been acquired by prescription at common law, or that a lost grant ought to be presumed, so that, when the Crown acquired its title to the site of the Bankruptcy Court, the site was already subject to the servitude of light which they claim. But, according to the evidence put in on behalf of the plaintiff Salaman, there was standing thereon an ancient building. The evidence is to the following effect: In 1398, there was standing on the ground a building called Blackwell Hall, which belonged to King Richard II. This building was then sold by the King to the Corporation of London. In 1658, the hall was rebuilt. In 1666, it was destroyed in the Great Fire. In 1672, it was again rebuilt on the same site. The building standing on the ground was used from 1398 to 1820 by the corporation as the Cloth Hall. This evidence is fatal to the plaintiff Salaman, for a reason presently to be mentioned. From the statute of 1 & 2 Geo. 4, c. 115, it appears that the ground comprised in the conveyance of 1820 included part of the site of the ancient Cloth Market of Blackwell Hall, or the building belonging thereto and that other part thereof was the site or part of the site of two messuages in Basinghall Street.

The result then is, that in 1820 the defendant's site was occupied by the ancient tenement of the Cloth Hall or market, and by other messuages which, in the absence of evidence to the contrary, must be presumed to be ancient. To these

tenements the custom of the city of London extended, which custom was that a man might rebuild his house or other edifice on the ancient foundation to what height he pleased, though thereby the ancient windows or lights of the adjoining or opposite house were obstructed, if there were no agreement in writing to the contrary: see *Wynstanley v. Lee* (2). The plaintiffs' houses have been rebuilt in recent times, and evidence was given for the purpose of showing that parts of their windows are in the same position as the lights of the houses which previously stood on their ground. Some evidence is given on behalf of the plaintiff Salaman with a view to show that his lights were ancient; the evidence, however, is for the most part conjectural, and of an unsatisfactory character. But, assuming that it would in the ordinary course be sufficient to raise a case on which a jury might find that the light had been enjoyed from time immemorial, or that a lost grant ought to be presumed, there is a short answer in point of law which is fatal to any such claim in all the cases before me. The presumption of any such right from twenty years' enjoyment previously to 1820 is excluded by the custom of the city of London; to allow any such presumption would be to destroy the custom: *Wynstanley v. Lee* (2).

The same answer applies with equal force to the period of twenty years which elapsed down to the first day of Michaelmas Term, 1832, when the Prescription Act, 1832, came into operation. Curiously the custom of London as to light is not simply abolished by that statute, but it is abolished merely for the purposes of s. 3. The plaintiffs cannot, therefore, maintain their claim to light by prescription from time immemorial, or as founded on a supposed lost grant. This claim is defeated by considerations wholly independent of the Royal prerogative, and the passage cited from *STAUNFORD ON THE KING'S PREROGATIVE* at pp. 42, 43, if a correct statement of the law, is irrelevant.

The argument for the plaintiffs then turned back to s. 3. It was contended that, although the section might not apply where the legal estate was vested in the Crown, it does apply where the legal estate is held by subjects in trust for the Crown. In support of this contention, some authorities were cited for the plaintiffs, but none of them really touched the point; one of them was *Sharp v. St. Sauveur* (3). All that was decided in that case was, that the Crown could enforce in the Court of Chancery a trust of land created for an alien prior to the Naturalisation Act, 1870. That has no bearing on the cases before me. In ancient times it was not the practice to vest the legal estate in trustees for the Crown, and thus there is little or no direct ancient authority on the point. The second resolution in the *Magdalen College, Cambridge Case* (4) appears, however, to be large enough to cover it. It was resolved that, where the King has any prerogative estate, right, title or interest, he shall not be barred of them by the general words of an Act of Parliament. There is no reason for confining this resolution to mere legal interests, or for excluding an absolute beneficial ownership in the Crown. In *Mersey Docks and Harbour Board v. Cameron* (5), a case involving the question of the liability of the Mersey Docks to be rated to the poor under the statute of Elizabeth, LORD CRANWORTH stated the law as to the exemption of the Crown in the following passage (11 H.L.Cas. at p. 508):

"The Crown not being named is not bound by the Act. It follows, therefore, that the land or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown, that this mistake has arisen. This principle exempts from rates not only Royal palaces but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions however have all gone on the ground more or less sound, that these might all be treated as buildings occupied by servants of the

**A** Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case, and I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown, or the Crown through its servants were directly concerned."

**B** The judgment of LORD BLACKBURN in *R. v. McCann* (6), a rating case, is much to the same effect. He expressly places (L.R. 3 Q.B. at p. 146) a trustee for the Crown in the same position as a servant of the Crown. In the cases before me, the Crown's absolute beneficial ownership for the purposes of the Act is expressly manifested by a public statute, and it is obvious that the bare legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen's government. I am of opinion, then, that the prerogative of the Crown takes these cases out of the operation of s. 3.

**C** Only one other point remains. It was urged for the plaintiffs that the defendant's ground being now held by him, a subject, he is not entitled to avail himself of the Crown's rights, and that, inasmuch as the plaintiffs have in fact enjoyed the light for twenty years before these actions, their title to the light is indefeasible. But this is only repeating one of the old arguments on the statute in a new form. It would allow the plaintiffs to claim that they were in process of acquiring the right to the light during that part of the twenty years during which the property was in the possession of the Crown. The case must be tried as if the actions had been brought the day after the conveyance of 1886. To hold that the statutory period of twenty years had then run would be to ignore the Crown's rights; and the result would be that the Crown could not dispose of the property for the interest therein to which it was then entitled; or, in other words, that, although the Crown held the property free from the servitude or easement of light, it could not dispose of it except subject to such a servitude or easement. There are, as I understand, other points of fact in dispute in these actions, but it was arranged by counsel that these should not be gone into until after I had given judgment on the above questions of law, and that it would not be necessary to go into them at all in the event of my judgment being (as it is) adverse to the plaintiffs on the questions argued. On the facts as I have stated them, giving rise to these questions of law, there was no dispute between the parties. The result is that the actions are dismissed with costs.

**D** Solicitors: *Munns & Longden; Emanuel, Round & Nathan; Morice & Blakesley; Howard C. Morris.*

[Reported by G. WELBY KING, Esq., Barrister-at-Law.]



## Re LLEWELLIN, A SOLICITOR

[CHANCERY DIVISION (Chitty, J.), July 21, August 5, 1891]

[Reported [1891] 3 Ch. 145; 60 L.J.Ch. 732; 65 L.T. 249;  
39 W.R. 713; 7 T.L.R. 742]

*Solicitor—Lien—Mortgage—Claim by mortgagee's solicitor to lien on deeds—  
Payment off of mortgage—Costs due to solicitor from mortgagee—Equitable  
right of mortgagor to deeds prevailing.*

If a mortgagor has paid his mortgagee all principal, interest, and costs, and has been duly released by him, the mortgagee's solicitor cannot retain the deeds as against the mortgagor for costs due to him from the mortgagee for work done relating to the mortgaged property pending the mortgage. The equitable right of the mortgagor to have his deeds from the mortgagee prevails against the solicitor's lien claimed in right of the mortgagee.

*Ogle v. Story* (1) (1833), 4 B. & Ad. 735, distinguished.

*Wakefield v. Newbon* (2) (1844), 6 Q.B. 276, followed.

**Per Curiam:** The position might have been different if the mortgagor and mortgagee had settled their account for the purpose of depriving the solicitor of any lien which he might have.

**Notes.** Referred to: *Brunton v. Electrical Engineering Corp'n.* (1891), 61 L.J.Ch. 256; *Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85; *Barratt v. Gough-Thomas*, [1945] 2 All E.R. 414; *Barratt v. Gough-Thomas*, [1950] 2 All E.R. 1048.

As to solicitor's lien generally, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 42 DIGEST 267-269.

Cases referred to:

(1) *Ogle v. Story* (1833), 4 B. & Ad. 735; 1 Nev. & M.K.B. 474; 2 L.J.K.B. 110; 110 E.R. 632; 42 Digest 267, 3017.

(2) *Wakefield v. Newbon* (1844), 6 Q.B. 276; 13 L.J.Q.B. 258; 3 L.T.O.S. 160; 8 Jur. 735; 115 E.R. 107; 42 Digest 268, 3019.

(3) *Blunden v. Desart* (1842), 2 Dr. & War. 405; 42 Digest 269, f.

(4) *Pelly v. Wathen* (1851), 1 De G.M. & G. 16; 21 L.J.Ch. 105; 18 L.T.O.S. 129; 16 Jur. 47; 42 E.R. 457, L.J.J.; 42 Digest 266, 3011.

Also referred to in argument:

*Pratt v. Vizard* (1833), 5 B. & Ad. 808; 2 Nev. & M.K.B. 455; 3 L.J.K.B. 7; 110 E.R. 989; 42 Digest 267, 3016.

*Re Jones* (1845), 8 Beav. 479; 50 E.R. 188; 42 Digest 171, 1774.

*Ex parte Cobeldick* (1883), 12 Q.B.D. 149; 49 L.T. 741; 32 W.R. 239, C.A.

*Hollis v. Claridge* (1813), 4 Taunt. 807; 128 E.R. 549; 42 Digest 266, 3009.

*Cattell v. Simons* (1843), 6 Beav. 304; 49 E.R. 843; 42 Digest 283, 3180.

**Summons** for the taxation of a solicitor's bill of costs and delivery of documents, the applicant disputing the retainer.

The respondent, John Charles Llewellyn, acted as solicitor to the applicant, David Sanders, in obtaining a mortgage for him on his property. All costs due from the applicant personally to the respondent were paid. A transfer of the mortgage was effected without notice to the respondent. The applicant took a release by deed from the mortgagee. The respondent had acted also as solicitor for the mortgagee in the matter of the mortgage, and set up a lien for costs on certain deeds in his possession which related to the mortgaged estate. These costs were incurred in taking possession under the instructions of the mortgagee, in obtaining a judgment against the mortgagor on his covenant, and in conducting an attempted sale. The respondent had obtained possession of the deeds as solicitor to the applicant, the mortgagor, but now contended that he held them for the mortgagee. He delivered his bill of costs in the name of the applicant, but now admitted that

A no express retainer had ever been given him by the applicant, and that he had now no bill of costs against him personally. On the present summons, the question of lien alone was argued.

Maidlow for the summons.

A. J. Allen for the respondent.

B

*Cur. adv. vult.*

Aug. 5, 1891. **CHITTY, J.**, stated the facts, and continued: I will assume, in favour of the respondent, that among the documents he holds there are some which relate to the title of the mortgaged property, and that though he received them originally from the applicant, the custody was changed, and that he afterwards held

C them as solicitor for the mortgagee.

After the admission of the respondent that he had no bill of costs against the applicant personally, it is clear that the lien claimed on the documents of title is merely a lien in virtue of the right of the mortgagee to hold such documents. But it appears from the evidence that the applicant has settled all accounts with his mortgagee, and that the mortgagee has no longer any claim against him for the

D costs included in the bill in question, and consequently no lien as against him on the documents of title, nor any right to withhold them from him. There is no suggestion in the evidence that the settlement of accounts between the applicant and his mortgagee, who was mortgagee in possession, was come to for the purpose of defeating any lien of the respondent, and it is unnecessary to consider what might have been the effect of such evidence if given.

E The question, then, is whether the respondent has any lien on the documents of title as against the applicant. The nature of a solicitor's lien is so well established that it is scarcely necessary to state its nature, or on what grounds it is founded. It is not the result of contract; it is not an equitable charge; it is not an encumbrance affecting the estate itself: see LORD ST. LEONARD's judgment in *Blunden v. Desart* (3). It does not confer on the solicitor any higher right to retain deeds than

F the client himself has (*ibid.* at p. 418). There is some error in the language attributed to the judges who decided *Ogle v. Story* (1), as reported in 4 B. & Ad. 735, where apparently an attorney's lien is spoken of as a pledge. In the case as reported in 2 L.J.K.B. 110, the term "pledge" does not appear. This case was cited as an authority on behalf of the respondent; but it has no bearing on the case now before me. It was an action to recover money from the attorney; the true

G ground of the decision was that the plaintiff had overpaid the mortgagee, and the plaintiff ought to have sued him and not the attorney: see LORD ST. LEONARD's judgment in *Blunden v. Desart* (3), 2 Dr. & W. at pp. 426, 427.

The nature of a solicitor's lien is stated clearly in the judgment of the court delivered by LORD CRANWORTH in *Pelly v. Wathen* (4). He says (1 De G.M. & G. at p. 23):

H "The general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied. It is a right derived entirely through the client, and, therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the

I solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor. These consequences flow so immediately from the nature of the relation subsisting between the client and his solicitor, that, even independently of authority, we should have felt bound by principles on which they depend."

And again (*ibid.* at p. 27), he says, in effect, that the right to hold title deeds in virtue of a solicitor's lien is subject to all rights, legal and equitable, affecting them in the hands of the person from whom he received them.

These principles are illustrated by numerous authorities which it is unnecessary to cite. From these it follows that when the mortgagor has paid to the mortgagee all that is due to him for principal, interest, and costs, and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage; the equitable right of the mortgagor to have from the mortgagee his deeds on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee. In *Wakefield v. Newbon* (2) there had been a re-conveyance to the mortgagor, and it was held that he was entitled to recover the deeds from the mortgagee's attorney. Here the mortgagee has released the mortgagor and conveyed the property to another mortgagee by the direction of the mortgagor; the only difference between the cases is that there the mortgagor had a legal right to the deeds; here he has only an equitable right.

If the new mortgagee had claimed the deeds, the result might have been different, but he has made no such claim. The documents of title having originally come into the possession of the respondent as solicitor for the applicant, the applicant is entitled to have them delivered back to him now that the lien is gone. There is no question as to the applicant's right to have back all documents belonging to him not relating to the mortgaged property. The order must be in the usual form, for delivery of all documents in the respondent's hands, on oath. The respondent must pay the costs. Inasmuch as the documents came into the possession of the respondent originally as solicitor for the applicant, it is not necessary that an action should be brought; the order can properly be made in the matter of the solicitor. It is unnecessary to consider the question, whether, by setting up wrongly a lien to retain the documents for a debt due from the applicant personally, the respondent has not waived his lien: *Dirk v. Richards*.

Solicitors: *Indermaur & Brown* for *Theodore Roberts*, Newport; *Thomas White & Son*.

[Reported by W. H. QUARRELL, ESQ., Barrister-at-Law.]



A

## NYBERG v. HANDELAAR

[COURT OF APPEAL (Lord Esher, M.R., Fry and Lopes, L.J.J.), April 28, 30, May 7, 1892]

[Reported [1892] 2 Q.B. 202; 61 L.J.Q.B. 709; 67 L.T. 361; 56 J.P. 694; 40 W.R. 545; 8 T.L.R. 549; 36 Sol. Jo. 485]

B

*Detinue—Recovery of goods—Co-owner of chattel—Right to immediate possession—Absolute or special property in goods—Chattel bailed to other co-owner and lodged by him with defendant as security for debt.*

C

The plaintiff was co-owner with F. of a box, and it was agreed between them that the plaintiff should keep possession of it until he was able to sell it. Afterwards he entrusted the box to F. to take to an auctioneer. F. gave it to the defendant as security for money which he owed him. In an action brought by the plaintiff against the defendant to recover possession of the box,

**Held:** as the plaintiff had the right to immediate possession of the box as well as a special property in it by virtue of the agreement, an action for detinue would lie, and the plaintiff was entitled to judgment.

D

Per LOPES, L.J.: A person who is entitled to the possession of a personal chattel can maintain an action for detinue if he has the right to the immediate possession at the date of the writ arising out of an absolute or special property.

**Notes.** As to conversion by co-owner, see 38 HALSBURY'S LAWS (3rd Edn.) 790; and for cases see 43 DIGEST 503 et seq.

**E** Case referred to:

(1) *Fenn v. Bittleston* (1851), 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197; 155 E.R. 895; 3 Digest (Repl.) 112, 335.

Also referred to in argument:

*Gordon v. Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 43 Digest 496, 354.

F

*Cooper v. Willomatt* (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest (Repl.) 117, 372.

*Roberts v. Wyatt* (1810), 2 Taunt. 268; 127 E.R. 1080; 3 Digest (Repl.) 114, 351.

*Brierly v. Kendall* (1852), 17 Q.B. 937; 21 L.J.Q.B. 161; 18 L.T.O.S. 254; 16 Jur. 449; 117 E.R. 1540; 7 Digest (Repl.) 138, 786.

G

**Application** by the plaintiff for judgment or a new trial in an action brought for the detention of a gold snuff-box.

The plaintiff had purchased a gold snuff-box for £130, and under an agreement with one Frankenheim it was arranged that the plaintiff should remain in possession of the box until it was sold, and that he should try and sell it. It was also agreed that when it was sold the proceeds should be divided between them. Some time afterwards the plaintiff entrusted it to Frankenheim to carry to Christie's, where it was to be sold by auction. Frankenheim, instead of doing this, gave possession of the box to the defendant as security for a debt which he owed.

H

At the trial of the action before A. L. SMITH, J., with a jury the only question which he left to the jury was whether Frankenheim put the box into the defendant's possession to keep his half share in it as security for the debt, and this question the jury answered in the affirmative. Upon further consideration the learned judge ruled that the plaintiff had no cause of action. The plaintiff now moved for judgment or a new trial.

I

*Willis, Q.C., and Fillan* for the plaintiff.

*W. H. Clay* for the defendant.

*Cur. adv. vult.*

May 7, 1892. **FRY, L.J.**—This is a case in which the plaintiff, who was owner of a gold box, entered into an agreement with one Frankenheim that Frankenheim

should become owner of half the box, while he, the plaintiff, should keep possession and have the selling of it. Apparently the jury found, and it must be taken to be so, that Frankenheim gave possession of the box to the defendant for value. The plaintiff is now suing the defendant to recover the box. The other facts of the case are that, after the box had remained for some time in the plaintiff's hands, he handed it to Frankenheim to take it to be sold by auction at Christie's, and Frankenheim passed it on to the defendant as security for a debt which he owed to him. The question now is, whether the plaintiff can maintain an action of detinue. A

I adhere to the statements in *SELWYN'S NISI PRIUS* and in *BULLEN AND LEAKE ON PLEADING*, that detinue is maintainable by anyone who has the immediate right to possession of personal chattels, whether arising out of an absolute or special property. I do not go beyond that, and the decision in *Fenn v. Bittleston* (1), which is a strong authority for that proposition. That being so, the question is an easy one: Had the plaintiff acquired any special property in the box? It was argued that there was no tenancy in common of the box, because the plaintiff was entitled to the possession of it under the agreement with Frankenheim; but I do not accede to that argument, because I think that the possession of the plaintiff was the possession of the plaintiff and Frankenheim. Nevertheless, there was here the special agreement entered into which I have mentioned, that the plaintiff should have possession of the box till it was sold, and should also have the power of selling it. B

The true conclusion to draw is, I think, that a special property was thereby created in the plaintiff for a term which was to last during his life, but was defeasible by the sale of the box. There was, therefore, a special property in the plaintiff, and the right of possession which he had being only given up for a specific purpose, which was not carried out, he became entitled again to immediate possession. As he had therefore both a special property in the box as well as a right to immediate possession, the action of detinue is maintainable. This point was not really pressed before A. L. SMITH, J., as the true result of the transaction between the plaintiff and Frankenheim, and though we are differing from his judgment, it might have been different if his opinion had been taken on this point. D

We must order judgment to be entered for the plaintiff for £130, or the return of the box. E

**LOPES, L.J.**—My view as to the law of detinue is that a person who is entitled to the possession of a personal chattel can maintain an action of detinue if he has the right to the immediate possession at the date of the writ, arising out of an absolute or special property. I cannot see how a person can have the right to immediate possession without having some property in it. It must be conceded that the plaintiff would have had no better right to possession of the box as against the defendant than Frankenheim, if there had been no special agreement between him and Frankenheim. Here there was an agreement that the plaintiff was to keep the box until it was sold. He afterwards entrusted it to Frankenheim to take to Christie's, but instead of doing so Frankenheim handed it to the defendant as security for a debt. That was a bailment of the box to Frankenheim for a special purpose, which he did not carry out. Under those circumstances the plaintiff's right to the immediate possession of the box at once accrued, and he is therefore entitled to maintain this action. I think, therefore, that this appeal should be allowed. F

**FRY, L.J.**—I wish to add that **LORD ESHER, M.R.**, has asked me to say that he agrees in the conclusion at which I arrived, and in the reasons I have given. G

*Appeal allowed.* H

Solicitors: *White & de Buriatte; Hepburn & Davison.*

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.] I

# **Ré VANSITTART. Ex parte BROWN**

[QUEEN'S BENCH DIVISION (Vaughan Williams, J.), October 26, 27, 1892]

[Reported [1893] 1 Q.B. 181; 62 L.J.Q.B. 277; 67 L.T. 592;  
57 J.P. 132; 41 W.R. 32; 9 T.L.R. 14; 37 Sol. Jo. 12;  
9 Morr. 280; 5 R. 38]

*Bankruptcy—Property available for distribution—Settlement within two years of bankruptcy—Husband and wife—Gifts of jewellery by husband to wife within two years of bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 47.*

By the Bankruptcy Act, 1883, s. 47: “(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. . . . (3) ‘Settlement’ shall for the purposes of this section include any conveyance or transfer of property.”

A husband at various times bought jewellery and gave it to his wife. Within two years of the gifts he was adjudicated bankrupt. On an application by the trustee under s. 47 to avoid the gifts,

**Held:** s. 47 applied to cases where the circumstances of the gift made it manifest that the subject-matter of the gift was intended to be preserved by the donee; in the present case the husband intended his wife to keep the jewellery; and, therefore, the gifts constituted “a settlement of property” within the section and were void against the trustee.

**Notes.** For s. 47 of the Bankruptcy Act, 1883, see now s. 42 of the Bankruptcy Act, 1914.

Followed: *Re Tankard, Ex parte Official Receiver*, [1899] 2 Q.B. 57. Approved: *Re Plummer*, [1900] 2 Q.B. 790. Considered: *Hubbard v. Hubbard*, [1900-3] All E.R.Rep. 342; *Thomas v. Marshall*, [1953] 1 All E.R. 1102. Referred to: *Tasker v. Tasker*, [1895] P. 1; *Re Branson, Ex parte Moore*, [1914] 3 K.B. 1086.

As to avoidance of settlements, see 2 HALSBURY'S LAWS (3rd Edn.) 548 et seq.; and for cases see 5 DIGEST (Repl.) 899 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Cases referred to:

(1) *Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682; 54 L.J.Q.B. 554; 2 Morr. 265, D.C.; 5 Digest (Repl.) 900, 7483.

(2) *Kensington v. Chantler* (1813), 2 M. & S. 36; 105 E.R. 295; 5 Digest (Repl.) 899, 7474.

Also referred to in argument:

*Re Ridler, Ridler v. Ridler* (1882), 22 Ch.D. 74; 52 L.J.Ch. 343; 48 L.T. 396; 47 J.P. 279; 31 W.R. 93, C.A.; 25 Digest (Repl.) 186, 120.

**Motion** for a declaration that certain pawn-tickets representing jewellery given by a bankrupt to his wife within two years of the bankruptcy were the property of his trustees in bankruptcy.

The parties were married on Feb. 24, 1881. There was no settlement, and between December, 1889, and December, 1891, the bankrupt presented to his wife certain valuable diamonds. The occasions selected for making such presents were Christmas Day, the anniversary of their wedding-day in 1891, and another occasion when a horse called Romance belonging to the bankrupt, won a race. Subsequently the debtor pawned part of the jewellery for £80, and afterwards, being



pressed by a bankruptcy notice, he handed over some more to Messrs. Hirsch, pawnbrokers, for a temporary loan. On Dec. 8, 1891, a receiving order was made against the bankrupt, and on Jan. 9, 1892, he was adjudicated bankrupt. A

Witt, Q.C., and Germaine for the trustee.

Yate Lee for the bankrupt's wife.

Muir Mackenzie as amicus curiæ.

Cur. adv. vult. B

Oct. 27, 1892. **VAUGHAN WILLIAMS, J.**, read the following judgment.—It is extremely difficult to extract from the decided cases any clear definition of the transfers which will and which will not fall within the operation of this section. The section, as CAVE, J., points out in *Re Player, Ex parte Harvey* (1), has a history. The word "settlement" did not appear in the Bankruptcy Act, 1603. The words there were C

"shall convey or procure or cause to be conveyed to any of his children or other person any lands, goods, or chattels, or transfer his debts into other men's names, it shall be in the power of the commissioners to dispose thereof as if the bankrupt had been actually possessed thereof." D

In *Kensington v. Chantler* (2) LORD ELLENBOROUGH held that money did not fall within the section, which was confined to things which were the subject of conveyance, and capable of being conveyed and procured to be conveyed. LORD ELLENBOROUGH did not mean by this that the section only extended to land, and did not extend to personal property; he meant apparently that the section did not apply to a gift of money which if given directly to the donee could not have been intended to be preserved, and seems to have mentioned the fact that money was not included in the words of the statute rather as an illustration that the statute was not intended to apply to gifts of personal property not intended to be preserved by the donee than as a definition of the subject-matter intended to be the subject-matter of the section; indeed, in the very case of *Kensington v. Chantler* (2) a portion of the property the transfer of which was held not to be within the section was flats or boats given by the bankrupt to his son for the purpose of a salt-work business carried on by the son, which flats were still in the possession of the bankrupt down to the date of his father's bankruptcy. E

I infer from this and other decisions on the same lines referred to in the textbooks that the judges so read the section as to make the application of it depend on the intention of the donor, at all events to the extent that the section did not apply to cases where the circumstances of the gift made it manifest that the subject-matter of the gift was not intended to be preserved by the donee, as would be manifest in the case of a gift of money to a son to advance him in business, or to a son for his maintenance. F

The words of the Act of 1603, so far as they affect the point under discussion, remained unaltered until 1869, when for the first time the word "settlement" was introduced in the bankruptcy statute, and substituted for the words which I have cited. Perhaps the object of the change was, on the one hand, to indicate that the section was not intended to apply to transfers of property which from the nature and circumstances of the transfer showed that the "donor" did not contemplate the preservation of the actual subject-matter of transfer by the transferee, and, on the other hand, to indicate that the section did apply to the transfer of a sum of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment. It is difficult to account for the use of the word "settlement" in substitution for the word transfer or conveyance unless the legislature intended to indicate that the transaction to fall within the statute must not be such as to negative a contemplation by the "donor" of the possible permanency of the subject-matter of transfer as the property of the transferee. This is what I understand CAVE, J., to mean when G

A he says (15 Q.B.D. at pp. 686, 687) the word to look at is "settlement,"

"although 'settlement' by the 3rd subsection 'shall for the purposes of this section, include any conveyance or transfer of property,' yet I think the view of my brother MATHEW is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person."

B Taking this view, I am afraid that a present of diamonds by a man to his wife is a present which I ought to hold was a settlement on the wife; it seems to me that, to use the words of CAVE, J., the purpose of the transaction was the preservation of the thing, whatever its form, for the enjoyment of the other person. I think the "donor" contemplated the retention by his wife of the present which he gave her. I should have held just the same if he had given her money to buy herself a present. It will be observed that in *Re Player, Ex parte Harvey* (1), where the transfer of the shares was held to fall within the section, the actual gift was of money to buy the shares.

C I wish to add that if I had had to construe the section apart from previous decisions I am not at all sure that I should not have limited its operation to written transfers. I am not sure that this is not what LORD ELLENBOROUGH meant in *Kensington v. Chantler* (2), but it is quite impossible at this time to introduce such a limitation into the section, which up to the present time has never been introduced, at all events expressly, in any of the judgments given in the decided cases.

E *Application allowed.*

Solicitors: *R. & E. Bastard; Sanderson, Holland & Adkin.*

[*Reported by W. B. YATES, Esq., Barrister-at-Law.*]

## G R. v. MISKIN HIGHER JUSTICES. Ex parte PITMAN

[QUEEN'S BENCH DIVISION (Lord Coleridge, C.J., and Wills, J.), November 19, 1892]

[Reported [1893] 1 Q.B. 275; 67 L.T. 680; 57 J.P. 263;  
41 W.R. 252; 9 T.L.R. 81; 37 Sol. Jo. 67; 5 R. 121]

H *Licensing—Licence—Renewal—Objection—Disorderly character of house—Evidence of convictions of previous tenants—Admissibility—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 42—Licensing Act, 1874 (37 & 38 Vict., c. 49), s. 26.*

I A notice of objection to the renewal of a publican's licence stated, inter alia, that the house in respect of which the renewal was sought was of a disorderly character. It was admitted that the applicant himself was of good character, but evidence was offered in support of the objection of three convictions against previous tenants for offences against the Licensing Acts. The justices refused to renew the licence.

**Held:** the character of a public-house was distinct from that of the person conducting it, and the evidence was properly admitted.

**Notes.** For restricted power of licensing justices to refuse renewal of an old on-licence, see now s. 14 of the Licensing Act, 1953. Section 13 of the 1953 Act, dealing with power to refuse renewal of an old off-licence, has been repealed

as virtually spent by the Licensing Act, 1961, but without prejudice to s. 14 (3) of the 1953 Act. By that section justices have power to refuse an application to renew an old beerhouse licence on grounds specified in paras. (a) to (c) of s. 13 (2) of the 1953 Act. These grounds include, inter alia, "that the house or shop to which the application relates . . . is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character". By s. 14 (4) justices have the power to refuse a renewal of an old on-licence, other than an old beerhouse licence, on the ground, inter alia, that the licensed premises have been "ill-conducted." For s. 42 of the Licensing Act, 1872, as amended by s. 26 of the Licensing Act, 1874, see now s. 11 of the Licensing Act, 1953. A

As to renewal of licences, see 22 HALSBURY'S LAWS (3rd Edn.) 549 et seq.; and for cases see 30 DIGEST (Repl.) 15 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142 et seq.; and for the Licensing Act, 1961, see *ibid.* vol. 41, p. 556. B

Case referred to:

- (1) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, 51. C

**Rule Nisi** for a writ of mandamus directed to the justices of the Miskin Higher Petty Sessional Division of the county of Glamorgan, to hear and determine the application of Thomas Pitman, for the renewal of his publican's licence for the Angel Inn, Aberdare. D

The affidavit set out that the applicant obtained a transfer licence of the premises at a special sessions held in April, 1892, having previously entered upon the premises. The general annual licensing meeting for the division was held on Aug. 23, 1892, and seven days before that day, viz., on Aug. 13, there was served upon the applicant by the superintendent of police a written notice of objections to the renewal of his licence on the following grounds: E

- "(i) That a house licensed for the sale of intoxicating liquor is not required in the neighbourhood in which your house is situate; (ii) that your house in respect of which a renewal of your licence is sought is of a disorderly character; (iii) that your house is not structurally adapted to the business carried on there." F

The first objection contained in the notice, which was a printed form, had been struck out before service, and was as follows:

- "That you have been convicted of an offence under the Licensing Acts, and therefore you cannot procure satisfactory evidence of your character." G

At the general annual licensing meeting on Aug. 23 the applicant attended, but the justices adjourned the hearing of his case to an adjourned meeting to be held on Sept. 27.

On Sept. 12 the clerk to the justices sent a written notice from the justices to the applicant to attend personally at the adjourned meeting, but the notice contained nothing about the grounds of objection. At the adjourned meeting on Sept. 27 the applicant attended with his solicitor, prepared to meet the objections stated in the notice. The clerk to the justices however proposed to prove three convictions against previous holders of the licence. To this the applicant's solicitor objected that the notice had not specified any objection upon that ground, and the justices, if they entertained an objection of which no notice had been given, would be acting without jurisdiction, and contrary to the Licensing Act, 1872, s. 42, and the Licensing Act, 1874, s. 26. The proposed evidence of convictions was against previous holders of a licence for the same house, one on May 1, 1888, for permitting drunkenness; one on Aug. 21, 1891, for keeping open on Sunday, and one on Mar. 15, 1892, for permitting drunkenness. None of the convictions was against the applicant. The justices, notwithstanding the applicant's objection, admitted evidence of the above convictions. The objections on the other grounds mentioned H  
I



**A** in the notice were dismissed. At the end of the hearing the justices refused the renewal of the applicant's licence, the chairman observing that although they were not bound to give any reasons, it might be taken that it was on the ground of the convictions. This rule was accordingly obtained, and the justices made no affidavit, being satisfied that the affidavit of the applicant set forth the facts correctly.

**B** *J. V. Austin* for the justices, showed cause.  
*J. Paterson* in support of the rule.

**LORD COLERIDGE, C.J.**—I am of opinion that this rule must be discharged. It is an application for a mandamus to order the justices to hear and determine an application for the renewal of a public-house licence. The answer is that they **C** have already done so. It appears to me that the justices were acting well within their jurisdiction in deciding as they did. I do not say whether or no I should have decided in the same way, but I am clearly of opinion that they had legal evidence before them of the ground on which their decision was based. Here was an applicant who was admitted to be of good character. Objection is taken against him that his public-house is of a disorderly character. The evidence offered in **D** support of the objection consists of three convictions against previous tenants of the house in 1888, 1891, and 1892 respectively. In the opinion of the magistrates these convictions showed that the house had been conducted in a disorderly manner; and I think they were entitled so to find. The applicant's counsel takes the objection that to say that a house is disorderly is to call mere bricks and mortar disorderly. I cannot agree with that view, and it is plain that Parliament **E** does not think so; because a "house of a disorderly character" is a parliamentary phrase, and it is one of the objections that may be made to a perfectly new applicant, so that it is plain that the house itself may be held to be of a disorderly character, as distinct from the person who is conducting it. The evidence therefore was perfectly admissible, and whether it was sufficient was a question entirely for the magistrates.

**F** As for the larger question whether the magistrates might have acted upon a ground not specified in the notice of objections, the law has been pronounced by the House of Lords in *Sharp v. Wakefield* (1). But that point does not arise here, because the magistrates have in fact acted upon a ground of which the applicant had due notice.

**G** **WILLS, J.**—I am of the same opinion. I agree with counsel for the justices that the short result of *Sharp v. Wakefield* (1) is that when objections have been properly and formally made to a renewal of a licence, the justices are at liberty to go into other grounds of objection than those contained in the notice, so long as they are not grounds personal to the applicant. But in this case the magistrates did act upon a ground which was specified in the notice, and the question is **H** whether they had any legitimate evidence to justify them in so acting. The ground on which they acted was that the house was of a disorderly character. The objection, says the applicant's counsel, means no more than that the applicant is a person who has conducted the house in a disorderly way. I entirely dissent from that view. I think that the policy of the Act was something much wider than that. This is shown by s. 9 of the Wine and Beerhouse Act, 1869 [repealed].

**I** Under that Act in the case of a perfectly new applicant, it may be shown that the house is of a disorderly character. I think the policy of the Act was quite in the opposite direction to that suggested, and was intended to provide for the house being conducted continuously in an orderly way. Every one knows what a well-conducted house means, although in its literal sense it is nonsense. It is the transference by a figure of speech of the things done in the house to the house itself. A house as well as a man, may have a certain character stamped upon it, and no matter in whose hands it has got that character, the justices may take it into account. The evidence in this case may or may not be slender. With that

we have nothing to do. I myself think it was sufficient. There were three convictions against previous holders of the licence in 1888, 1891, and 1892. That might be sufficient to affect the character of the house, and I think the policy of the Act was that such a character should not be got rid of merely by a change of tenant. I therefore agree that the application must be dismissed.

Solicitors: *Purkis & Sons*, for *Phillips & Co.*, Aberdare; *Bell, Brodrick & Grey*, for *Lewis & Co.*, Merthyr Tydvil.

[Reported by G. H. GRANT, ESQ., Barrister-at-Law.]

## BURT, BOULTON AND HAYWARD v. BULL AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.J.J.), December 3, 1894]

[Reported [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65]

*Company—Debenture holders' action—Receiver and manager—Appointment by court—Carrying on business—Personal liability on contracts.*

A receiver and manager appointed by the court in a debenture holders' action to carry on a business is appointed to do so on his own responsibility, the sole control of the business being vested in him, and, in the absence of clear stipulation to the contrary, he can pledge no credit but his own and so is personally liable on any contract which he makes, e.g., for the purchase of goods for use in the business.

**Notes.** Considered: *Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365. Applied: *Thomas v. Todd*, [1926] All E.R.Rep. 564. Considered: *Stead, Hazel & Co. v. Cooper*, [1933] All E.R.Rep. 770; *Consolidated Entertainments, Ltd. v. Taylor*, [1937] 4 All E.R. 432. Referred to: *Re Flowers*, [1897] 1 Q.B. 14; *Justice v. James* (1899), 15 T.L.R. 181; *Re British Power Traction and Lighting Co., Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co.*, [1906] 1 Ch. 497; *Forster v. Nixon's Navigation Co.* (1906), 23 T.L.R. 138; *Plumpton v. Burkinshaw*, [1908-10] All E.R.Rep. 331; *Nicholls v. Knapman* (1909), 101 L.T. 746; *Boehm v. Goodall*, [1911] 1 Ch. 155; *Moss Steamship Co. v. Whinney*, [1911-13] All E.R.Rep. 344; *Re Hawkins, Briebe v. Hawkins* (1915), 31 T.L.R. 247.

As to liability of a receiver for contracts, see 32 HALSBURY'S LAWS (3rd Edn.) 438 et seq.; and for cases see 10 DIGEST (Repl.) 833 et seq.

Cases referred to:

- (1) *Sargant v. Read* (1876), 1 Ch.D. 600; 45 L.J.Ch. 206; 2 Char. Pr. Cas. 81; 39 Digest 12, 73.
- (2) *Taylor v. Neate* (1888), 39 Ch.D. 538; 57 L.J.Ch. 1044; 60 L.T. 179; 37 W.R. 190; 4 T.L.R. 748; 36 Digest (Repl.) 594, 1518.
- (3) *Owen & Co. v. Cronk*, [1895] 1 Q.B. 265; 64 L.J.Q.B. 288; 11 T.L.R. 76; 2 Mans. 115; 14 R. 229, C.A.; 10 Digest (Repl.) 821, 5366.

Also referred to in argument:

*Redpath v. Wigg and O'Beirne* (1866), L.R. 1 Exch. 335; 4 H. & C. 432; 35 L.J.Ex. 211; 14 L.T. 764; 12 Jur.N.S. 903; 14 W.R. 866, Ex. Ch.; 1 Digest (Repl.) 733, 2766.

**A** **Appeal** by the defendants from a decision of MATHEW, J., at the trial without a jury in Middlesex, in an action by the plaintiffs to recover from the defendants the price of goods sold and delivered.

A company, called Joseph Bull & Co., Ltd., carried on business as builders and contractors. In an action in the Chancery Division brought against the company by the debenture-holders, the defendant Bull and one Bird were appointed by the court to carry on the business of the company. Certain unsecured creditors of the company then presented a winding-up petition but no order was made, the arrangement being that second debentures should be issued to them to secure their debts, and one Hobbs should be appointed receiver and manager on their behalf in the place of Bird. The court ultimately appointed the defendant Ward, an accountant, to replace Hobbs and to act jointly with the defendant Bull on behalf of the unsecured creditors.

**C** Part of the business of the company consisted of two uncompleted contracts for building schools. For the purpose of completing these contracts the defendants ordered from the plaintiffs the goods for the price of which this action was brought. The order was in writing and purported to be given "For Joseph Bull & Co., Ltd.," and was signed "E. C. Bull—R. J. Ward, receivers and managers." At the trial **D** before MATHEW, J., without a jury, the defendants contended that they were not personally liable, and that the plaintiffs could look only to the assets of the company for payment. MATHEW, J., gave judgment for the plaintiffs. The defendants appealed.

*Farwell, Q.C., and Beven* for the defendant Bull.  
*Upjohn* for the defendant Ward.  
**E** *Lawson Walton, Q.C., and C. A. Russell* for the plaintiffs.

**LORD ESHER, M.R.**—This action was tried by MATHEW, J., without a jury, and was brought to recover the price of goods sold and delivered. The goods were timber supplied for the business of a builder. The building business had passed out of the hands of Joseph Bull & Co., Ltd., to the extent that the Chancery Division **F** had appointed managers and receivers of the business at the suit of debenture holders. What is the meaning and effect of such an appointment? The Chancery Division has taken the management of the business into its own hands, and has appointed managers of the business. What is the position of such managers? Are they agents of the court? If they are, they must obtain and act under the directions of the court. They are not the agents of the company, which cannot **G** control or dismiss them. Neither the company nor the debenture holders can control or dismiss them or give them orders as to the carrying on of the business. They can only make suggestions to the court that the managers are not doing the best that can be done in their interests, and ask the court to discharge them. When one person is in such a relation as that to another person, he is the agent of that other person. The manager, therefore, is the agent of the court.

**H** That being so, would the court make itself responsible? That is impossible. What then, must the court do? It is inevitable that it should so appoint its agent that he shall carry on the business on his own responsibility. He must, when necessary, order goods, etc., upon his own responsibility. It seems to me, therefore, to follow, as an inevitable consequence from the position, that the manager **I** must make himself personally liable. What SIR GEORGE JESSEL, M.R., said in *Sargant v. Read* (1) shows that he was of that opinion, and that the rule was well known and did not require to be proved. I think that what CHITTY, J., said in *Taylor v. Neate* (2) is to the same effect, that when a court appoints a manager, it knows that he must make contracts which can pledge no credit but his own. That, in my opinion, is the position of a manager appointed by the Chancery Division.

When the question has to be determined as to the liability of the manager under a contract with another person, if that person has contracted upon other terms,



he cannot then turn round and say that the manager is personally liable. If the manager tells the person with whom he is contracting that he is a manager, and gives his order expressly upon the terms, which are not the ordinary terms, that such person is to be paid only out of the funds of the business if there are any, then such person cannot say that the manager is personally liable. There may be, therefore, cases in which orders are accepted not upon the personal credit of the manager. If, however, no such special stipulations are made, and orders are given by the manager simply as manager, then the inference is that the manager is personally liable. If that were not so, the consequences would be most serious. No tradesman could deal with a manager without making inquiry as to the existence and extent of funds belonging to the business and the number of creditors; so also in the case of workmen and servants in respect of their wages. Those considerations show that the contention is absurd.

That being so, in this case we have to look at the order which was given, and at what took place, and not to consider the use of the words "receivers and managers." The defendants could not be the agents of the company, because they were not appointed by the company. They signed as "receivers and managers," but that is only a legal term showing the persons who dealt with them what their position was, namely, that of receivers and managers appointed by the court, and that they were dealing on the credit of the receivers and managers. The question is one of fact in every case, because special circumstances may take any particular case out of the general rule. In this case it has been found that the transaction came within the ordinary rule. That decision was right, and the appeal must be dismissed.

**LOPES, L.J.**—The learned judge at the trial found that the defendants, who were receivers and managers appointed by the court, were personally liable. The question is one of fact, and must always be so in every case. The question is: On whose credit were the goods supplied? It is said that the defendants were only agents. Whose agents were they? It is suggested that they were the agents of the company, but that could not be so. In my opinion, it is impossible to contend that the defendants were the agents of anybody. The sole control of the business, subject to the jurisdiction of the court, was vested in the defendants. In my opinion, the goods were supplied upon the credit of the defendants. They gave the orders, as receivers and managers, to the plaintiffs, who knew what the position was. It is said that it is hard upon the defendants to make them personally liable. They can, however, protect themselves. If there are not sufficient assets, they need not give orders at all, or they may give orders in such express terms as to avoid any personal liability at all. I am of opinion that they intended to incur personal liability. The decision of **MATHEW, J.**, was right, and must be affirmed.

**RIGBY, L.J.**—This was an action to recover the price of goods sold and delivered. The order given for the goods was in the following form, which is probably the form usually used by a receiver and manager: "For Joseph Bull & Co., Ltd." (Signed) "E. C. Bull, R. J. Ward, receivers and managers." It appears to me that the use of the words "receivers and managers," if this had been a transaction between strangers, was enough to put persons upon inquiry as to the real position of the party ordering the goods. In *Owen & Co. v. Cronk* (3) it appeared that the person giving the order acted on behalf of a principal. In the present case they were not agents of any person or company, but had been appointed by a judge of the Chancery Division, in an action by debenture holders, in order to do what was supposed to be for their benefit, that is, to carry on the existing business of Joseph Bull & Co., Ltd. It was promised that a fund would be provided, and the defendants undertook the office of receivers and managers on that basis.

When a receiver and manager is appointed by the court, it is not intended to put forward an officer of the court to carry on a business, involving the making of contracts, in such a way as to deceive the public into a belief that someone else

A is personally liable. There may be special cases, which must be very special cases, in which a receiver and manager appointed by the court might be ordered not to deal with third persons without telling them that he would not be personally liable. I am not, however, aware of any such case having occurred. When a manager is appointed by the court to carry on a business, it is always intended that the manager shall be so appointed as to appear to carry on the business as a person who is personally responsible, except when he clearly stipulates to the contrary with the persons with whom he deals, and that he shall look to the assets for indemnity. It is impossible for the public to know for whose benefit the business is being carried on, and they must look to the manager as being liable. I do not say that it is the duty of such an officer of the court to incur heavy expenses, but it must be his duty to undertake the ordinary responsibilities of such a business as he has appointed to carry on. I do not say that he may not, in any case, come to the court and ask to be relieved from such duties. He cannot, however, get rid of such liabilities by simply stating that he is a receiver and manager. I think that, as soon as it appears that he has no principal, it is to be implied that when he makes a contract it binds him personally.

I am not surprised that there is not much authority upon this question. Receivers and managers have often been held to be personally liable, and this has been looked upon as well settled law. I am of opinion that such a receiver and manager is not appointed upon the model of an agent who has no principal, but upon the model of individuals in a fiduciary capacity who carry on a business for the benefit of others, such as executors and trustees, who are *prima facie* responsible to the outside world. That being the model, I think that the court, when it appoints a receiver and manager, intends that he shall be in the position of being personally responsible. The court never intended to create a position where their officer would carry on a business for the liabilities of which no one would be personally responsible. In the cases which have been cited the learned judges recognised the well-established rule that receivers and managers are personally liable.

*Appeal dismissed.*

Solicitors: *W. J. Hastings Bull; Ward, Perks & McKay; Trinder & Capron.*

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]

# TYRRELL v. PAINTON AND ANOTHER

[COURT OF APPEAL (Lindley, A. L. Smith and Davey, L.JJ.), December 19, 20, 1898]

[Reported [1894] P. 151; 70 L.T. 453; 42 W.R. 343; 6 R. 540]

*Probate—Will—Circumstances exciting suspicion of the court—Onus on party propounding will to prove it expresses true will of testator—Fraud or undue influence—Onus of proof on party contesting will.*

The rule throwing the onus on the party propounding a will to prove that it expresses the true will of the testator is not confined to cases where a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases in which circumstances exist that excite the suspicion of the court. Wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion or doubt, and to prove affirmatively that the testator knew and approved of the contents of the document. It is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely upon, to displace the case made for proving the will.

**Notes.** Applied: *Finny v. Govett* (1908), 25 T.L.R. 186. Considered: *In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264; *Re Preston* (1950), 94 Sol. Jo. 518; *Re Cutcliffe (deceased), Le Duc v. Veness*, [1958] 3 All E.R. 642. Referred to: *Atkinson v. Morris* (1896), 75 L.T. 440; *Wilson v. Basil* (1903), 72 L.J.P. 89; *Robins v. National Trust Co., Ltd.*, [1927] All E.R.Rep. 73.

As to grounds for opposing probate, see 16 HALSBURY'S LAWS (3rd Edn.) 203 et seq.; and for cases see 23 DIGEST (Repl.) 130 et seq.

Cases referred to:

- (1) *Barry v. Butlin* (1838), 2 Moo.P.C.C. 480; 1 Curt. 637; 12 E.R. 1089, P.C.; 23 Digest (Repl.) 130, 1357.
- (2) *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 W.R. 566, H.L.; 23 Digest (Repl.) 133, 1382.
- (3) *Brown v. Fisher* (1890), 63 L.T. 465; 23 Digest (Repl.) 134, 1383.

**Appeal** from a decision of SIR FRANCIS JEUNE, P.

By an indenture dated May 23, 1874, being a settlement made on the marriage then intended, and shortly afterwards solemnised, between George Bye and Rebecca Hatton, a freehold cottage and premises and a life interest in certain personality were assured to the Rev. George Purdue and John Painton upon trust to hold the same (inter alia) in case there should not be any child of the marriage who, under the trusts thereinbefore declared, should attain a vested interest in the trust premises, upon trust for such person or persons as Rebecca Hatton, whether covert or sole, by deed or will, should appoint.

George Bye died in 1880 and there were no children of the marriage. In 1880 and 1884 Mrs. Bye caused her solicitor to prepare wills, whereby she disposed of her property in favour of Painton and his children. In 1888, Purdue having died, Painton became sole trustee of the marriage settlement. Until that time Mrs. Bye had had complete confidence in Painton, but she then became dissatisfied with him, and ceased to regard him with favour. She complained of his conduct as trustee, and she took steps to have someone appointed trustee with him, and proposed her cousin, Edward Brooks Tyrrell. On Oct. 17, 1892, Mrs. Bye, being then in a bad state of health, instructed her solicitor as to making a new will in Tyrrell's favour. Before anything further was done towards making this proposed will, a doctor was consulted as to her mental capacity, and he declared himself satisfied that she was fit to make a will.

Mrs. Bye became worse, and she being very anxious to make the new will, and the matter appearing to weigh on her mind, steps were taken by her friends to



A enable her to carry out her wishes; and on Nov. 7, 1892, a new will, in favour of Tyrrell, was prepared at her house by her solicitor upon her instructions, and was executed by Mrs. Bye in the presence of her solicitor, the vicar of the parish, and the doctor. This will gave the cottage and the residue of her personal property to Tyrrell, whom she appointed executor, subject to a life interest in one part of the cottage (it being then divided into and occupied as two tenements), in favour of one Mitchell; it gave her household goods to Mitchell absolutely. It was manifest to all three witnesses that Mrs. Bye clearly understood the provisions of the will, and that she was, as she expressed herself, completely satisfied with what she had done.

C Two days later, namely, on Nov. 9, 1892, Mrs. Bye executed another will, which was attested by Thomas Painton, a son of John Painton, and Peter Rowland. This will was in the handwriting of Thomas Painton, and had been prepared by him upon verbal instructions from Mrs. Bye, and written in pencil by him on Nov. 8, 1892, and subsequently in ink on the following day. It was in favour of John Painton, giving him the cottage and the household furniture absolutely, subject to a life interest in part of the cottage in favour of Mitchell, and it appointed Joseph Painton, another son of John Painton, sole executor. The evidence of all the circumstances attending this will was such as to justify suspicion and to leave it doubtful whether the testatrix understood what the effect of it would be if it were admitted to probate. Mrs. Bye died on Nov. 22, 1892.

D On Feb. 1, 1893, Tyrrell commenced this action against Joseph Painton and John Painton, claiming to be the sole executor of the will dated Nov. 7, 1892, and to have that will established. The defendants alleged in their defence that the true last will of the deceased was the one which was dated Nov. 9, 1892, and they counterclaimed that the court should pronounce against the will bearing date Nov. 7, 1892, and grant probate of that bearing date Nov. 9, 1892. The plaintiff in reply alleged that the will of Nov. 9, 1892, was obtained by the undue influence and by the fraud of the defendants and Thomas Painton; that the deceased never gave instructions for it; and that the contents thereof were never brought to her knowledge. At the trial of the action on Nov. 25, 1893, SIR FRANCIS JEUNE, P., having heard the evidence, considered that there was no fraud established by the plaintiff, and pronounced in favour of the will of Nov. 9, 1892. From that decision the plaintiff now appealed.

G *Wheeler, Q.C., and W. H. Roberts* for the plaintiff.  
*Bargrave Deane* for the defendants.

LINDLEY, L.J.—It is extremely difficult for us to review a case in which the judge whose decision is appealed from has seen the witnesses himself, and is much better able, therefore, than we are to judge of the evidence. Still, I do not hesitate, on the grounds which I will presently state, to differ from the decision he has come to. [HIS LORDSHIP then discussed the facts of the case, observed that, as to the will of Nov. 7, 1892, he could not see any reason for throwing any suspicion upon it, but that he could not say the same as to the will of Nov. 9, 1892, and proceeded:] But SIR FRANCIS JEUNE, P., in arriving at the conclusion he did, did not address his mind to a rule which is perfectly well established as applicable to cases of this sort, namely, that wherever circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will as to which the suspicion arises to remove such suspicion or doubt, and to prove affirmatively that the testator knew and approved of the contents of the document. It is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely upon to displace the case made for proving the will.

I will refer to a passage in *Barry v. Butlin* (1). There PARKE, B., says that the rules of law according to which cases of this nature are to be decided are two,

which he proceeds to state as follows :

"The first is, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

Similar expressions of opinion are to be found in *Fulton v. Andrew* (2), where LORD HATHERLEY says that

"there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will, and they have thrown upon them the onus of showing the righteousness of the transaction";

and also in *Brown v. Fisher* (3).

The rule laid down in those cases is not confined to the single case in which a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases where, as I have said, there are circumstances which arouse the suspicion of the court. In my opinion, therefore, the judge misdirected himself; he directed himself to the question of fraud, forgetting the well-established rule to which I have referred. I think the appeal must be allowed.

**A. L. SMITH, L.J.**—I am of the same opinion. If I thought that the judge had directed himself rightly, I should certainly not be disposed to interfere with his decision. There is, to my mind, in this case such "a strong presumption," to use the language of LORD HANNEN in *Brown v. Fisher* (3), "against the correctness" of the defendants' statements "from all the circumstances of the case," as to the will of Nov. 9, 1892, that I cannot accept them. The law applicable to these cases, as laid down in *Barry v. Butlin* (1), has been acted upon over and over again. Before we need come to consider the question of fraud alleged by the plaintiff, there is that other onus, which is thrown upon the defendants by the suspiciousness of the case to be disposed of. That onus has not, in my opinion, been satisfied, and I think, therefore, the appeal should be allowed. I entirely agree with the principle of law which has been deduced by LINDLEY, L.J., from *Barry v. Butlin* (1), *Fulton v. Andrew* (2), and *Brown v. Fisher* (3).

**DAVEY, L.J.**—I entirely agree, and should not wish to say anything were it not that we are differing from the learned judge in the court below. The principle of law laid down in the cases which my brothers have referred to does not apply, as LINDLEY, L.J., has said, merely where the person who has been concerned in the preparing of the will takes a legacy or some benefit under it—as happened in those cases; but it applies to all cases which give rise to a suspicion in the mind of the court. The suspicion which the circumstances of the present case give rise to has not been removed by the defendants, on whom the onus is, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: Wood, Bigg & Nash for A. G. Haines, Faringdon; Tarry & Sherlock.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

A

## HILL v. THOMAS

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), August 2, 10, 1893]

B

[Reported [1893] 2 Q.B. 333; 62 L.J.M.C. 161; 69 L.T. 553; 57 J.P. 628; 42 W.R. 85; 9 T.L.R. 647; 4 R. 565]

*Highway—Extraordinary traffic—Carriage over road of articles exceptional in quality or quantity—Mode or time of user of road—Substantial increase of burden imposed by ordinary traffic—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict., c. 77), s. 23.*

C

By the Highways and Locomotives (Amendment) Act, 1878, s. 23 [replaced and substantially re-enacted by s. 62 of the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 480)]: "Where . . . it appears to the authority which is liable or has undertaken to repair any highway . . . that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved . . . to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

D

E

**Held:** the object of the section was not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the shoulders of those who caused the damage and to whose benefit it enured; the section distinguished between "excessive weight" and "extraordinary traffic," and so the damage done by extraordinary traffic might differ from that done by "excessive weight"; "extraordinary traffic," as distinct from "excessive weight," was the carriage of articles over the road, at either one or more times, which was so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to increase the burden imposed by ordinary traffic on the road and to cause damage and expense beyond what is common; the singularity of the articles carried or the singularity of the purpose for which they were carried was not the sole criterion of the applicability of the section.

F

G

**Notes.** Followed: *Etherley Grange Coal Co. v. Auckland Highway Board*, [1894] 1 Q.B. 37. Considered: *Norfolk County Council v. Green* (1904), 90 L.T. 451; *Wolverhampton Corpn. v. Salop County Council* (1895), 64 L.J.M.C. 179; *Kent County Council v. Kent Coal Concessions* (1908), 72 J.P. 507. Applied: *Ledbury Rural Council v. Somerset* (1915), 84 L.J.K.B. 1297. Approved: *Butt & Co. v. Weston-Super-Mare U.D.C.*, [1922] All E.R.Rep. 469. Distinguished: *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J.P. 29. Referred to: *Wycombe R.D.C. v. Smith* (1903), 67 J.P. 75; *High Wycombe R.D.C. v. Palmer* (1905), 69 J.P. 167; *Geirionydd R.D.C. v. Green* (1908), 72 J.P. 321; *Shepton Mallet R.D.C. v. Wainwright* (1908), 72 J.P. 459; *Cambridgeshire County Council v. Pepper and Hollis* (1912), 76 J.P. 393; *Worsborough U.D.C. v. Barnsley British Co-operative Society* (1914), 111 L.T. 429; *Abingdon R.D.C. v. City of Oxford Electric Tramways*, [1916-17] All E.R.Rep. 700.

H

I

As to extraordinary traffic, see 19 HALSBURY'S LAWS (3rd Edn.) 153-161; and for cases see 26 DIGEST (Repl.) 437 et seq.

Cases referred to:

- (1) *Lord Aveland v. Lucas* (1880), 5 C.P.D. 211, 351; 49 L.J.Q.B. 643; 42 L.T. 788; 44 J.P. 360; 28 W.R. 571, C.A.; 26 Digest (Repl.) 437, 1362.
- (2) *Williams v. Davies* (1880), 44 J.P. 347, D.C.; 26 Digest (Repl.) 443, 1403.



- (3) *Wallington v. Hoskins* (1880), 6 Q.B.D. 206; 43 L.T. 597; 45 J.P. 173; 29 W.R. 152; sub nom. *Wallington v. Hoskins*, *Stone v. Hoskins*, *Pictor v. Hoskins*, 50 L.J.M.C. 19, D.C.; 26 Digest (Repl.) 438, 1365. A
- (4) *R. v. Williamson* (1881), 45 J.P. 505, D.C.; 26 Digest (Repl.) 440, 1386.
- (5) *Pickering Lythe East Highway Board v. Barry* (1881), 8 Q.B.D. 59; 51 L.J.M.C. 17; 45 L.T. 655; 46 J.P. 215; 30 W.R. 246, D.C.; 26 Digest (Repl.) 440, 1380. B
- (6) *Raglan Highway Board v. Monmouth Steam Co.* (1881), 46 J.P. 598, D.C.; 26 Digest (Repl.) 443, 1404.
- (7) *R. v. Ellis* (1882), 8 Q.B.D. 466; 30 W.R. 613; sub nom. *Ellis v. Maidstone Rural Sanitary Authority*, 46 J.P. 295, D.C.; 26 Digest (Repl.) 438, 1363.
- (8) *Whitebread v. Sevenoaks Highway Board*, [1892] 1 Q.B. 8; 61 L.J.M.C. 59; 65 L.T. 855; 56 J.P. 214, D.C.; 26 Digest (Repl.) 442, 1398. C

**Appeal** from a decision of the Divisional Court (VAUGHAN WILLIAMS and BRUCE, JJ.), reversing the decision of justices upon a Case stated for the opinion of the court.

The respondent, Thomas, was the surveyor of the Pembroke District Highway Board, which district included the parish of Angle, and, as such surveyor, on April 23, 1892, gave the following certificate: D

“To the Pembroke District Highway Board.—I, the undersigned, the surveyor of the above-mentioned authority, hereby certify, in pursuance of the provisions of the Highways and Locomotives (Amendment) Act, 1878, that, having regard to the average expenses of repairing the highway and road called Angle Road in the village and parish of Angle, in the county of Pembroke, situate within the district of such authority, extraordinary expenses amounting to £125 17s. 9d. have been incurred by the said authority in repairing such highway and road, and being a highway repairable by the inhabitants at large, by reason of the damage caused by excessive weight passing along the same, and extraordinary traffic thereon, conducted by or by the order of Messrs. Hill & Co., of Bury Works, Gosport, and carrying on business at Angle aforesaid, contractors, from Jan. 14, 1890, until and including the month of April, 1892, in consequence of materials used by them in the construction of a battery in the said parish of Angle, and conveyed by them or their order along and over the said highway, by and with their horses and carts, or by and with horses and carts hired by them for the conveyance of such materials.” E

On Sept. 10, 1892, an information and complaint was laid by the surveyor and a summons issued against the appellants for that, from Jan. 14, 1890, until the month of April, 1892, at the parish of Angle, the Pembroke District Highway Board did incur extraordinary expenses in repairing certain highways in the parish of Angle, which roads were within the jurisdiction of the highway board, and that they were liable to repair the same, by reason of damage caused by excessive weight passing along the same, and by extraordinary traffic thereon, which weight and traffic had been conducted by or under the order of the appellants, which expenses amounted to £125 7s. 9d., as appeared by the said certificate, and that the said appellants had refused to pay the same. The proceedings were taken under s. 23 of the Highways and Locomotives (Amendment) Act, 1878. The road in question was within the said parish, and was a public highway repairable by the inhabitants at large, and not a main road, and ran from the seashore at Angle Bay to and beyond a government road, branching thereout at right angles, and leading to the government fort known as “Chapel Bay Fort,” and a road 1,260 yards long, and on an average four yards wide, and was generally called or known as the Angle Road, and was, previously to the appellants’ traffic being brought over it, in fairly good repair suitable to the ordinary traffic thereon. Such ordinary traffic consisted of ordinary agricultural produce and materials, and the conveyance of bricks from an adjacent brick works belonging to and worked by a Mr. Mirehouse, against F

A whom a similar complaint had been preferred in respect also of damage done by him to the Angle Road by the carriage of materials for the construction of a pier, which he was building on the seashore. In January, 1890, Messrs. Hill, the appellants, commenced, under a contract with the government, the construction of a battery for the government at Chapel Bay Fort. Their materials, consisting of shingle and cement, were brought by the appellants to Angle Bay in barges, and  
B carted from there over the road in question. The total quantity of such materials was 8,051 tons, carted in 9,000 loads, being a very great addition to the usual total traffic along the same. The appellants carted a small portion of the said building materials with their own horse and cart; the rest of such materials were carted in the local farmers' ordinary agricultural carts, drawn by the farmers' horses, and generally in charge of the farmers' men. During the period from January, 1890,  
C to April, 1892, the traffic over the road in question consisted, in addition to that brought on it by the appellants, and to the ordinary agricultural traffic, of the brick traffic of Mr. Mirehouse, and the user of his traction engine and trucks for carting of materials by him for the building of the pier (such carting traversing the whole extent of the road in question), and also of three government guns, intended for the fort, each weighing eighteen tons, drawn by Mr. Mirehouse's traction  
D engine, together with heavy gun carriages and slides. It was proved, however, that the traction engine, by reason of the width of its wheels, did no damage to the road. During the said period the road was very considerably cut up, and damaged in an extreme degree. It appeared that, of the total building materials carried over the road in question during the time under consideration, about three-fourths were carried by the appellants and one-fourth by Mr. Mirehouse. The  
E respondent gave evidence that the ordinary average expense of the repair of highways in the neighbourhood of the parish of Angle amounted to £6 5s. 10d. per mile, and that of the highways within that parish, which were all called and known by the name of the "Angle Road," and were nine miles in extent, did not exceed the amount of £3 16s. 4d. per mile, and proved that extraordinary expenditure had been incurred in respect of the highway in question, and had been paid for by  
F the said board, caused by the unusual traffic mentioned, and that such extraordinary expenditure amounted to the sum mentioned in the certificate of the respondent as such surveyor as aforesaid.

The justices excluded from consideration the other traffic hereinbefore mentioned which happened to be coincident in time with the appellants' traffic, and which was alleged to be extraordinary, and a proportionate part (so far as they  
G could estimate it) of the damage caused to the highway in question by such other traffic as well as the ordinary wear and tear thereof. They were of opinion on the facts stated, (i) that none of the carts conveying the appellants' materials carried greater weight than those usually carried for agricultural and other purposes in the neighbourhood, and, therefore, that there was no proof before them of excessive weights having been carried over the highway by the appellants otherwise than by  
H the great increase of carting hereinbefore mentioned, but they regarded the traffic, as being carried on for the unusual purpose of the building of a government fort, as extraordinary, and assessed the extraordinary expenses for which they considered the appellants liable at £105 1s. 7d. and costs; (ii) that the traffic was conducted by order of the appellants and under their control, and that, therefore, they were liable. The Divisional Court allowed the appellants' appeal, and the  
I surveyor appealed to the Court of Appeal.

*Manisty* for the surveyor.

*Roskill* (C. M. Atkinson with him) for Messrs. Hill.

*Cur. adv. vult.*

Aug. 10, 1893. **BOWEN, L.J.**, read the following judgment of the court: The most important question we have to consider is the true meaning to be placed on the words "damage caused by extraordinary traffic." We may begin by

observing that the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders, namely, upon those who caused the damage and to whose benefit it ensued. The section, in the second place, distinguishes between "excessive weight" and "extraordinary traffic." The damage done by "extraordinary traffic" may, therefore, in the eyes of the legislature, differ from that done by "excessive weight." Traffic, thirdly, is a nomen collectivum—a collective term, a noun of multitude. It does not, like "excessive weight," apply merely to the cargo carried by a single vehicle; it is large enough to include the continuous or repeated user of the road by various vehicles belonging to one owner. Finally, extraordinary traffic, according to the plain use of language, is traffic which is not of the common order of traffic; and taking all these considerations together, and especially when we remember that the object of the section is to provide for the expense of such extraordinary traffic as does damage to a highway, we shall arrive at the following result, viz., that "extraordinary traffic," as distinct from "excessive weight," will include all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair.

Why should the singularity of the product carried, or the singularity of the purpose for which it is carried, be the sole criterion of the applicability of a section, the scope of which is what I have said? To confine it in this way would be to deprive the legislation of half its practical value, and arbitrarily to limit it to a few cases of user not a whit more deserving of relief than others. It is true that extraordinary traffic is a traffic to be specifically distinguished from other traffic by the section, but the distinction cannot solely depend on the unusual character of articles carried, but rather on the effect which the carriage of the particular articles—call them by whatever name or classification one will—may presumably be expected to have upon the road. If so, extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common. Under this wider interpretation the section becomes consistent and reasonable. If it be an exceptional user of the highway that really has caused the mischief, why should the relief be given only in cases of articles of an exceptional quality or nature, and not to all exceptional cases whatever which increase the burden of the road, especially when we bear in mind that extraordinary traffic is treated by the Act of Parliament as a different thing from excessive weight, and that the term "extraordinary" is used earlier in the section as applicable to what is unusual in amount.

Let us take some of the obvious instances which (upon such a construction) will fall within the section. A contractor builds a large house, or factory, or church, and by so doing temporarily increases the user of the road in a way that ends by damaging the road itself. Why should he not pay for the extra use of the road? It is argued that he ought not to pay because he is only using the road in a lawful way. If he used it in any other way he would be indictable for a nuisance. But this section of the Act of Parliament, as we have seen, is not intended only to prevent unlawful user; it applies also to damage caused by legitimate and proper user: see per BAGGALLAY, L.J., in *Lord Avcland v. Lucas* (1).

It is argued that he is only carrying over the road the same substance as that which other people ordinarily carry. Here, again, the answer is that the section is not penal, but remedial and recuperative, and that it is because, though he carries ordinary articles, he does not carry them in the manner or on the limited number of occasions in and on which other people carry them, and because the frequency of his travels over the road has caused the special mischief to the road, that such frequency constitutes in itself a reason why he should pay more than his neighbour. Such an interpretation, which makes the relief commensurate with the



**A** damage done and places it on the shoulders of the person who actually causes the damage, gets rid of all the minute discussions as to whether the cargo carried is, or is not, of a nature ordinarily carried in the neighbourhood, the nature of the cargo and purpose for which it is carried being matters that may indeed throw light on the user of the road, and thus have a bearing on the question whether the traffic is, or is not, extraordinary, but which do not form any absolute factors in the definition of "extraordinary traffic." It is, however, important to recollect that the section does not mean that a man is to be mulcted merely because he uses a road more than others do, even if it be his own user which has produced the mischief to the road. The traffic must be extraordinary as regards the ordinary user of the road as a whole by all who use it, and not merely large as regards the traffic put on the road by other persons.

**C** Such is the conclusion as to the meaning of the section at which one would reasonably arrive independently of decided cases. Is there anything in the state of the authorities that tends to a different view? The first case to be noticed is that of *Williams v. Davies* (2). The defendant had bought timber near a railway station which was conveyed in waggons in sixty-seven loads between Christmas and March. The timber was purchased in the ordinary course of business, but

**D** the sixty-seven loads of timber were a greater number of timber-loads than usually passed over the roads in question in three consecutive months, and the heavier loads were heavier than the loads of ordinary agricultural produce. The magistrates held that the sixty-seven loads of timber were in the aggregate excessive weight and extraordinary traffic. The Court of Queen's Bench (LUSH and BOWEN, JJ.) held that the justices were right. LUSH, J., said (44 J.P. at p. 348): "What

**E** the traffic was to be compared with was the ordinary traffic along the road," and the fact that the timber was the natural produce of the land did not prevent the traffic being held as extraordinary. In *Lord Aveland v. Lucas* (1) all that was determined was that a traction engine, drawing two waggons for the carriage of materials and goods used for ordinary purposes on the estate of the defendant, was not prevented from being extraordinary traffic by the fact that the engine was of

**F** less weight than was allowed by the Act [s. 28 of the Act of 1878, repealed by Road Traffic Act, 1930], and had its wheels constructed in conformity with the Act. GROVE, J., indeed, thought that the weight and character of the traffic, not the amount of the user to which the road is subjected, was the criterion. This was not necessary for the decision in the case. But LINDLEY, J., considered that the words "extraordinary traffic" meant extraordinary with reference to the ordinary

**G** use and traffic upon and over the road. In the Court of Appeal the judgment was affirmed, but no expressions were used which in any way directly determine the precise point now in question, except that the court point out (see per BAGGALLAY, L.J.) that the Act of Parliament is intended to apply to cases where the user of the road has been rightful and legitimate.

In *Wallington v. Hoskins* (3) LORD COLERIDGE, C.J., and FIELD, J., held that the traffic was not extraordinary, and affirmed this portion of the finding of the justices. The justices had also found that the weights were excessive, and this portion of their order the court reversed. But the traffic in question consisted in the carriage of stone in heavy loads; with respect to this the justices found that the carriage of stone was an ordinary and recognised industry of the place, and do not appear to have found that it was carried in any unusual manner or quantity, even as regarded the particular roads in question. It is difficult to see that the case in any way governs the present, and LORD COLERIDGE, C.J., adopts the view of LINDLEY, J., in *Lord Aveland v. Lucas* (1), that "extraordinary" is a term used with reference to the ordinary use and traffic on the road.

**I** In *R. v. Williamson* (4) the respondent, who was owner of ironstone mines, sent his traffic to the railway station in carts of the ordinary size and weight, but which made about seventy journeys a day. The other traffic was agricultural and very small. It was held by GROVE and LINDLEY, JJ., that the justices were wrong in finding that the defendant caused extraordinary traffic merely because he had

many carts to send. It is not clear that the traffic in question was found by the justices to be anything beyond what the road was accustomed to bear, although the greater portion of the traffic on the road was no doubt produced by the appellant. If the justices had found the traffic caused by the defendant to be beyond the ordinary user of the road, and to have occasioned the damage, their finding, I think, would have been correct, and ought not to have been disturbed. I do not, however, see clearly that the justices did so find. LINDLEY, J., said (45 J.P. at p. 507):

"I am disposed to say that there may be cases where the use of the highway is so frequent and incessant as to amount to extraordinary traffic. . . . Nevertheless, the mere fact that one person uses a highway more than others is no reason for calling it extraordinary traffic on the part of that person."

In *Pickering Lythe East Highway Board v. Barry* (5) materials for building a house were carried by the defendant over a highway, the ordinary traffic of which was agricultural traffic. For several months carts containing heavy building materials were almost daily on the road, and the weight of the loads was such that the drivers of the carts when going downhill were frequently obliged to adopt exceptional means to take the strain off the horses. Here was a case in which beyond all question the damage done to the highway by the traffic would, according to the view suggested as the proper construction of the Act, have been done by extraordinary traffic. The justices, however, considered that s. 23 of the Act of 1878 did not apply in a case where the damage was caused by an extraordinary quantity of traffic which differed not materially in character, but chiefly in its weight and amount, from the traffic to be expected on the highways, citing the authority of GROVE, J., in *Lord Aveland v. Lucas* (1). The Queen's Bench Division (GROVE and LOPES, JJ.) refused to disturb their finding. GROVE, J., said (8 Q.B.D. at p. 62):

"The traffic in this case was only a greater amount of the same traffic as was used before on the road."

LOPES, J., said (*ibid.*):

"I think the legislature intended something unusual in weight, or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood, or as compared with that which the road in its ordinary and fair use may be reasonably subjected to. It would not be sufficient to compare the weight and traffic complained of with traffic usually carried on the particular road; it might be the traffic was usually of the lightest kind, but surely the legislature never intended that a man was not to use the road for carrying materials for building a dwelling-house, farmhouse, or barn, provided he used it in a reasonable way for those purposes."

There is a difficulty in reconciling this language with the decision in *Williams v. Davies* (2), and it seems to me, with deference, that my brother LOPES assumed without sufficient justification that the object of the legislature was to prevent extraordinary traffic, whereas its only object is to throw on the person who causes such traffic the duty to pay for the damage it does the road. If this is the true view, the question is not what is a reasonable use of the road, but what is its ordinary use. It would seem, therefore, that the decision in the *Pickering Case* (5) is based on an imperfect view of the Act of Parliament. In *Raglan Highway Board v. Monmouth Steam Co.* (6) there were large woods which came to maturity in a group of twenty parishes after ten to seventeen years' growth. One or other wood was cut every year, and the timber hauled over one or other highway each winter. The justices found that the traffic was not extraordinary, it being the ordinary trade of the district carried on in the ordinary manner. This decision was affirmed by the Queen's Bench Division (GROVE, LOPES and BOWEN, JJ.). In *R. v. Ellis* (7) the road was broken down by a traction engine with trucks, which made on several days two journeys a day upon it. It was held by FIELD and

**A** BOWEN, JJ., that the traffic was extraordinary traffic. In *Whitebread v. Seven-oaks Highway Board* (8) the expenses were incurred in consequence of stone having been carted by the defendant from a quarry along the road, which was an ordinary country road, used for ordinary light country traffic, and which had never been adapted for, or made up to bear, heavier traffic. Stone traffic was a recognised business in the neighbourhood, but was not the ordinary or recognised traffic of the

**B** road in question. It was held by MATHEW, J., and my brother A. L. SMITH, J., that the justices were right in finding the traffic to be extraordinary. This case seems to me not to be reconcilable with the decision of GROVE and LOPES, JJ., in *Pickering Lythe East Highway Board v. Barry* (5), and A. L. SMITH, J., appears to have dissented from the language used by LOPES, J., in the last-mentioned case.

**C** In this state of the authorities, and in the absence of any decision by the Court of Appeal, it may be assumed that we are entitled to deal with the section upon principle, and it is certainly desirable to lay down for the future some clear and intelligible canon which shall guide the magistrates in their interpretation of the law; and for the reasons given above the true interpretation appears to be that which has been already explained.

**D** It remains to be considered what is the true effect of the magistrates' finding in this case. The ordinary traffic of the road in question before the respondents' traffic was brought over it consisted of agricultural produce and materials, and the conveyance of bricks from an adjacent brick works by Mr. Mirehouse. In January, 1890, the respondents began to construct a battery at a government fort. Their materials consisted of shingle and cement, which the respondents brought by sea in barges and carted over the road in question. The justices found that the

**E** total quantity of the materials was a very great addition to the usual total traffic, and that the road was cut up and expenditure incurred in consequence of this unusual traffic. On the facts stated the justices were of opinion that none of the carts conveying the respondents' materials carried greater weights than those usually carried for agricultural and other purposes in the neighbourhood, and, therefore, that there was no proof before them of excessive weights having been

**F** carried over the highway by the respondents otherwise than by the great increase of carting hereinbefore mentioned, but regarded the traffic, it being carried on for the unusual purpose of the building of a government fort, as extraordinary. If by this the magistrates meant to find, as I rather gather that the Divisional Court believed, that the purpose for which the traffic was called into existence being unusual the traffic must necessarily be extraordinary within the meaning of

**G** the Act, it would be difficult to justify their decision. But exceptional purposes may have a tendency to produce and may explain and account for exceptional traffic; and in that sense the unusual character of the object may bear on the question of increase of traffic. Taking the Case stated by the justices in its fair and obvious meaning, I think that the justices found, and meant to find, that there was an exceptional increase of traffic produced by a cause which, being itself

**H** exceptional, explained and accounted for such increase, and that the increase of traffic was one that damaged the road and gave rise to extra expense. This seems to justify their finding that the traffic was extraordinary within the meaning of the Act. Their decision, therefore, appears correct, and the appeal ought to be allowed with costs here and below.

*Appeal allowed.*

**I** Solicitors: *Field, Roscoe & Co.* for *Hughes Brown*, Pembroke Dock; *Bridges, Sawtell, Heywood, Rain & Dibdin* for *F. J. Bendall*, Milford Haven.

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]



## ECKERSLEY AND OTHERS *v.* MERSEY DOCKS AND HARBOUR BOARD

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), March 16, 1894]

[Reported [1894] 2 Q.B. 667; 71 L.T. 308; 9 R. 827]

*Arbitration—Stay of legal proceedings—Arbitrator not independent person—Servant of one party to dispute—Need to show certain bias—Probability of bias.*

An agreement between the plaintiffs and the defendants contained a clause that all disputes under it should be referred to a servant of the defendants as sole arbitrator. A dispute arose in which the professional skill of the servant's son was in issue, and the plaintiffs began proceedings in which they claimed damages for damage suffered by them as the result of his negligence. On an application by the defendants to stay the proceedings,

**Held:** (i) the rule that a judge, magistrate, or other person holding a judicial office, must not only not be biased, but also must not act if the circumstances be such that he may be suspected of bias, did not apply to a case where the parties had agreed that a servant of one party should act as arbitrator in the event of disputes arising between them; to justify a stay being refused it must be shown that such an arbitrator would in fact be biased or that there was a probability that he would be biased; the fact that the arbitrator might have to decide questions of the competency of himself or his son was not sufficient to show a probability of bias; and, therefore, there was no reason why the proceedings in question should not be stayed.

*Jackson v. Barry Rail. Co.* (1), ante p. 661, applied.

**Notes.** The provisions as to staying court proceedings where there is a submission to arbitration are contained in the Arbitration Act, 1950, s. 4 (1), reproducing the Arbitration Act, 1889, s. 4.

Applied: *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835. Referred to: *Ives and Barker v. Willans*, post p. 1135; *John Aird v. Bristol Corpn.*, *Bristol Corpn. v. John Aird* (1913), 77 J.P. 209; *Maclean v. Workers' Union*, [1929] All E.R.Rep. 468.

As to staying proceedings, see 2 HALSBURY'S LAWS (3rd Edn.) 21 et seq.; and for cases, see 2 DIGEST (Repl.) 488. For the Arbitration Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 93.

Cases referred to:

- (1) *Jackson v. Barry Rail. Co.*, ante p. 661; [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest (Repl.) 499, 477.
- (2) *Nuttall v. Manchester Corpn.* (1892), 8 T.L.R. 513; 2 Digest (Repl.) 488, 406.

**Appeal** by the plaintiffs from an order of the Queen's Bench Division (MATHEW and CAVE, JJ.), affirming an order of the judge at chambers staying proceedings in the action.

By a contract in writing the plaintiffs contracted with the defendants to do excavation work for the purpose of making a new dock at Liverpool. During the progress of the work the defendants were making excavations in a dock, called the Canada Dock, which adjoined the land on which the plaintiffs were working. The work in the Canada Dock was being done under the superintendence of the son of the engineer of the defendants, who was acting as assistant engineer to his father. The plaintiffs alleged that, owing to the negligence or incompetency of the son of the engineer, water escaped from the Canada Dock and flooded the works which were being executed by them (the plaintiffs), so that their work was impeded and their plant damaged.

The contract provided, by cl. 45, that if, in the opinion of the engineer of the defendants, the contractors should fail duly to carry out and perform their contract,

A or to exercise due diligence, and make due progress with the works, the defendants were to have the power to take the works out of their hands and put an end to the contract. Clause 47 provided that, if the contractors should not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regarded materials, plant, or workmen, or the manner in which the work was being done, or the despatch which was being made, or if for any other reason the engineer should be  
 B of opinion that it was expedient that any parts or part of the work should be done by the defendants and not by the contractors, then the defendants might, on giving notice signed by the engineer or their solicitor, proceed themselves to execute the work unperformed by the contractors, and recover the expenses which they might incur in or about the exercise of the powers given to them by this clause from the contractors, the amount of such expenses to be ascertained and fixed by the  
 C engineer. By cl. 53:

"All disputes and differences of every kind which may arise between the contractors and the Board during the progress, or after the completion, of the works contracted for, in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or the contract, or in relation  
 D to any of the works, or the payment to be made for the same, or as to the accounts between the Board and the contractors, shall be and the same are hereby referred to the engineer of the Board as sole arbitrator . . . and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made, and shall not be disputed on any ground whatever."

E The defendants applied, at chambers, for an order staying all proceedings in the action, upon the ground that the action was brought in respect of disputes and differences which came within the arbitration clause. The plaintiffs contended that the claims in the action did not come within the arbitration clause, and that, in any case, the action ought not to be stayed because the engineer, who would be the arbitrator, would probably be biased in favour of the defendants. In the  
 F affidavits filed by the plaintiffs in opposition to the application to stay proceedings, it was stated that the engineer's son hoped to succeed his father as engineer of the dock board, and that the question of the son's appointment had already been discussed by the dock board. The plaintiffs alleged that those facts were not known by them when they entered into the contract. The master made an order staying all proceedings in the action, which was affirmed by the judge at chambers.  
 G The Divisional Court (MATHEW and CAVE, JJ.) dismissed the plaintiffs' appeal against that order. The plaintiffs appealed to the Court of Appeal.

*Fletcher Moulton, Q.C., and J. A. Hamilton* for the plaintiffs.

*Sir Richard Webster, Q.C., Bigham, Q.C., Curver, and Llewellyn Davies* for the defendants.

H **LORD ESHER, M.R.**—In this case the plaintiffs are contractors, and they entered into a contract with the defendants, the Mersey Docks and Harbour Board, to do certain works within the ambit of the Liverpool Docks. The works were to excavate a certain piece of ground within the ambit of the docks for the purpose of making a new dock, or a new basin, to give some assistance to the Liverpool Docks.

I They entered into a contract, and in that contract was a stipulation that:

"All disputes and differences of every kind which may arise between the contractor and the Board during the progress, or after the completion, of the works contracted for, in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or contract, or in relation to any of the works, or the payment to be made for the same, or as to the accounts between the Board and the contractors, shall be and the same are hereby referred to the engineer of the Board, as sole arbitrator, with power to make awards from time

to time as he may think proper, and with power to make such orders in any such award as to the costs and charges of and attending any such reference, and of the award, as the said engineer shall in his discretion think proper, and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made."

It seems to me that words cannot be larger, and that they are a submission to arbitration in the cases spoken of.

The plaintiffs allege that certain things were done by the servants of the Mersey Docks and Harbour Board, not on or within the space which was the subject-matter of the contract, that is to say, the portion of the ground which was to be excavated, but outside it, which caused water to flow into the part which the plaintiffs were excavating. In my opinion all those things are within the submission.

The plaintiffs say that the court ought not to stay the action, because there is sufficient reason why the matter should not be referred to the engineer. What is their ground for saying that? They say that he might be biased in that which he had to do for reasons which they state. They argue that it is sufficient for them to say that he might be biased, although the court should be of opinion that there is no ground for supposing that he would in fact be biased. This, therefore, is an attempt to apply the doctrine which is applied to judges—I do not mean only to judges of the Superior Court, but to all judges—that not only must they not be biased, but, even although it be proved to demonstration that they would not be biased, yet if the circumstances are such that people—not reasonable people, but many people—would suspect them of being biased, they ought not to sit as judges. That is the rule that is applied to judges. Is that a rule which can be applied to such a contract as this, where, as between the contractor and a principal, the parties both agree that the chief servant of one of the parties shall be the arbitrator? If you applied the rule which is applied to judges in such a case as this it is obvious that such a servant, under whose superintendence the work was to be done, never could act as the arbitrator. Some people would suspect that he would be biased in favour of his employers. That cannot be, because the parties have agreed that such a person shall be the arbitrator. Therefore, the allegations must go further, and must go, in my opinion, to the extent that it must be shown, I will not say that he would be biased, but that there is a probability that he would be biased. That seems to me to be distinctly the decision in *Jackson v. Barry Rail. Co.* (1).

The case relied upon by the plaintiffs is *Nuttall v. Manchester Corpn.* (2). That case has been discussed since it was decided, and, as I understand it, it has been explained upon the ground, first of all, that there had been a very unseemly dispute between the engineer in that case and the contractor—a personal dispute raising a vindictive feeling—and also that he had expressed an opinion so strongly as to amount to a pre-judgment. If that is the ground of the decision in *Nuttall v. Manchester Corpn.* (2), that case is to be supported entirely, but it is not in point in this case, because such facts do not exist in this case and are not suggested. If it is said that, according to a reading of the report, which I cannot help thinking is not a full report of what the judges decided, the mere fact of the conduct of the engineer himself being likely, or being sure, to come into question, is sufficient of itself to satisfy the court that there is a reason why the matter should not be referred to him, all I can say is that it seems to be contrary to other cases, and is absolutely contrary to *Jackson v. Barry Rail. Co.* (1). If that be the right view of the case we ought not to agree with it, and we ought to say that we overrule it.

Therefore it must be shown, at least, that it is probable that the engineer in this case would be biased. What is relied upon by the plaintiffs to show that? It seems to be admitted that, if he had to consider whether he himself had given a negligent order, or whether he himself had given an unskilful order, that would



A not justify the court in saying that he should not be the arbitrator; but we are asked to say so where the very same negligence was committed, or an ill-advised or incompetent order was given, by his son. That involves that we must think that a man of whom nobody could say it was possible that he would act with bias in judging of his own acts, would be probably biased to give a decision which he knew to be wrong in favour of his son. All I can say is that that is a view of human nature which I do not adopt. When we have a man of high character, one whose character for impartiality cannot be impeached when his own conduct is called into question, and I am told that such a man would not have strength of mind and honesty enough to act impartially where his son's conduct is called into question, all I can say is, I do not accept the suggestion. I certainly do not accept it in this case. I am, therefore, of opinion that the decision of the Divisional Court, of the judge at chambers, and of the master, all of which coincided, cannot be set aside by this court, and that this appeal must be dismissed.

**LOPES, L.J.**—I am of the same opinion. [His LORDSHIP stated the facts] I am of opinion that the Divisional Court were right, and that the disputes are within the terms of cl. 53.

D The other point is this. It is said that, even assuming this is a dispute within the terms of the contract, still the action ought not to be stayed because the engineer is disqualified, from the nature of the dispute, from acting as arbitrator. It is said that he will have to decide upon the professional competency, not of himself, but of his son; and that it would not be right and proper that he should be called upon to do so and be considered at the same time an impartial arbitrator.

E It is to be observed that the rule to be applied to a case of this kind is entirely different from that which is to be applied to magistrates, or judges, or any persons in a judicial capacity, where the tribunal is not chosen by the persons who are sending their differences to it, but is a tribunal constituted apart from any agreement or any consent on their part. No doubt in cases of that kind the rules are very strict. There is no principle which is better recognised than that a man is not to be a judge in his own cause, and in the case of magistrates it has been held that it is an established principle that, if there is any reason which can be suggested which would affect the minds of ordinary people or induce them to think that there might be any bias, that would be sufficient to render the tribunal incompetent. But that is entirely different to the case which is now before us, where, as I have said, the parties have chosen their own judge, and have agreed that the disputes are to be referred to the engineer as sole arbitrator.

G It is of the essence of the submission that questions are to be submitted to this engineer, as arbitrator, which must involve matters connected with his own competency, with his own care, with his own caution, and with the way in which he may have discharged the duties which belonged to him under this contract.

H The parties agree that the arbitrator is to adjudicate on matters in which he has an interest. Further than that, I understand it was admitted and was not disputed at the Bar that, if the matter in question here were a matter which involved the professional competency or the professional skill of the engineer himself, he would not be disqualified. What is the additional fact in this case? What is there to distinguish it from a case where his own professional competency is involved?

I Simply that he would have to decide upon the professional competency of his son, instead of upon his own. It appears to me that that can make no substantial difference upon which this court ought to act. I am unable to say that that raises in my mind any reasonable probability of any partiality on his part. The master before whom the matter came arrived at that conclusion; the judge before whom this matter came confirmed that view; the Divisional Court acted in the same way, and I am glad to think that here we are able to give effect to the discretion which has been exercised by those tribunals. I think, therefore, this appeal fails.

DAVEY, L.J.—I am of the same opinion. Upon the first point, I think that the dispute, when one thoroughly understands the facts and the contentions of the parties, is one which is thoroughly within the arbitration clause. Upon the other point I confess I have had more doubt; but, upon consideration, I must say I do not think there are sufficient circumstances to make it right in the present case to deprive the defendants of the benefit of the provision in the contract for arbitration. No doubt, in a certain sense, the engineer will be the judge of his own conduct, and no doubt that is a position which *prima facie* raises some surprise in a judicial mind; but that is the contract of the parties. The parties have contracted that the servant of one of them shall be the arbitrator, and it appears to me that they have contracted that he shall be the arbitrator in cases which necessarily involve the correctness of his own opinion, the competency of his advice and opinion as engineer, and the regularity of his own proceedings.

It is sufficient for that purpose to refer to cl. 45 of the contract, which provides that, if the contractors, in the opinion of the engineer, fail in the performance of any part of the undertaking, the defendants may take the works out of their hands, and put an end to the contract. Suppose the engineer had been of opinion that the contractors had failed in the due performance of their contract, and the defendants had taken the works out of their hands, it could not be suggested that that did not fall within cl. 53, and yet the question in dispute would be whether the opinion of the engineer that the contractors had failed in due performance was well founded or not under the circumstances. The same observation must be made upon cl. 47, which provides that, if the contractors do not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regards materials, plant, or workmen, or the manner in which the same is being done, or the despatch which is being made, or if for any other reason the engineer shall be of opinion that it is expedient that any part or parts of the works should be done by the defendants, and not by the contractors, then he is to take the works out of their hands, and he is to assess the amount of compensation payable to the board.

In all those cases it is perfectly obvious that the parties did contemplate and intend that the engineer, notwithstanding the interest he would have in the subject-matter in dispute, should be the tribunal by which the disputes between the parties should be settled. It is, therefore, not, in my opinion, any objection to the engineer acting in this dispute that his conduct, or the conduct of his son as assistant engineer in directing the other works done in the Canada Dock, would be or might be called in question. It must have been within the contemplation of the parties that the engineer might have to superintend other works undertaken by the defendants during the progress of the contract works, and it seems to me to be an objection which the contractors waived and deprived themselves of the right to insist on when they agreed that the engineer should be the sole arbitrator as regards themselves.

I have only to add that I think that the suggestion that, although he might be trusted on a question concerning his own professional skill, he cannot be trusted on a question concerning his son's professional skill, is one which the court ought not to entertain. I am therefore of opinion that, having regard to the nature of the contract, we cannot disturb the order of the court below.

*Appeal dismissed.*

Solicitors: Wynne, Holme & Co., for Layton & Springworth, Liverpool; Rowcliffes, Rawle & Co., for A. T. Squarey, Liverpool.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

## IVES AND BARKER v. WILLANS

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), April 23, 24, 1894]

[Reported [1894] 2 Ch. 478; 63 L.J.Ch. 521; 70 L.T. 674;  
42 W.R. 483; 10 T.L.R. 439; 38 Sol. Jo. 417; 7 R. 243]

*Arbitration—Stay of legal proceedings—“Step in the proceedings”—Notice requiring plaintiff to deliver statement of claim.*

A “step in the proceedings” within s. 4 of the Arbitration Act, 1889 [now s. 4 of the Arbitration Act, 1950], means the taking out of a summons or making some application to the court. Accordingly, where the defendant in an action for breach of contract gave the plaintiffs notice in writing requiring them to deliver a statement of claim (thus enabling him definitely to ascertain what disputes raised in the action were within the submission clause in the contract and what were not and to elect whether to allow the proceedings to continue or to apply for a stay under s. 4),

**Held:** the defendant had not taken any step in the proceedings within s. 4, and a stay of the action would be granted.

*Arbitration—Arbitrator—Bias—Construction contract—Engineers of undertakers appointed arbitrators—Previous expression of opinion on matters in dispute.*

The fact that the arbitrators named in a contract for the execution of construction works are the engineers of the persons for whose undertaking the works contracted for are being done, or the fact that they have previously expressed an opinion as to some of the matters in dispute, does not, in the absence of evidence of fraud or collusion, render them unfit to act as arbitrators.

*Arbitration—Stay of legal proceedings—Matters agreed to be referred mixed in action with matters not so referred—Stay as to matters referred.*

If matters which are agreed to be referred are mixed in an action with matters not agreed to be referred there is no reason why a stay of the action should not be granted to apply to those matters which have been agreed to be referred, leaving the action to go on as to the other matters.

*Turnock v. Sartoris* (1) (1889), 43 Ch.D. 150, distinguished.

**Notes.** Considered: *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q.B. 850. Explained: *R. W. Blackwell v. Derby Corpn.* (1909), 75 J.P. 129. Distinguished: *Bristol Corpn. v. John Aird & Co.*, [1911–13] All E.R.Rep. 1076; *Parker, Games & Co. v. Turpin*, [1918] 1 K.B. 358. Considered: *Mundy v. Butterley Co.*, [1932] 2 Ch. 227. Referred to: *Zalinoff v. Hammond*, [1898] 2 Ch. 92; *Freeman v. Chester R.D.C.*, [1911] 1 K.B. 783; *Lane v. Herman*, [1939] 3 All E.R. 353.

As to stays of legal proceedings and misconduct by arbitrators, see 2 HALSBURY'S LAWS (3rd Edn.) 21–28, 57–60; and for cases see 2 DIGEST (Repl.) 477 et seq., 679–682. For the Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Cases referred to:

- (1) *Turnock v. Sartoris* (1889), 43 Ch.D. 150; 62 L.T. 209; 38 W.R. 340, C.A.; 2 Digest (Repl.) 494, 438.
- (2) *Jackson v. Barry Rail. Co.*, ante p. 661; [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest (Repl.) 499, 477.
- (3) *Eckersley v. Mersey Docks and Harbour Board*, ante p. 1130; [1894] 2 Q.B. 667; 71 L.T. 308; 9 R. 827, C.A.; 2 Digest (Repl.) 488, 407.

Also referred to in argument:

- Chappell v. North*, [1891] 2 Q.B. 252; 60 L.J.Q.B. 554; 65 L.T. 23; 40 W.R. 16; 7 T.L.R. 563, D.C.; 2 Digest (Repl.) 495, 444.
- Brighton Marine Palace and Pier, Ltd. v. Woodhouse*, [1893] 2 Ch. 486; 62 L.J.Ch. 697; 68 L.T. 669; 41 W.R. 488; 37 Sol. Jo. 424; 3 R. 565; 2 Digest (Repl.) 496, 455.



*Adams v. Catley* (1892), 66 L.T. 687; 40 W.R. 570; 36 Sol. Jo. 525; 2 Digest A  
(Repl.) 495, 445.

*Nuttall v. Manchester Corpn.* (1892), 8 T.L.R. 513; 2 Digest (Repl.) 488, 406.

**Appeal** by the plaintiffs from a decision of KEKEWICH, J., on a summons by the defendant to stay the proceedings under s. 4 of the Arbitration Act, 1889.

On July 22, 1889, the defendant, John William Willans, entered into a contract with the Liverpool Overhead Rail. Co. for the construction of a high-level railway. B  
The contract contained the following clauses :

"4. The works shall be executed in compliance with the provisions hereinafter contained, and with the best materials and workmanship, and in the most workmanlike manner, and to the satisfaction in all respects of the company's engineers for the time being, and of the inspecting officer of the Board of Trade. . . . 37. If any question, difference, or dispute shall arise between the company and the contractor touching the construction or meaning of anything contained in these presents or in the said specification, plans, or sections, or any of them, or as to any works, plant, material, matters, or things, which the company shall require the contractor to execute, do, or supply under or by virtue of these presents, or as to any extra, or additional, or supplemental D  
works which may be so ordered by the engineers as aforesaid, or as to the price to be paid by the company and the contractor for the same or any of them, or as to any matter of account between the company and the contractor, or as to any moneys alleged to be payable by the company to the contractor, or by the contractor to the company, or as to the rights, duties, liabilities, or obligations of either party under or by virtue of these presents, or as to any E  
other matter or thing in any way arising out of or relating to the premises, the matter or difference shall be referred to the engineers, whose decision thereon shall be final and conclusive on both parties, and neither of the parties hereto shall commence or prosecute any action against the other of them touching any of the matters aforesaid, unless and until the matter in difference shall have previously been submitted to the engineers for their decision, and the engineers shall have refused or wilfully neglected for the space of one month after service upon them of notice in writing requiring them so to do to adjudicate thereon."

On Aug. 24, 1889, the defendant entered into a sub-contract with the plaintiffs, Ives and Barker, for the erection and fitting up by them of the work required for the railway. The material provisions of the sub-contract were as follows : G

"Whereas by an agreement (hereinafter called the principal agreement), a copy of which, and of the specification of works scheduled thereto, has for the purpose of identification been signed by or on behalf of the parties hereto, and is intended to be hereunto annexed, the contractor has contracted with the said Liverpool Overhead Rail. Co. to construct, so far as described in the principal agreement, an overhead high-level railway. And whereas the erection, painting, and tarring, comprising the setting out, carting, and putting together, rivetting, erecting, painting, and tarring of the wrought and cast iron work, steel, and other work mentioned in the schedule hereto form part of the work which by the principal agreement the contractor has undertaken to provide or do. . . . Now, these presents witness that it is hereby agreed between the parties hereto as follows :—1. The sub-contractors shall for the contractor, at their own cost, by their own workmen, appliances, shops, plant, staging, tools, and power, and in such manner, times, and by such tools, appliances, etc., as shall be determined or approved by engineers and the contractor and in accordance in all respects with the requirements of the principal agreement and of the specification of works therein referred to, so far as they respectively apply to the works of the description now in question, set out all the foundations, also take to all the wrought and cast ironwork, steel, and other work H  
I

**A** and materials therefor mentioned in the schedule hereto at the stations in Liverpool, as such are delivered from the manufacturers in accordance with their drawings, specification and contract, load up, cart, unload, stack, set out, level, put together, rhymer, drill, punch, as is reasonably necessary in this work, close up, fit and rivet together where and as required, erect, fix and rivet in place, test, paint, tar, and finish the same complete, finding at their own cost the paint and tar as specified, for the net price of 23s. (twenty-three shillings) per net ton of finished work mentioned in the schedule. . . . 3. The sub-contractors shall, unless otherwise instructed by the contractor in writing, put together and rivet up the girders and flooring of all the plates, girder spans, and the other girders, flooring and work, as far as is possible, in the shops to be provided by them, that the work may be proceeded with satisfactorily and continuously day and night, if so required, and shall convey the same to the place of erection. . . . Care will be taken to have the work made at the manufacturers' works in such a way as to make all the parts as accurate and as nearly interchangeable as is reasonably possible in such work, and any suggestions on these points from the sub-contractors will have consideration, but it is understood that subject to such care the sub-contractors take to the work as delivered by the manufacturers at Liverpool, and at their own cost correct and adjust any ordinary imperfection of workmanship, the intention being that under this contract the sub-contractors shall take the work as and in the condition in which it is delivered by the manufacturers ready for erecting according to specification, the method of manufacture and the condition in which the work is to be delivered being at this time known to them.

**E** . . . 9. All questions arising from this agreement shall be settled by the engineers in the manner mentioned in the principal agreement, and the arbitration clauses contained in the principal agreement shall be treated as being herein repeated with the substitution only of the names of the contractor and sub-contractors for those of the company and the contractor."

**F** On July 1, 1893, the plaintiffs issued the writ in this action against the defendant, claiming specific performance of the sub-contract and damages for alleged breach thereof. The defendant appeared to the action, and, at the time of entering appearance, gave the plaintiffs notice in writing requiring a statement of claim to be delivered. On July 20, 1893, the defendant took out the summons, asking that, pursuant to s. 4 of the Arbitration Act, 1889, all further proceedings in the action might be stayed on the ground that the matters in difference had been agreed to be referred to arbitration, and that he, the defendant, was ready and willing to submit to arbitration. On Nov. 3, 1893, the summons came on to be heard before KEKEWICH, J., when his Lordship decided that the request by the defendant that a statement of claim might be delivered was not a "step in the proceedings" within the meaning of s. 4 of the Arbitration Act, 1889, but that there must be some application to the court by summons or motion to constitute a step in the proceedings: see [1894] 1 Ch. 68. Accordingly, he made an order, staying all proceedings in the action, except as to certain claims in respect of matters which were outside the submission to arbitration. The plaintiffs now appealed.

**I** *Renshaw, Q.C., and A. F. Peterson* for the plaintiffs.  
*Warmington, Q.C., and Bramwell Davis* for the defendant.

**LINDLEY, L.J.**—This is an appeal from a decision of KEKEWICH, J., staying proceedings in this action, and in fact and in substance referring the matters in dispute to arbitration, the order being made under s. 4 of the Arbitration Act, 1889. An application was made by the defendant, and the appeal is by the plaintiffs, and the plaintiffs' grounds for appealing, now that we have heard them, are reduced to three. First of all, they say that the application to stay was too late, because the defendant had taken a step in the action. The other grounds of complaint go

to what I may call the merits of the case. The plaintiffs attack the fairness of the arbitrators; that is their second head. Their third head is that, inasmuch as the whole of the action is not referred to the arbitrators, no part of it ought to be referred by the court in the exercise of its discretion.

By s. 4 of the Arbitration Act, 1889 :

"If any party to a submission . . . commences any legal proceedings in any court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

As to the first point about the applicant being too late, the facts are these. The plaintiffs issued their writ against the defendant; the defendant entered appearance; by the *præcipe* and by the formal document he required a statement of claim. That was contemporaneous with the entry of the appearance. Then he wrote a letter to the plaintiffs' solicitors saying that he should desire a statement of claim. That is all he did. He took no other steps—if those are steps—before he made the present application for a stay under the section to which I have referred. The contention on the part of the plaintiffs is that the defendant is too late because he asked for or gave notice that he would require a statement of claim. That is said to be the taking of a step in the proceedings. The language of the section requires a little attention. It is quite obvious that the step to be taken must be a step taken by the applicant. The section does not say before any pleadings are delivered by anybody or any step is taken by anybody; but that the party applying before delivery of the pleadings—that is, before he delivers pleadings or takes any other steps in the proceedings—may apply. The question we have to consider, therefore, is narrowed down to whether a request by one party to another to take a step is taking a step himself. That is what the defendant did. He asked the plaintiffs to take a step, *viz.*, to deliver a statement of claim. I cannot say that the defendant was taking a step in these proceedings which precludes him from making the present application. I do not think that it would be good sense if we held the contrary, because what did the defendant do?

Addressing myself to the substance of the case I find that he was served with a writ, and the writ showed him that there was a claim for breach of contract. That he knew the contract I do not doubt; but he did not know from the writ what the particular breaches were in respect of which the plaintiffs were suing him, and, until he did know that at all events, how was he to form an opinion whether it would be desirable to apply or not? He had not the materials before him to enable him to exercise his judgment in the matter. It appears to me, therefore, that we should be doing an injustice to a defendant if we said that he must apply under the section before he knows what the plaintiff is suing him for. Quite apart, therefore, from the case not being within the words, I do not think that it is within the spirit or the sense of the Act. Before a man can make up his mind as to which of the alternatives he intends to take, he ought to know what the alternatives are, and ought to be in a position to exercise some kind of judgment in the matter. If we were to hold that the defendant ought to apply, and was too late, we should be saying that he should do that before he knew what to apply for. I think, therefore, that the decision of the learned judge in the court below was right on that part of the case. I think that the authorities establish, that a step in the proceedings means some application to the court or something of that nature, and not talk between solicitors or solicitors' clerks, nor the writing of



A letters, but the taking of some step, such as issuing a summons or something of the kind which is, in the technical sense, a step in the proceedings.

I pass to the second point. That point, as I have already said, goes to the merits. It is an attack on these arbitrators. In order to deal with that point it is of the utmost importance that we should see what is the agreement between the parties which is comprised in what is called the sub-contract of Aug. 24, 1889, made between Willans the defendant, and the plaintiffs Ives and Barker. The sub-contract refers to a principal contract of an earlier date, namely, July 29, 1889. It is impossible to understand the sub-contract without looking at the principal contract. The principal contract is for the construction of the Liverpool Overhead Railway, and it is made between the Liverpool Overhead Rail. Co., of the one part, and Willans, the contractor, of the other part, and by that principal contract Willans contracted to make the Overhead Railway. [His LORDSHIP read the material clauses of the contract of July 22, 1889, and continued:] That is a very tight-fitting bond, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well that a dispute between the contractor and the company is in substance in this kind of business a dispute between the contractor and the company's engineers, whose business it is to see that the works are done for the company according to the agreement and the plans and specifications. So the real agreement between the contractor and the company is that, if there is any dispute between them, although the engineers are to tell the contractor what to do, and order him to do what they like consistently with the agreement, their decision must be final.

What is the business explanation of that? How does it happen that a contractor will agree to be bound by such a very stringent provision? The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other, and it has been ascertained by long experience that engineers of the highest character may be trusted. The sub-contract arose in this way. Willans agreed to make the works in question, but he found it necessary to enter into sub-contracts with other people, as in this particular case, not to make the things, but to put together the things which were made. The sub-contract with which we have to deal, and which was entered into between Ives and Barker, of the one part, and Willans, of the other, refers to the original contract. [His LORDSHIP read the provisions of the sub-contract, and continued:] Pausing there, let us see what that agreement really amounts to. What is it that the sub-contractors agree to when they sign and enter into that sub-contract? They agree to be bound in all disputes between them and the contractor, that is, Willans, by the decision of the engineers of the company. They knew the arbitration clauses contained in the original contract, and they knew what the duties of those engineers were, and they knew that among other duties was that of passing or rejecting the materials. The sub-contractors agreed to put up the materials which were to be supplied, relying upon the honour and character of the engineers to reject such as were unfit, and they were willing, as the contractor himself was willing, to submit any difference between them and the company—which indirectly is really a difference between them and the engineers—to the arbitration of those engineers themselves. That is what was contemplated and that was the substance of the bargain.

If that is so, what must the sub-contractors not only allege, but prove, in order to make out that, in a dispute between them and Willans, the contractor, these engineers as arbitrators are not proper persons to decide that dispute? It is obvious that they must prove a great deal more than that the engineers have formed an opinion already upon the subject of the dispute. It is obvious that they must prove a great deal more than that there is a difference of opinion, and that they must give way to the decision. They must attack the character of the engineers to such an extent and in such a manner as to show that the engineers will probably be guilty of some misconduct in the matter of the arbitration—that they will not act fairly. That is what it must come to. Having chosen to put themselves in

that condition they cannot complain of the legitimate consequence, but they can complain of the illegitimate consequence. If it were true that these engineers were in collusion with the contractor so as to act unfairly, or so as to lead the court to suppose that they would act unfairly, there would be some ground for saying that this arbitration clause ought not to be enforced. But there is no evidence which deserves serious consideration so far as collusion is concerned. A

It is said that the contractor and engineers have precluded themselves from acting justly, because they have already passed improper materials. If there was any reason whatever to suppose that the engineers had passed materials which they knew and believed were unfit that would be a very serious charge indeed. But the charge does not come up to that, or anything like it. The charge is put in this way: "We, the sub-contractors, complained to you that some girders and other things were unfit; you treated our complaint as frivolous." What does that mean? It means that the engineers did not think they were unfit. That is precisely one of the very things which the sub-contractors contemplated and agreed to submit to. It was the engineers' duty to exercise their own judgment, and any difference of opinion must of course be accepted. The sub-contractors must go far beyond that in order to convince the court that these engineers are not men who ought to be trusted after the trust and confidence which has been put in them deliberately by the sub-contractors themselves. That part of the case seems to me to break down almost, if not quite, as conclusively as the part relating to the suggestion of collusion and impropriety. B C D

The third point is this: It is said that the language of s. 4 of the Arbitration Act, 1889, only gives the court power to stay. The language is that the court, if satisfied that there is no sufficient reason why the matter should not be referred, may make an order staying the proceedings. It is said that, inasmuch as the whole of the controversy between the parties cannot be referred to arbitration, there is no sufficient reason for referring anything. It is all or none—and the case which was cited of *Turnock v. Sartoris* (1), it is said, goes to support that view. That which is to be referred under s. 4 of the Arbitration Act, 1889, are matters which are agreed to be referred, and if matters which are agreed to be referred are mixed in an action with matters not agreed to be referred, there is no reason why s. 4 should not be applied to those matters which have been agreed to be referred, leaving the action to go on as to the other matters. But I quite see that, if the matters agreed to be referred were not the main matters in dispute, but formed a subordinate part and trifling part, and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part, and let the action go on as to the large part. That is what occurred in *Turnock v. Sartoris* (1), but that is not the case here. The position is reversed. The great controversy is as to the matters which have been referred, and the matters which have not been referred are comparatively small. I see no reason why those matters which have been referred should not be referred, and the action go on as to the rest if it is found worth while to go on with them. Accordingly, I have come to the conclusion that the decision of the learned judge in the court below was right, and must be affirmed; and the appeal must, therefore, be dismissed, with costs. E F G H

**LOPES, L.J.**—I am of the same opinion. The first point made is, that this application is too late under s. 4 of the Arbitration Act, 1889, and the real question raised is whether or not asking for a statement of claim is a step in the proceedings within the meaning of that section. I am clearly of opinion that it is not. In this case the writ was issued for breach of contract and for damages, and the defendant entered an appearance and simultaneously asked for a statement of claim. The words of the section are to be looked at. The section says that, if any party to a submission commences any legal proceedings in any court against any other party to the submission—then come these words, "in respect of any matter agreed to be referred." These words "in respect of any matter agreed to be referred" appear to me to be important, because I think that all that the I

A defendant here did was this. He had a statement of claim before him of a very general kind, and he naturally said: "There is a submission in respect of certain matters which were agreed to be referred, and when I look at this statement of claim I find it is very general indeed, and I cannot tell how much of this cause of action, how much of the claim in dispute, comes within this submission to refer, and how much, on the other hand, is without it." For that purpose he  
B applied for a statement of claim in order thereby more definitely to ascertain for himself what was within the submission and what might be without it, in order that when he knew that, he might then elect what he should do—whether, in point of fact, he should do that which would be a step in the action, or whether he should forbear. I do not think that an application of that kind for a statement of claim is a "step in the proceedings" within the meaning of the section.  
C Therefore I am of opinion that the learned judge in the court below was perfectly right in the view which he took on that part of the case.

Another and important part of the case is this. It is said that these engineers as arbitrators are not to be trusted, and it is submitted that the arbitration should not be allowed to proceed. It must be borne in mind that these are not arbitrators in the ordinary sense of the word. They are arbitrators chosen and  
D selected by the parties, selected with the knowledge that to some extent they must have an interest in the direction of their employers. It is well known they must have it, and I think the words of BOWEN, L.J., in *Jackson v. Barry Rail. Co.* (2), at the commencement of his judgment, are highly instructive as to what the position of engineers or arbitrators is in a case like the present: Every word of that judgment appears to me to apply to the present case.

E I will deal shortly with the two main attacks which are made against these engineers and arbitrators. I think the chief one is this. It is said that they are not fit to be trusted because they have prejudged a certain question with regard to the action, namely, the quality and fitness of certain materials. The answer to that, to my mind, is, that the parties perfectly well knew, when they consented that these engineers should be arbitrators, and that difficulties such  
F as these which are now suggested might arise—they perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question. They knew that these engineers had that to do as well as to act as arbitrators in what is termed the larger arbitration. Knowing that, they agreed that they would accept them as arbitrators, and it appears to me that they cannot now turn round and say that, because the engineers' judgment  
G is erroneous, therefore they are not bound to accept it. They agreed to be bound by the engineers' judgment, however erroneous it might be, provided it was honest, and provided it was not tainted with fraud or with misconduct. So far as I can gather, it cannot be suggested that the engineers have acted fraudulently; nor can I find any evidence of any misconduct on their part. If it could have been made out that the engineers, perfectly well knowing that these materials were  
H improper, passed them, that, to my mind, would have been strong ground for assenting to the application which the plaintiffs are now making. But there is nothing of the kind. I say that that is no ground whatever, having regard to the peculiar nature of this arbitration, for stopping the arbitration.

Another ground is made, which is this. It is said that the arbitrators could not behave properly because a question of their competency may be involved. I  
I think that that is entirely disposed of by *Eckersley v. Mersey Docks and Harbour Board* (3). Another attack is made upon them on the ground of collusion. It is said that the engineers and the defendant are acting in collusion. All I can say with regard to that, is that that charge is so wild and so vague, and that in respect of it there is so little that is conclusive, that I desire to adopt the view that they have acted not at all in that way; I think, therefore, that that ground fails also. In my opinion, therefore, the decision of the learned judge in the court below was right, and I think that this appeal ought to be dismissed with costs.



**KAY, L.J.**—I also agree with the decision of the learned judge in the court below, and I agree entirely with the judgments that have been pronounced in this court, particularly with the very careful judgment of **LINDLEY, L.J.**, and I should say nothing in the matter only that I think it involves some very important questions to which I can hardly be contented to give my silent assent. A

As to the first question, whether requiring a statement of claim is taking a step in the action within the meaning of s. 4 of the Arbitration Act, 1889, I am very clearly of opinion that it is not, for the reasons which have already been given, and particularly for this reason. When a writ has been issued, however carefully it is endorsed, it may very well be that the defendant who is sued may not completely understand from the writ what the entire scope of the action is. The argument on behalf of the plaintiffs on the point—and I agree with that argument—is, that the defendant has to exercise an election whether he will allow the action to go on or avail himself of an arbitration clause like that in the agreement now before us, and apply to the court to stay the action. But it is essential to every case of election that a person who is put to election shall thoroughly understand the facts which make it necessary for him to elect. In this case what the defendant did was, in the first instance, to require that a statement of claim should be delivered. He did so simultaneously with giving notice of his having entered an appearance in the action. But he did not wait till the statement of claim was delivered. On the contrary, he withdrew that notice, and then gave this notice of motion to stay proceedings under the arbitration clause. He applied, as I understand, to stay all the proceedings in this action. When the scope of the action became apparent upon the argument of the case it was found that he did not thoroughly understand what the scope and extent of this action was, and he included in his motion to stay a part of the action which referred to a matter which was outside the agreement containing the clause of arbitration. Nothing could show more clearly how improper it would be to say that requiring a statement of claim which would show him what the scope of the action was more clearly and definitely than he could make out from the writ would be the taking by him of such a step in the action as would debar him from exercising the election which he ought only to be bound to exercise when he thoroughly understands what the nature of the action against him is. I, therefore, think that the learned judge in the court below on that point was entirely right in deciding that it was not a step in the action within the meaning of s. 4 of the Arbitration Act, 1889. B C D E F

The other points are of vastly more importance. It seems to be a custom now that in large contracts of this kind the engineers who are employed to watch the contractors on behalf of the company which is undertaking the work should be named as the arbitrators between the employers and the contractors if a dispute should arise. One can see, and the course of decisions of late years in this court has shown it, that that must lead now and then to questions of difficulty between the two contracting parties. To make the engineers, who are employed by the persons who engage the contractors to do the work, the arbitrators of every question that arises between the two contracting parties must put those engineers sometimes into a very difficult position indeed. But, as men of business in this court, we have to deal with the practice which has become almost inveterate, constantly done, and is a thing which contractors and employers thoroughly understand, which they are entirely accustomed to, and which nothing that we can say would in the least alter or stop. G H I

What is the course which this court ought to take as a matter of business in questions of this kind? Here is this kind of practice, thoroughly understood, introduced, and acted on from day to day, and contractors who enter into contracts of this kind know very well that the engineers are put into a position which makes them for some purposes not the most proper arbitrators that could be selected. They know perfectly well that the engineers are employed by the other party to the contract, that they have to watch the work that is done, that

A they have, as is quite usual in contracts of this kind, and to determine whether the materials are good or not, and whether the work is or is not properly done. They know that any question that arose between the two contracting parties would probably be a question which the engineers in the course of their employment as engineers would already have had before them and have had to consider and to form some judgment upon. With that knowledge the contractor agrees

B that the engineers shall be the persons whose decision upon questions that arise between him and his employers shall be absolutely final; that they shall be put into the position of arbitrators and judges from whom there is no appeal whatever. I have no doubt that that is done for the reasons already indicated by LINDLEY, L.J., mainly. I think, because engineers who are put into that kind of position are persons of known integrity, far above any suspicion of improper dealing, and

C the contractor is content to be bound by the decision of arbitrators who are in a position of very considerable difficulty. Also I daresay the other motive which LINDLEY, L.J., referred to has much to do with the matter, namely, that competition is so keen that railway companies and great employers of labour and other persons who have large works to put into the hands of contractors find that they have no difficulty in obtaining contractors who are willing to submit

D to such terms.

In the present case there has been, first of all, the faintest possible suggestion, not supported by an atom of anything like proof, of collusion between the engineers, who are celebrated men, and the defendant to this action, who was the original contractor, the plaintiffs being the sub-contractors. I disregard entirely the suggestion that has been made upon that point, because I do not think it comes

E to more than a mere suggestion, and I think that there would be the greatest possible danger of involving persons who employ contractors in interminable litigation if an arbitration clause of this kind could be set aside upon a mere suggestion such as that which I am now dealing with. I think that that is entirely out of the question, and I am sorry that upon such very insufficient materials any such suggestion should have been made. The most material thing

F that strikes my mind which has been put forward in order to show that the engineers are not proper arbitrators in this case is this. It is said—and although no particular instance is given, the evidence is supported in a way I will indicate in a moment—that these engineers have in the exercise of their duty as engineers approved and passed various materials in iron which the sub-contractors by the terms of their sub-contract were bound to put together in order to construct this

G overhead railway in Liverpool, the subject of the contract. It is said that, having already approved these materials, they are the last persons in the world who should be made arbitrators in a question as to whether the materials were good or not.

That, I confess, struck me as being the strongest point that was made by the plaintiffs in this case, and they confirmed their evidence on that point by specifying

H the dates of letters which they had written to the engineers complaining of the quality of some of the iron materials furnished. Besides that, they said that they had in innumerable instances made verbal representations to the same effect, but that all these representations had been treated by the engineers as frivolous, that is to say that the engineers had in each one of these instances exercised their judgment against the plaintiffs, and in such a manner as to make them

I most unfair arbitrators in a question as to the sufficiency of those materials which they had already approved and passed. But one must look back at the contract, and I find on looking back at the contract that it seems to have this effect. In the original contract the materials for the construction of this railway were to be such as the engineers should approve, and their approval was made by the terms of the contract between the contracting parties, the company who are forming this railway and Willans, the defendant in this action, sufficient and conclusive. So that, in the absence of mala fides, if the engineers approved

the materials there was an end of the matter, and the contractor was entirely bound by that approval. A

In the sub-contract the original contract to that extent is adopted, and the sub-contractors, who had not furnished any materials themselves, but had only to put together the materials which were furnished to them, took these materials from Willans, the person with whom they contracted, upon the terms of the original contract, namely, that they were to be materials which the engineers had approved as between Willans and the company. Therefore, again, as between Ives and Willans, the approval by the engineers of the quality of the materials is to be a binding thing. Supposing the question were attempted to be raised before the arbitrators, who are third persons altogether, whether the materials were good or not, and it was proved in the absence of mala fides or misconduct that the engineers had approved and passed these materials, I think that the judge would not go behind their approval for a moment. I think that the judge would say that, according to the contract, that is to be sufficient evidence that the materials were proper and right, and no judge and no arbitrator would allow evidence in the absence of some suspicion of mala fides or misconduct to show that that approval of the engineers was at all improper, and that the materials, notwithstanding that approval, were not good and sufficient. That is one answer. The other answer is that these parties with their eyes open entered into this contract; they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties; and they agreed that in any question that arose which was submitted to arbitration those engineers should be the arbitrators. After that agreement they turn round and say: "We cannot prove that you have acted dishonestly; we can only say that you approved of the materials, and we allege that those materials were not good notwithstanding your approval, and therefore that you cannot properly sit as arbitrators." That is not fulfilling the obligation which is incumbent upon them, namely, to make out that those arbitrators—to use the language of LORD ESHER, M.R., in *Eckersley v. Mersey Docks and Harbour Board* (3)—will be so biased when they come to exercise their duty as arbitrators that they are unfit to sit in that position. I think that that is not made out, even upon that argument which seems to me the very strongest that was used on behalf of the plaintiffs in this case in order to show that the arbitrators were not proper arbitrators to decide the question between the two parties. B C D E F

With respect to the rest of the case I have very little to add. It is said that there is sufficient reason for not allowing this arbitration to go on in the fact that the action has proceeded as to a very small part of it. I agree entirely with the observations that have been made, and I have no doubt that that is a matter which the court should regard. But looking at how much of this action is allowed to go on, and seeing what a very small part indeed it is of the questions which have been raised between the parties, and seeing that it relates merely to a comparatively small question which was not included in the agreement which contains this arbitration clause, I do not think that there is sufficient reason here on that ground to prevent the arbitration going on. On the whole, though I feel very much impressed by the difficulty of the position in which these arbitrators are placed by reason of their being both arbitrators and engineers of the company which is forming this overhead railway, I do not think that a sufficient case has been made out for allowing the action to go on. I think the learned judge in the court below was right in the conclusion at which he arrived. Therefore, I think that this appeal should be dismissed with costs. G H I

*Appeal dismissed.*

Solicitors: James Kirkley for Davidson & Barker, South Shields; Addleshaw, Warburton & Trenam for Addleshaw & Warburton, Manchester.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]



## LONG v. CLARKE AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.J.J.), November 16, 1893]

[Reported [1894] 1 Q.B. 119; 63 L.J.Q.B. 108; 69 L.T. 654; 58 J.P. 150; 42 W.R. 180; 10 T.L.R. 71; 38 Sol. Jo. 55; 9 R. 60]

*Distress—For rent—Entry—Entry through open door or window—Right to break open inner doors—Right to climb walls and walk over grounds.*

A landlord, in distraining for rent, may not break into any building, including a house, stable or barn, but he may enter through any open door or open window, or through a hole in a wall, and he may lift a window which is partly open. Having so entered, he may break open inner doors. He may walk over a garden or park for the purpose of entering the building, and may climb over a wall.

*Eldridge v. Stacey* (1) (1863), 15 C.B.N.S. 458, approved.

*Scott v. Buckley* (2) (1867), 16 L.T. 573, doubted.

**Notes.** As to entry for distress, see 12 HALSBURY'S LAWS (3rd Edn.) 129; and for cases see 18 DIGEST (Repl.) 323-325.

Cases referred to:

- (1) *Eldridge v. Stacey* (1863), 15 C.B.N.S. 458; 3 New Rep. 41; 9 L.T. 291; 10 Jur.N.S. 517; 12 W.R. 51; 143 E.R. 863; 18 Digest (Repl.) 347, 949.
- (2) *Scott v. Buckley* (1867), 16 L.T. 573; 18 Digest (Repl.) 323, 684.
- (3) *American Concentrated Must Corp'n. v. Hendry* (1893), 62 L.J.Q.B. 388; 68 L.T. 742; 57 J.P. 521, 788; 9 T.L.R. 340, 445; 37 Sol. Jo. 475; 5 R. 331; 18 Digest (Repl.) 323, 690.

Also referred to in argument:

- Brown v. Glenn* (1851), 16 Q.B. 254; 20 L.J.Q.B. 205; 16 L.T.O.S. 341; 15 Jur. 189; 117 E.R. 876; 18 Digest (Repl.) 323, 639.
- Penton v. Brown* (1664), 1 Keb. 698; 1 Sid. 186; 83 E.R. 1193; 21 Digest (Repl.) 567, 625.
- Barnes v. Southsea Rail. Co.* (1884), 27 Ch.D. 536; 51 L.T. 762; 32 W.R. 976; 11 Digest (Repl.) 196, 626.
- Nash v. Lucas* (1867), L.R. 2 Q.B. 590; 8 B. & S. 531; 32 J.P. 23; 18 Digest (Repl.) 324, 698.

**Appeal** by the plaintiff, the tenant, from a decision of HENN COLLINS, J., at the trial without a jury in Middlesex, dismissing his action to recover damages for trespass to goods which had been seized as a distress for rent.

The defendant Clarke was the landlord of a house in Gower Street which was let to a tenant. Rent being in arrear, Clarke employed the defendant Hawkins as his bailiff to distrain. The defendant Hawkins went through the house next to the tenant's house into the back yard. This back yard was separated from the back yard of the tenant's house by a wall about five feet high. The bailiff got over this wall by means of a ladder, and so got into the back yard of the tenant's house, and then entered the house through an open window, and distrained upon the goods in the house. The bailiff distrained upon goods belonging to the plaintiff which were in the house, and the plaintiff brought this action to recover damages, alleging that the entry was illegal, and that the landlord and his bailiff were, therefore, trespassers. At the trial before HENN COLLINS, J., without a jury, the learned judge held that the entry was not illegal, and gave judgment for the defendants. The plaintiff appealed.

*Cababé* for the plaintiff.

*Jelf, Q.C.*, and *Wilkinson* for the defendant Clarke.

*C. C. Scott* for the defendant Hawkins.

**LORD ESHER, M.R.**—This is a case in which a landlord distrained upon goods which were in a house. A

What is the law relating to distress for rent? The law of distress gives to a landlord, to whom rent is due, the right to do things which if done by any other person would be a trespass. When doing those things, a landlord commits no trespass. If the landlord only does that which he is entitled to do, he does not commit a trespass. The question, then, in this case is whether that which the landlord has done is within that which is permitted by the law relating to a distress by a landlord. When a landlord goes into a house to distrain, whether the door is open or shut, he does that which, if done by any other person, would be a trespass. If the landlord gets into the house in a way which is justified by the law of distress, he may then break open any inner doors. If a landlord walks across his tenant's land up to the front door of the house and walks in, that is no trespass on the part of the landlord. The sole question in this case is, therefore, what is the law as to the right of a landlord to enter and distrain. From the beginning of time, as far as I can see, a landlord has had no right to go into a house or building to distrain by breaking into the house or building. If he can get into the house or building without breaking into it, he can go in for the purpose of distraining, and does not commit a trespass. How has that rule been applied? D The only ordinary way of getting into a house is through the door, but it has been held that a landlord may enter through a window if he can do so without breaking. If, therefore, a landlord can get in through a door or open window he enters without breaking and commits no trespass in law, because he did not break into the building.

It has been argued that, because something has been said long ago about entering per ostia et fenestras, if a landlord found a hole in the wall of a building, he would not be entitled to enter through it to distrain. Why not? If a tenant is altering the house by putting in a bow window instead of a flat one, and, while the work is being done, has permitted an opening to be left in the wall, I know of no law which says that the landlord may not go through that hole to distrain. The landlord can enter through such a hole because he does not thereby break in. That law has been applied to the case of houses, and also to the case of other buildings, such as a warehouse, in which a landlord wishes to distrain. The landlord must not break open an outer door to enter, and that is the law with regard to a stable or barn, as well as a house. It has been held that the landlord may go in if the door is open, but that he may not break in. If a building is within a yard, which people call the curtilage, it has been held that a landlord cannot enter such a building if it is closed. It, therefore, makes no difference whether a building is within the curtilage or not. E F G

With regard to a house, is a yard, which is within the curtilage, a part of the house? Can you persuade any ordinary person to believe that a yard is part of his house. I think not. It is true that by a conveyance of a house the yard will pass, but that is quite another matter. When, therefore, a landlord is within the curtilage he is not in the house, and if the house is locked up he cannot enter it by breaking in. It was so held in *Eldridge v. Stacey* (1). Although the landlord may have got within the curtilage, yet he is not in the house and cannot break the house. That shows that, so far as regards the law of distress, the curtilage is no part of the house. The argument, therefore, in this case that the landlord could not enter the house through an open window because he had climbed over a wall into the curtilage cannot succeed. The question is whether the landlord had not a right to enter the house. The house was open and he could enter and had a right to do so. H I

There is another defect in the case for the plaintiff. Even assuming that the curtilage is a part of the house, the landlord did not break into the curtilage. He broke nothing; he only got over a wall. What difference is there between getting over a wall like this and getting up a wall to go in at an open window? The landlord may get over a wall to get in at an open window because he does not thereby

**A** break anything. There can be no difference between the one case and the other. The law is quite clear upon this matter. *Eldridge v. Stacey* (1) decided this question quite correctly.

The judgment in *American Concentrated Must Corp'n. v. Hendry* (3) in the court below has nothing whatever to do with this case. When that case came before the Court of Appeal, the question decided was what was the outer door of a house, and it was held that the door of an outer yard was not the door of a house. That is in point in this case. I think that the decision of the court below was quite right, and that this appeal must be dismissed.

**LOPES, L.J.**—I am of the same opinion. A landlord may distrain for rent, and may, in so doing, commit what would be a trespass if done by another person, provided that he does not break the outer door of any building. The landlord may enter through the open door of any building, and, having so entered, may break open inner doors; he may walk over a garden or park for the purpose of entering the building. The landlord must not, however, break into a building. The word "building" includes a house, a stable, or a barn.

**D** The question in this case is whether the landlord was justified in climbing over a wall which enclosed the yard of the house and thus getting to the house and then entering through an open window for the purpose of distraining. It seems to me clear that the landlord was entitled to do so. The yard is not part of the house. I think that it cannot be said to be so any more than a garden or park is part of a house.

**E** It is to be observed also that the landlord broke nothing in this case. I am clearly of opinion that there was nothing wrong in what the landlord did. This very point was clearly raised in *Eldridge v. Stacey* (1). The headnote to that case is as follows (15 C.B.N.S. at p. 458):

"There is no illegality in distraining for rent by climbing over a fence and so gaining access to the house by an open door."

**F** That statement is borne out by the report of the case, and is directly in point here. In his judgment, **ERLE, C.J.**, says (*ibid.* at p. 459):

"I do not think the distress was rendered unlawful by the broker getting over the fence. None of the authorities cited warrant such a conclusion."

I think that there cannot be any distinction between a wall and a fence.

**G** Then there is a case, decided in 1867, four years after *Eldridge v. Stacey* (1), which is relied on by the plaintiff. That is *Scott v. Buckley* (2) the headnote to the report of which is as follows (16 L.T. at p. 573):

"A landlord in making a distress got over a fence or wall of from five to eight feet high at the back of the tenant's house, such being the only means of effecting an entrance, as the front door was locked: *Held*, that such a mode of entry was illegal."

**H** That seems to be in favour of the plaintiff. I cannot, however, believe that that case is correctly reported, and I think that there must have been some ground of distinction between that case and *Eldridge v. Stacey* (1) which does not appear in the report. I cannot think that **BYLES, J.**, would not have considered *Eldridge v. Stacey* (1), though that case does not appear from the report to have been cited.

**I** The last case upon this subject is *American Concentrated Must Corp'n. v. Hendry* (3) which, in my opinion, confirms the decision in *Eldridge v. Stacey* (1); in that case the Court of Appeal determined what was meant by an outer door. That case, however, was not in its facts like this case. I think that this appeal must fail and be dismissed.

**KAY, L.J.**—I agree with the argument of the plaintiff that the curtilage is part of the house for some purposes. A conveyance of a house includes the curtilage



also, and that has always been the law. If there had been a door in this wall leading into the curtilage, and the landlord had broken that door, I should think that he had exceeded his rights, and was a trespasser ab initio. It is not, however, necessary to decide that point in this case. There was no door in this wall. The landlord obtained access to the yard adjoining the house, and then got over the wall separating that yard from the yard of the tenant's house; he did not, however, break anything, and entered the house through an open window. I agree that, if done by anyone else, the getting over the wall would have been a trespass. The question now is, whether that was a trespass on the part of the landlord who levied the distress. The land belonged to the landlord, but, having let it, he had no right to enter except for the purpose of levying a distress. The law has always made that exception in his favour, that he may enter when rent is in arrear for the purpose of distraining. In this case, if there had been no wall but only a garden, anyone else who had entered it to get to the house would have been a trespasser, but the landlord is not a trespasser in such case. That is the distinction which the law has made in favour of the landlord.

The question, therefore, is whether getting over a wall to get into the yard makes the landlord a trespasser. If it does, I agree that the landlord was a trespasser ab initio. Has any case decided that the landlord is a trespasser under such circumstances? In 1863 *Eldridge v. Stacey* (1) was decided. The facts of that case were as follows. The plaintiff was tenant under the defendant of a house; the rent being in arrear a broker was employed to distrain; the broker, in the absence of the tenant, got over the fence from the adjoining garden and entered the house by a door which was only latched. Substituting the word "wall" for the word "fence," the facts of that case are absolutely identical with the facts of this case. There is really no distinction between that case and the present case. In his judgment in that case, ERLE, C.J., states the law thus (15 C.B.N.S. at p. 459):

"I do not think the distress was rendered unlawful by the broker getting over the fence."

The other learned judges all concurred. Three years later *Scott v. Buckley* (2) was decided at Nisi Prius, and there is a brief report of the case in the LAW TIMES REPORTS. Reading the report of that case it seems to be the exact contrary to *Eldridge v. Stacey* (1), and it was decided by BYLES, J., who was one of the judges who decided *Eldridge v. Stacey* (1). According to the report, the latter case was not cited in *Scott v. Buckley* (2), but I think that BYLES, J., must have remembered that decision. I think, therefore, that there must have been some distinction between the two cases which does not appear in the report.

Which of these decisions is most consistent with the general law upon this subject? The only restriction which the law imposes upon the right of the landlord to enter to distrain is, that he must not break into the house or building, and it has been decided that lifting up a window which is partly open is not breaking in. Short of breaking in, the landlord may get into the house or building in any way he can. Here the landlord only got over a wall, and that, in my opinion, is no more than walking over a garden, which is not a trespass when done by a landlord for the purpose of entering to distrain. I think that *Eldridge v. Stacey* (1) is an authority in this case, and I prefer that case to *Scott v. Buckley* (2). The plaintiff has no cause of action, and the appeal fails.

Appeal dismissed.

Solicitors: *Westcott & Son; Noon & Clarke; A. G. Dinn.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

## R. v. OXFORDSHIRE JUSTICES

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), June 19, 1893]

[Reported [1893] 2 Q.B. 149; 62 L.J.M.C. 156; 69 L.T. 368;  
57 J.P. 712; 41 W.R. 615; 9 T.L.R. 520; 37 Sol. Jo. 580;  
4 R. 482]

*Solicitor—Retainer—Retainer to conduct affiliation proceedings—Duration of authority.*

*Magistrates—Appeal to quarter sessions—Notice of appeal—Service on respondent's solicitor—Duration of solicitor's authority—Affiliation order—Summary Jurisdiction Act, 1879 (42 & 43 Vict., c. 49), s. 31 (2).*

The authority of a solicitor who has been retained for the purpose of obtaining an affiliation order does not continue after the order has been obtained, and the service upon him of a notice of appeal against the order is not a valid service upon the respondent, though the solicitor has accepted the service and his authority has not been expressly revoked.

**Notes.** In place of the original s. 31 of the Summary Jurisdiction Act, 1879, a new s. 31 was substituted by the Summary Jurisdiction Appeals Act, 1933, s. 1. Sub-section (1) of the substituted s. 31 was later amended by the Criminal Justice Act, 1948, ss. 79, 80 and Scheds. 9 and 10, and, as so amended, appears in 14 HALSBURY'S STATUTES (2nd Edn.) 869. Parts of it, including s. 31 (1) (ii), were later repealed by the Magistrates' Courts Act, 1952, s. 132 and Schedule, and s. 84 (1) of this Act provides: "An appeal from a magistrates' court to quarter sessions shall be commenced by the appellant's giving notice of appeal, within fourteen days after the day on which the decision of the magistrates' court was given, to the clerk of the magistrates' court and to the other party."

Referred to: *Godman v. Crofton*, [1914] 3 K.B. 803; *Jones v. Birch Brothers, Ltd.* (1933), 49 T.L.R. 586.

As to appeals from magistrates' courts, see 25 HALSBURY'S LAWS (3rd Edn.) 298 et seq.; as to the nature and duration of a retainer, see 36 HALSBURY'S LAWS (3rd Edn.) 67 et seq.; and for cases see 42 DIGEST 51–53. For the Magistrates' Courts Act, 1952, s. 84, see 32 HALSBURY'S STATUTES (2nd Edn.) 486.

Case referred to:

(1) *Lady De La Pole v. Dick* (1885), 29 Ch.D. 351; 54 L.J.Ch. 940; 52 L.T. 457; 33 W.R. 585, C.A.; 42 Digest 52, 425.

Also referred to in argument:

*Ex parte Portingell*, [1892] 1 Q.B. 15; 61 L.J.M.C. 1; 65 L.T. 603; 56 J.P. 276; 40 W.R. 102; 8 T.L.R. 40; 36 Sol. Jo. 41, C.A.; 30 Digest (Repl.) 18, 99.

*Syred v. Carruthers* (1858), E.B. & E. 469; 27 L.J.M.C. 273; 23 J.P. 37; 6 W.R. 595; 120 E.R. 584; 33 Digest (Repl.) 416, 1265.

*Pennell v. Uxbridge Churchwardens* (1862), 31 L.J.M.C. 92; 5 L.T. 685; 26 J.P. 87; 8 Jur.N.S. 99; 10 W.R. 319; 33 Digest 415, 1253.

*Lawrence v. Harrison* (1654), Sty. 426; 82 E.R. 833; 42 Digest 51, 420.

*Anderson v. Watson* (1827), 3 C. & P. 214; 172 E.R. 392, N.P.; 42 Digest 367, 4180.

**Appeal** by the putative father of an illegitimate child from an order of the Divisional Court (MATHEW and WRIGHT, JJ.), discharging a rule nisi for a mandamus to the court of quarter sessions for the county of Oxford to hear and determine an appeal against an affiliation order, which had been granted to the mother, the respondent to the present appeal.

At the hearing of the application by the mother at petty sessions a solicitor appeared for each party, and an affiliation order was made by the justices against the putative father, by which he was ordered to pay three shillings a week towards

the support of the child. The putative father thereupon instructed the solicitor who had appeared for him at the petty sessions to appeal against the order. On the last day for giving notice of appeal, the putative father's solicitor called at the office of the solicitor who had appeared for the mother, and handed to that solicitor a notice of appeal against the affiliation order, which the solicitor accepted on behalf of the mother. The solicitor then wrote a letter to the mother, which reached her on the following day, informing her of the receipt of the notice, and stating that, if she wished counsel to be instructed to support the order at quarter sessions, she must come to see him on the following Monday. On that day she called upon the solicitor and was told what the probable expense would be. She said that she had a friend who, she thought, would find the money, and that she would call again that day to tell him. She did not call again, but wrote on the next day that she was waiting to see what she could do, and would call again. She afterwards wrote him that she would not require his services. In the meantime she had retained another solicitor to act for her at the quarter sessions. When the appeal came on for hearing at the quarter sessions, it was objected on behalf of the mother that no valid notice of appeal had been given to her. The justices upheld the objection, and refused to hear the appeal.

The putative father obtained a rule nisi for a mandamus to the justices to hear and determine the appeal. Upon the argument of the rule nisi the Divisional Court (MATHEW and WRIGHT, JJ.) discharged the rule. The putative father appealed.

By the Summary Jurisdiction Act, 1879 :

"Section 31. Where any person is authorised . . . to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following: . . .

(2) The appellant shall, within the prescribed time, or if no time is prescribed within seven days after the day on which the said decision of the court was given, give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal."

*Mackarness* for the appellant.

*F. Fitzgerald* for the respondent.

**LORD ESHER, M.R.**—The question upon this appeal is whether any notice of appeal was properly served upon the respondent.

The mother obtained an affiliation order against the putative father. For the purpose of obtaining that order she had retained a solicitor. When that order was obtained it seems to me that the purpose for which the solicitor had been retained was accomplished. The putative father decided to appeal against the order, and instructed a solicitor to act for him in respect of such an appeal. The first thing which it was necessary to do was to serve a notice of appeal upon the mother. It was argued that, inasmuch as personal service on the mother was not necessary, there might be service on some person who stood in such a relation to her that service upon him would be the same as service upon her. I do not think that it is necessary to consider that question. The notice of appeal was served upon the solicitor who had acted for the mother at the petty sessions, and it is contended that he then still continued to be her solicitor.

Upon what grounds can it be said that he continued to be her solicitor? There is no statutory enactment which makes him so continue. Is there any rule of the common law by which he continued to be her solicitor? With regard to common law actions it has, indeed, been held that, where there is a judgment which has not been carried into effect by execution, so long as any steps remain to be taken in the litigation for the purpose of obtaining the fruits of it for the successful



A party, or defending the other party from any wrong proceedings in execution, the action is not at an end, and the solicitor instructed by a party in the action continues to be his solicitor unless his authority has been revoked, and notice of such revocation given to the other party. *Lady De la Pole v. Dick* (1) shows that the same principle applies to litigation in the Court of Chancery, and that, where there was a decree or order made in a Chancery suit which it was necessary to work out in chambers, the authority of a solicitor continued until the decree or order was worked out. I think that the Court of Appeal did not intend to lay down any new rule in that case, but only held that the same rule obtained in courts of equity as in courts of law upon this matter. In my opinion, the court expressly declined to hold that the authority of a solicitor continued, or that the other party would be entitled to consider that it did continue, as long as it was possible that there might be an appeal. In that case it was pointed out by CORRON, L.J., that it was very inconvenient that the authority of a solicitor did not continue so long as there was a right of appeal, and BOWEN, L.J., expressed surprise that the matter had not been dealt with by the rules and orders. R.S.C., Ord. 7, r. 3, seems to have been framed in consequence of those expressions of opinion. That rule only applies to litigation in the High Court, and not to a case of this kind.

D In the present case a solicitor was employed to obtain an affiliation order, and that litigation was finished as soon as the order was obtained, nothing more remaining to be done. In my opinion, it is impossible to apply to such a case the rule applicable to common law actions where the fruits of the judgment have not been obtained by execution. If that rule were applied, the authority of the solicitor would, in a case of this kind, continue throughout the whole period during which E payments would have to be made under the affiliation order. I, therefore, think that the authority of the solicitor did not continue, and that the putative father was not entitled to consider that it did continue, at the time when the notice of appeal was served.

F It has been argued that the mother ratified the service of the notice upon the solicitor. I think that it is impossible to say that any such ratification took place under the circumstances. It was never pointed out to her that she had to consider whether she would or would not ratify the service of the notice upon the solicitor. She only considered whether she would retain him as her solicitor for the purposes of the appeal, and she decided not to so retain him. I think, therefore, that there was no valid service upon her of the notice of appeal, and that this appeal must be dismissed.

G **BOWEN, L.J.**—I concur.

**KAY, L.J.**—I agree.

*Appeal dismissed.*

H Solicitors: *Thomas A. Jones*, for *Stockton & Sons*, Banbury; *Cunliffe & Davenport*, for *Davenport & Rose*, Oxford.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

EVANS *v.* DAVIES

[CHANCERY DIVISION (Kekewich, J.), February 17, 1893]

[Reported [1893] 2 Ch. 216; 62 L.J.Ch. 661; 68 L.T. 244;  
41 W.R. 687; 3 R. 360]*Practice*—Sale of goods by order of court—"Goods"—Shares—*R.S.C., Ord.* 50,  
r. 2.

Under *R.S.C., Ord.* 50, r. 2 (which provides that the court may order the sale of "any goods, wares or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once"), the court may order the sale of shares in a limited company.

**Notes.** As to the interim sale of goods, see 30 HALSBURY'S LAWS (3rd Edn.) 386-387; and for cases see 9 DIGEST (Repl.) 232.

Cases referred to:

- (1) *Bartholomew v. Freeman* (1878), 3 C.P.D. 316; 38 L.T. 814; 26 W.R. 743; Digest (Practice) 660, 2801.
- (2) *R. v. Slade* (1888), 21 Q.B.D. 433; 57 L.J.M.C. 120; 59 L.T. 640; 52 J.P. 599; 4 T.L.R. 777; 37 W.R. 141; 16 Cox, C.C. 496; 2 Digest (Repl.) 372, 491.
- (3) *Coddington v. Jacksonville, Pensacola and Mobile Rail. Co.* (1878), 39 L.T. 12, C.A.; Digest (Pleading) 218, 1842.

**Interlocutory Motion** by the plaintiff for an interim injunction to restrain the defendant from selling or otherwise dealing with certain shares, and **Cross-Motion** by the defendant for an order directing a sale of the shares.

By an agreement, dated Nov. 19, 1891, and made between the plaintiff, of the one part, and the defendant, of the other part, the plaintiff agreed to sell and the defendant to purchase 130 six per cent. preference shares of £10 each, fully paid up, in Carmarthen United Breweries, Ltd., at the price of £1,300, the defendant paying the plaintiff £300 by way of deposit, and giving the plaintiff a four months' bill for £500 in further part payment of the purchase money, the balance of £500 to be paid on the date of the maturity of the said bill, whereupon the plaintiff would execute a transfer of the shares to the defendant. On the completion of the purchase the plaintiff was to pay or allow to the defendant the sum of £90 by way of commission on the sale and purchase and in reduction of the balance of £500. Until the completion of the purchase the certificate of the shares was to remain in the custody of a Mr. Rees as trustee for the parties, the interest on the shares being received by the plaintiff, and until payment of the whole of the purchase money, the certificate, shares, and interest were to stand charged with the payment to the plaintiff of the unpaid purchase money. In default of completion the plaintiff was to be at liberty to sell the shares, and out of the proceeds to retain the unpaid balance of purchase money, and pay the balance to the defendant.

The defendant paid the plaintiff the deposit of £300, and gave him a four months' promissory note for £500, but the promissory note was dishonoured at maturity, whereupon the plaintiff brought an action against the defendant in the Queen's Bench Division for the amount of the promissory note and interest. The defendant delivered a statement of defence to that action, the question being whether the transaction between him and the plaintiff was, as alleged by the latter, one of sale and purchase of the shares, or whether the defendant was merely the agent of the plaintiff to sell the shares on commission. Shortly after the close of the pleadings in that action the plaintiff discovered that the defendant was advertising an intended sale of the shares by auction, whereupon he (the plaintiff) issued a writ in the Chancery Division, before KEKEWICH, J., claiming a declaration that he was entitled to a lien on the shares for £1,000, the balance of purchase money

**A** remaining unpaid, with interest; also to have the shares sold towards payment of the £1,000 and interest; judgment for the balance (if any) remaining unsatisfied after such sale; and an injunction. The plaintiff then served the defendant with notice of motion in the Chancery action for an interim injunction to restrain the defendant from selling or otherwise dealing with the shares, on the ground that the offering of the shares for sale by auction would depreciate their value, and prejudice his, the plaintiff's, lien; and the defendant then served the plaintiff with a cross notice of motion in the transaction for an order directing a sale by auction of the shares and payment of the proceeds into court to the credit of the action, to be dealt with as the court should direct, on the ground that the shares had gone up in value, and would, if sold, realise more than sufficient to meet any claim the plaintiff might have under the agreement, and to put an end to the action in the Queen's Bench Division. Subsequently, an order was made transferring that action from the Queen's Bench Division to KEKEWICH, J. The two motions in the Chancery Division now came on for hearing.

*Henry Terrell* for the plaintiff's motion.

*D. Villiers Meager* for the defendant's motion.

**D** **KEKEWICH, J.**—On this agreement of Nov. 19, 1891, it is a question whether the transaction was one of sale and purchase of the shares out and out, or whether, in fact, the sale and agreement was only a sham, and really the defendant was constituted an agent of the plaintiff to sell the shares on commission, and the plaintiff could withdraw his mandate at any time. The defendant says that he is merely agent of the plaintiff, and the plaintiff insists that the transaction was a sale and purchase of the shares. That question is one to be decided at the trial of the action. In the meantime the plaintiff is entitled to protection. The defendant also is entitled to protection; he has been made to pay £300 deposit, and is entitled to a lien to that amount at all events.

**E** The question is, Has the court power to realise the security? It has no original jurisdiction. R.S.C., Ord. 50, r. 2, provides that it shall be lawful for the court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once. The object of the rule is to enable the court from time to time to order a sale of goods, etc., which are in dispute, and so to preserve the proceeds.

**F** Are shares "goods" so as to come within the terms of the order? In *Bartholomew v. Freeman* (1) a horse was held to be included in the word "goods"; and in *R. v. Slade* (2), under s. 40 of the Metropolitan Police Courts Act, 1839, a dog was also held to be "goods." It seems to me that, though shares are uncommonly unlike a dog, the reasons given by MANISTY, J., and HAWKINS, J., in that case are applicable here. MANISTY, J., seems to have based his decision upon an illustration suggested by HAWKINS, J., in the course of the argument, namely, the case of a will containing the words "I give and bequeath all my worldly goods," and the illustration recalls words with which most of us are familiar at some period of our life, namely, "with all my worldly goods I thee endow." Upon these authorities, then, I hold that shares are "goods" within the order. In *Coddington v. Jacksonville, Pensacola and Mobile Rail. Co.* (3) the Court of Appeal ordered a sale of bonds of the State of Florida, but not under Ord. 50, r. 2. But now, supposing the word "goods" includes shares, can I order them to be sold in this particular case? Are shares "perishable or likely to injure from keeping"? I think not, but I do think they come under the last words of the rule "which for any other just and sufficient reason it may be desirable to have sold at once." In *Bartholomew v. Freeman* (1) the court thought it was a sufficient reason to order the sale of a horse because it was eating its head off. But as to shares, it is



common knowledge that shares are of a fluctuating character, so that any wise man, wishing to realise his security, would as soon as he could obtain a convenient market.

It seems to me that the defendant gives a very sufficient reason for selling the shares at once, and I think I should order a sale. The order will be that the shares be sold under the direction of the judge in chambers, and the proceeds of sale paid into court. Costs of both motions costs in the action.

Solicitors: *Crowders & Vizard; Evans, Richards & Marriott.*

[Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.]

## BOURNE v. WALL. WALL, Claimant

[QUEEN'S BENCH DIVISION (A. L. Smith and Grantham, JJ.), April 13, 1891]

[Reported 64 L.T. 530; 39 W.R. 510; 7 T.L.R. 428]

*Bill of Sale—Security—Maintenance—Power to sell goods—Sale by private treaty or public auction on or off the premises—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43) Schedule.*

A bill of sale contained a clause giving the grantee "power to sell the goods by private treaty or public auction on or off the premises."

**Held:** this clause was necessary "for the maintenance of the security" within the meaning of the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and, therefore, did not vitiate the bill of sale.

**Notes.** As to the form of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 287-296; and for cases see 7 DIGEST (Repl.) 70. For the Bills of Sale Act (1878) Amendment Act, 1882, Schedule, see 2 HALSBURY'S STATUTES (2nd Edn.) 583.

Cases referred to:

- (1) *Lyon v. Morris* (1887), 19 Q.B.D. 139; 56 L.J.Q.B. 378; 56 L.T. 915, D.C.; on appeal, 19 Q.B.D. 146; 56 L.J.Q.B. 381; 57 L.T. 324; 35 W.R. 707, C.A.; 7 Digest (Repl. 70, 396.
- (2) *Bardell v. Daykin* (1887), 3 T.L.R. 526, D.C.; 7 Digest (Repl.) 74, 434.
- (3) *Furber v. Cobb* (1887), 18 Q.B.D. 494; 56 L.J.Q.B. 273; 56 L.T. 689; 35 W.R. 398; 3 T.L.R. 456, C.A.; 7 Digest (Repl.) 71, 410.

Also referred to in argument:

*Re Barber, Ex parte Stanford* (1886), 17 Q.B.D. 259; 34 W.R. 237, C.A.; 7 Digest (Repl.) 72, 413.

**Appeal** on an interpleader issue by the claimant, Mrs. Wall, from a decision of Croydon County Court, holding that a bill of sale held by her, which had been given by her husband, the defendant, over his furniture, was void for not being in the prescribed form, and that the plaintiff, a judgment creditor of the husband, was entitled to seize the furniture.

In December, 1887, the defendant Wall gave a bill of sale on certain furniture to the Mutual Loan Association. In December, 1889, the Loan Association were pressing the defendant for the balance of £42 due on the bill of sale. The defendant was unable to pay this sum, and on Dec. 10, 1889, his wife, the claimant, paid the money to the Loan Association. On Jan. 23, 1890, she took an assignment of the bill of sale from the Loan Association, so that henceforth she became the holder

**A** of that bill over her husband's furniture. The money with which the claimant paid off the bill of sale was her own. The plaintiff, having recovered judgment against the defendant, proceeded to seize the furniture comprised in the bill of sale. The claimant then set up the bill of sale over the furniture, which had been assigned to her. The present interpleader issue was directed, and the question of the validity of the bill of sale was raised. The bill contained a clause giving to **B** the grantee

"power to sell these goods by private treaty or public auction on or off the premises."

The county court judge held that the bill of sale was bad, and gave judgment for the execution creditor as regards the goods comprised in the bill of sale. The **C** claimant appealed.

*Colam* for the claimant.

*Carrington* for the plaintiff.

**A. L. SMITH, J.**—This is an appeal from the learned county court judge at **D** Croydon, who held this bill of sale bad on the ground that it gave power to the grantee to enter and seize the goods and sell the same when seized on the premises, and he held that that clause vitiated the bill of sale on the ground that it was not in the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

The form is more or less a hard-and-fast one. In this form, however, there is some latitude given, namely, that the parties may insert in their own terms **E** matters which are necessary for the maintenance of the security, that is, matters which the court may hold to be necessary for the maintenance of the security; and I should say that the clause in the present case is one necessary for the maintenance of the security. To go by steps, a clause giving power to seize and sell on the premises by private sale, in my judgment, is a clause necessary for the maintenance of the security. There is direct authority by **DAY, J.**, in *Lyon v. Morris* (1) that that **F** power to seize and sell on the premises by private sale is a reasonable provision and one necessary for the maintenance of the security. Does the clause become unreasonable if sale by public auction is also included? I do not think so, and I do not see how that can alter the case. I am prepared to hold that the bill of sale is not vitiated by the remaining part of the clause in question.

The learned judge seems to have been led astray by *Bardell v. Daykin* (2). The **G** point there argued was argued before **MATHEW** and **CAVE, JJ.** almost at the same time as *Furber v. Cobb* (3), in the Court of Appeal, and the court arrived at the same conclusion. In that case objection was taken to the bill of sale on the ground that it contained a clause that the grantee might

"at any time during the subsistence of the security affix such bills and placards having reference to the said chattels and things as he or they might think fit **H** on any premises for the time being in the occupation of the grantor;"

and the court there held that that clause was not necessary to the maintenance of the security, and that it vitiated the bill of sale. That is a very different case from the present. It seems to me, that this bill of sale does not sin against the form in the schedule, and we think, therefore, that the judgment of the learned **I** judge was erroneous, and that this appeal ought to be allowed.

**GRANTHAM, J.**—I am of the same opinion.

*Appeal allowed.*

Solicitors: *Stanley Evans; Seal.*

[*Reported by W. W. ORR, ESQ., Barrister-at-Law.*]

## WALLACE v. UNIVERSAL AUTOMATIC MACHINES CO.

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), May 5, 28, 1894]

[Reported [1894] 2 Ch. 547; 63 L.J.Ch. 598; 70 L.T. 852;  
10 T.L.R. 501; 1 Mans. 315; 7 R. 316]*Company—Debenture—Payment of principal—Winding-up—Principal payable on winding-up.*

Upon the winding-up of a company the undertaking, on a floating charge on which debenture holders had lent their money, came to an end, and, therefore, the debenture holders became entitled to realise their security for the full amount secured by their debentures, notwithstanding that the day mentioned therein for payment of the capital has not arrived.

*Hodson v. Tea Co.* (1) (1880), 14 Ch.D. 859, applied.

**Notes.** The Companies Act, 1862, s. 158, has been replaced by the Companies Act, 1948, s. 316. The Supreme Court of Judicature Act, 1875, s. 10, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925.

Followed: *Re Crompton, Player v. Crompton*, [1914] 1 Ch. 954.

As to redemption of debentures, see 6 HALSBURY'S LAWS (3rd Edn.) 487-488; and for cases see 10 DIGEST (Repl.) 781-783. For the Companies Act, 1948, s. 316, see 2 HALSBURY'S STATUTES (2nd Edn.) 697. For the Supreme Court of Judicature Act, 1875, s. 10, see 9 HALSBURY'S STATUTES (2nd Edn.) 704.

Cases referred to:

- (1) *Hodson v. Tea Co.* (1880), 14 Ch.D. 859; 49 L.J.Ch. 234; 28 W.R. 458; 10 Digest (Repl.) 781, 5070.
- (2) *Re Browne and Wingrove, Ex parte Ador*, [1891] 2 Q.B. 574; 61 L.J.Q.B. 15; 65 L.T. 485; 40 W.R. 71; 7 T.L.R. 747; 8 Morr. 264, C.A.; 4 Digest (Repl.) 334, 3031.
- (3) *Re Panama, New Zealand, and Australian Royal Mail Co.* (1870), 5 Ch. App. 318; 39 L.J.Ch. 482; 22 L.T. 424; 18 W.R. 441, L.J.; 10 Digest (Repl.) 764, 4955.

Also referred to in argument:

*Brownlie v. Russell* (1883), 8 App. Cas. 235; 48 L.T. 881; 47 J.P. 757, H.L.; 36 Digest (Repl.) 632, 1952.

**Appeal** by the plaintiff, a debenture holder, from a decision of KEKEWICH, J., reported [1894] 2 Ch. 547, refusing to grant a declaration that the principal moneys secured by the debentures issued by the defendant company had become due and owing upon the winding-up of the defendant company.

The action was brought by the holder of debentures charged on the undertaking and property of the company, which was being wound-up, for the realisation of the security, and the question raised by this appeal was, whether the principal moneys secured by the debentures and thereby made payable at a future date, could be treated as if they had become due at the date of the commencement of the winding-up. The company was registered under the Companies Acts in September, 1887. Its object was to acquire and work certain patents. It had power to borrow money on debentures, and it raised £6,000 at 6 per cent. on sixty debentures for £100 each charged on the undertaking and property of the company. The interest was to be paid half-yearly, and the principal was repayable on Dec. 31, 1894. On July 19, 1890, the company was ordered to be wound-up by the court. On July 2, 1890, a writ was issued by the plaintiff, on behalf of himself and all the other holders of the debentures, for an account and a receiver. On Feb. 5, 1894, a statement of claim was filed, and on Mar. 14, 1894, KEKEWICH, J., on a motion for judgment in default of defence, gave judgment for the plaintiff, directing an account of what was due to the plaintiff and the other holders of the outstanding



A debentures, and an inquiry into the question what the property comprised in and charged by the debentures consisted, but he held that the principal moneys secured by the debentures ought not to be treated as if they had become due at the date of the winding-up. The plaintiff appealed.

*Eve* for the plaintiff.

B The company did not appear.

*Cur. adv. vult.*

May 28, 1894. The following judgments were read.

. LINDLEY, L.J., stated the facts and continued: The plaintiff is not content with the order of KEKEWICH, J., as no account is directed of what is due in respect  
C of the principal sums secured, and he has appealed in order to have the judgment corrected in this respect. The time for the payment of the principal not having yet arrived, it is clear that it is not a debt for which any action at law could now be brought. But it is equally clear that, as the company is being wound-up, the plaintiff and the other debenture holders could, if they chose, prove against the company in respect of all the moneys secured by the debentures, whether due or  
D not: see Companies Act, 1862, s. 158. Moreover, by the Supreme Court of Judicature Act, 1875, s. 10, if the debenture holders did so prove, they would have to give up their securities, and they could only prove for such amount as would be provable if the company had been a debtor and had been adjudicated bankrupt. The amount provable in bankruptcy in respect of a future debt bearing interest was determined in *Re Browne and Wingrove, Ex parte Ador* (2).

E The plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down. He wants to realise his security and to apply the proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up, and this circumstance entitles the debenture holders to realise their security at  
F once. This point was determined in *Hodson v. Tea Co.* (1), which was itself based on the earlier case of *Re Panama, New Zealand, and Australian Royal Mail Co.* (3). In *Hodson v. Tea Co.* (1) the debenture was not due, but it was treated as having become due on the commencement of the winding-up of the company, and accounts were directed of what was due for principal and interest on that footing. The  
G principle on which this decision is founded is, in my opinion, correct, and the plaintiff is entitled to an order to give effect to it. The order appealed from must be varied accordingly, and the costs must be added to the amount due to the plaintiff on his security.

LOPES, L.J., concurred.

H KAY, L.J.—This action is brought by the plaintiff on behalf of himself and all other holders of debentures in the defendant company for foreclosure or sale. By the form of the debentures the principal money secured by them was charged upon all the undertaking and property of the company, both present and future, as “a floating security,” and was accordingly

I “not to prevent or hinder the company from leasing, exchanging, selling, mortgaging, or otherwise dealing with the property as it may from time to time think fit.”

The principal money so charged was not to become payable till Dec. 31, 1894, but the company was empowered to pay off the debenture holders on July 1 or Dec. 1 in any year, on giving at least three calendar months' previous notice in writing. The interest at 6 per cent. was payable on stated days fixed by coupons attached to the debentures. Default was made in payment of the interest on July 1, 1890.

The action was commenced on July 2, 1890. On July 4, 1890, an order was made for a receiver. On July 19, 1890, an order was made to wind-up the company. On Mar. 14, 1894, this action was heard as a short cause. The appeal is from this judgment. A

The question is whether the debenture holders can claim as against the security the interest and the full amount of their principal, although the day fixed for payment has not arrived, or whether they must be satisfied with interest only till the day of payment, or with the principal subject to a discount for payment before the day on which the principal becomes due. It is material to observe that it is not a question of proof in the winding-up, but of realisation of the security. By the winding-up order the position of the debenture holders is very much altered. The subject of their security is, amongst other things, the undertaking—that is, the profit-producing concern. The winding-up practically put an end to any chance of producing further profits. The security is a floating charge—that is, the company might use all its assets included in the security for the purpose of its bona fide business, as though the charges did not exist. These powers are to some extent vested in the liquidator for the purposes of winding-up the company. If the debenture holders were compelled to wait until the debentures became due, the security might, and probably would, be very much depreciated in the meantime. These considerations led to the conclusions expressed by GIFFARD, L.J., in *Re Panama, New Zealand, and Australian Royal Mail Co.* (3) that, upon the occurrence of the winding-up, the debenture holders had a right at once to realise their security. It follows that, if the time of realising is accelerated by this event, the realisation must be for the full amount, as though the debt was then due, and this seems to have been held in the same case. The same result was arrived at by HALL, V.-C., in *Hodson v. Tea Co.* (1). B  
C  
D  
E

I think there should be a declaration that, upon the occurrence of the winding-up, the debenture holders became entitled to realise their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital had not arrived, and that an account should be directed of what is due for principal and interest to the time of actual payment on that footing, and for the costs of this action. The other inquiries directed seem to be in the right form. The costs of the appeal should be added to the security. F

*Appeal allowed.*

Solicitors: *Slaughter and May.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

## JOHNSON v. DIPROSE

[COURT OF APPEAL (Lord Esher, M.R., Bowen and A. L. Smith, L.JJ.), February 9, 1893]

[Reported [1893] 1 Q.B. 512; 62 L.J.Q.B. 291; 68 L.T. 485; 57 J.P. 517; 41 W.R. 371; 9 T.L.R. 266; 37 Sol. Jo. 267; 4 R. 291]

*Bill of Sale—Passing to grantee of property in goods—Right to possession—Seizure of goods by grantee—Remedies of grantor—Right to sue for trespass—Damage by grantee to goods during lawful seizure—Negligence—Right of grantor to recover.*

When a bill of sale is executed in accordance with the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882, the property in the goods thereby assigned passes to the grantee, and upon the happening of any one of the five causes mentioned in s. 7 of that Act, the right to possession also passes to him. If the grantor pays the money due or makes a valid tender at the right time, the grantee may not seize the goods; if he does so he will be liable for trespass. If, however, the grantor does not pay the money due or make a valid tender at the right time, the goods may be seized. Upon a lawful seizure, the only rights of the grantor are the summary remedy exercisable within five days given by s. 7, and the equitable right to bring an action for redemption (which, unless there is fraud or oppression on the part of the grantee, is only given upon the grantor paying principal and interest and the costs charged and expenses and the costs of the suit). If the goods are seized for any of the causes in the section, the grantor cannot sue the grantee in trespass for removing them, even after tender of principal interest and costs. If goods are lawfully seized and are damaged in the course of removal through the grantee's negligence, the grantor cannot sue for this injury in an action for trespass, but, on redeeming, the grantor is entitled to be credited with the loss.

**Notes.** *Re Wood, Ex parte Woolfe*, [1894] 1 Q.B. 605; *Re Tooth, Ex parte The Trustee v. Tooth*, [1933] All E.R.Rep. 496.

As to seizure under a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 316-323; and for cases see 7 DIGEST (Repl.) 137-139. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 7 and Schedule, see 2 HALSBURY'S STATUTES (2nd Edn.) 577, 583.

Cases referred to:

- (1) *Maugham v. Sharpe* (1864), 17 C.B.N.S. 443; 4 New Rep. 332; 34 L.J.C.P. 19; 10 L.T. 870; 10 Jur.N.S. 989; 12 W.R. 1057; 144 E.R. 179; 7 Digest (Repl.) 149, 823.
- (2) *Flory v. Denny* (1852), 7 Exch. 581; 21 L.J.Ex. 223; 19 L.T.O.S. 158; 155 E.R. 1080; 7 Digest (Repl.) 5, 9.

Also referred to in argument:

- Brighly v. Norton* (1862), 3 B. & S. 305; 1 New Rep. 93; 32 L.J.Q.B. 38; 7 L.T. 422; 9 Jur.N.S. 495; 11 W.R. 167; 122 E.R. 116; 7 Digest (Repl.) 138, 787.
- Toms v. Wilson* (1862), 4 B. & S. 442; 1 New Rep. 88; 32 L.J.Q.B. 33; 7 L.T. 421; on appeal (1863), 4 B. & S. 455; 2 New Rep. 454; 32 L.J.Q.B. 382; 8 L.T. 799; 10 Jur.N.S. 201; 11 W.R. 952; 122 E.R. 529, Ex. Ch.; 7 Digest (Repl.) 138, 788.
- Brierly v. Kendall* (1852), 17 Q.B. 937; 21 L.J.Q.B. 161; 18 L.T.O.S. 254; 16 Jur. 449; 117 E.R. 1540; 7 Digest (Repl.) 138, 786.
- Yungmann v. Briesemann* (1892), 67 L.T. 642; 41 W.R. 148; 4 R. 119, C.A.; 32 Digest 218, 28.

**Appeal** by the defendant, grantee of a bill of sale, from a decision of WRIGHT, J., at the trial of the action with a jury, awarding to the plaintiff, the grantor of the bill,



damages for trespass to goods seized by the defendant, including damages for damage caused to the goods by the negligence of the defendant's servants while removing them. A

The plaintiff gave to the defendant a bill of sale upon some household furniture by way of security for the payment of money. The bill was drawn up in accordance with the form prescribed in such cases by the Bills of Sale Act, 1882, and provided for the repayment of the money thereby secured by certain monthly instalments payable upon certain dates specified in the bill. The plaintiff made default in payment of one of these instalments. The defendant thereupon seized the goods, and put a man in possession. Some time after the expiration of five days from the seizure the defendant began to remove the goods. The plaintiff then tendered to the defendant the sum of £51 5s., the amount remaining due in respect of the sum advanced and interest up to that date, and also the sum of £2 15s. for the expenses of the seizure, demanding at the same time two separate receipts for the two sums. The defendant refused to give these two receipts, and as the plaintiff's tender was conditional on the two receipts being given, he removed the goods. B C

The plaintiff then brought this action for damages for trespass to the goods, and for redemption on payment of what was due. The defendant paid £5 into court in respect of some injury done to the goods while they were being removed. At the trial of the action before WRIGHT, J., with a jury, the learned judge held that the tender was a valid one, and upon the jury finding a verdict of £50 damages for the trespass, and £5 for the injury done to the goods during removal beyond the £5 paid into court by the defendant, he gave judgment for the plaintiff for that amount. He also gave judgment for the plaintiff for redemption of the goods as asked for, and gave the plaintiff the costs of the action. The defendant appealed. D E

In the form of bill of sale set out in the schedule to the Bills of Sale Act, 1882, which was followed in this case, is a proviso as follows:

"Provided always, that the chattels hereby assigned shall not be liable to seizure, or to be taken possession of by the said C. D. [the grantee] for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882." F

By s. 7 of the Act it is provided:

"Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes: (1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, . . . Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just." G H

*Jelf, Q.C.*, and *Cababé* for the defendant.

*Herbert Reed, Q.C.*, and *Pocock* for the plaintiff.

**LORD ESHER, M.R.**—In this case the plaintiff has brought an action against the defendant for an alleged wrongful interference with the plaintiff's goods. I

The action is in two forms, one being a common law action for trespass, the other an equitable action for redemption. The learned judge who tried the case with a jury gave judgment for the plaintiff in respect of the common law action of trespass for the damages which had been assessed by the jury partly in respect to the actual injury done to the plaintiff's goods, and partly in respect of the injury suffered by the plaintiff in consequence of the wrongful seizure. The learned judge also gave judgment for the plaintiff upon his claim for redemption. The defendant has now appealed to this court on the ground that no action of trespass would lie

A at common law. He says that the plaintiff had given him a bill of sale according to the form prescribed by the Bills of Sale Act, 1882, which had been registered, and that the plaintiff had made default in certain things whereby the defendant became entitled under the provisions of the bill of sale to seize and keep the goods. Therefore, says the defendant, no action of trespass will lie at common law. That gives rise to a question as to what is the right view to be taken, and what is the construction of a bill of sale drawn up according to the statutory form. I apprehend that such a bill of sale might have been given before the passing of the Act which provides that every bill of sale given by way of security for the payment of money shall be void unless made in accordance with the form in the schedule.

C What is the meaning of a bill of sale under this Act? It is a document given in respect of the chattels therein mentioned by which the property in the chattels passes to the grantee, but not the possession. A bill of sale is not a pledge, because in the case of a pledge possession does pass. A bill under this Act is to be in a certain form, and it must include the stipulations contained in s. 7 of the Act. The form is to the effect that the indenture witnesseth that, in consideration of the sum of £      , "A. B. doth hereby assign unto C. D." the chattels described in the schedule. By those words the property in the chattels passes.

D But then comes the proviso at the end of the bill which also speaks of "the chattels hereby assigned." That proviso incorporating s. 7 of the Act derogates from the full and absolute right of the grantee, not as to his property in the goods, but as to his right to take possession of them. He can only take possession for any one of the five causes specified in s. 7. If any of the events there named takes place, then the grantee has, besides his right of property, a right given him to take possession of the goods. Then when the grantee has seized and taken possession, if the grantor within five days makes good all that he ought, he may apply to the High Court for the remedy provided by the section; that summary remedy being given instead of the old remedy which the Court of Chancery would formerly have applied. If the grantor does not apply to the High Court within the five days he loses his summary remedy, but he still remains entitled to use the old equitable remedy of a redemption suit. Therefore, if the grantor pays his money at the right time, the grantee cannot, after payment, seize the goods; if he should seize he will be liable to an action of trespass.

Again, if at the right time the grantor, in fulfilment of the stipulations in the bill, tenders to the grantee all that he is bound to pay, such a tender will, for the purpose of fixing the rights in this matter, be the same as payment; so that, if the grantee rejects such a tender and seizes the goods, he will be liable to an action of trespass. But if the grantor does not pay at the right time or make a proper tender, then the provisions of s. 7 apply, and the grantee is entitled to seize the goods. The grantor cannot then bring an action of trespass for such seizure, because the seizure is a rightful seizure by the defendant of his own goods. An action for trespass lies at common law for a wrongful interference with the plaintiff's actual possession of goods, or his legal right to the immediate possession of them. Under this bill of sale the plaintiff had neither. It is admitted that he did not pay the money due to the grantee, or tender it at the right time, and the grantee was therefore entitled to take possession of the goods. The plaintiff, therefore, was not entitled to bring this action for trespass, and the judgment for damages for trespass being wrong, the appeal upon this point is successful.

I On the question of the equitable right to redeem, there is another point to be considered. The plaintiff could maintain a suit for redemption upon the terms of paying the principal and interest and the costs, charges, and expenses, and the costs of the suit, because a plaintiff can only succeed in such a suit upon those terms, unless there has been some extortion or oppression on the part of the defendant. The learned judge has decreed redemption, and rightly I think, except upon one point. The claim for damages for injury to the goods was maintainable in the redemption suit, though not in the action for trespass, and as I think the

jury meant that the damage to the goods was caused by the negligence of the defendant, we will allow the amount assessed by them to be part of the order for the redemption of the goods. Then the learned judge has not given the defendant the costs of the claim for redemption, and that must be put right. The appeal substantially succeeds, and the plaintiff must therefore pay the costs. A

**BOWEN, L.J.**—I am of the same opinion. The first point to be considered is, whether there is any foundation for an action of trespass, or any other common law action. An action for trespass to goods will not lie unless the plaintiff at the time of the alleged trespass was either in possession of the goods, or entitled to their immediate possession; and, for the reasons already given by the Master of the Rolls, I think that in this case there was no ground for an action of trespass, nor was any other common law right of the plaintiff infringed by the seizure and removal of the goods by the defendant. B C

It seems to me that the matter becomes clear when you consider what a mortgage of chattels is, and what is the effect of the particular form of mortgage prescribed by the Bills of Sale Act. The use of the term bill of sale is not confined to mortgages of chattels. Where chattels are mortgaged, the property in them passes to the mortgagee as a general rule, though of course the parties to the agreement can make any stipulations they may like as to the passing of the property. Since by a mortgage of chattels the property in them generally passes, the mortgagor provides that he shall remain in possession of the goods until the arrival of the time for payment of money due under the mortgage. Then, if at that time he makes default in the payment, his right of possession ceases, and as the property in the goods has already passed, he cannot bring an action for trespass to the goods. What other common law right of action could the plaintiff in this case have except under any special term in the deed? The property and possession of the goods had passed to the mortgagee. The mortgagor had an equitable right of redemption upon certain terms, but he had no legal right. Therefore, if there were no breach of any term in the deed, no common law action would lie. D E

The reasoning seems to me to be clear, and there is express authority on the point to be found in *Maugham v. Sharpe* (1). That was a case of a mortgage by deed of chattels which were assigned to secure repayment of an advance, with power to the mortgagees upon default in payment by the mortgagor to sell and dispose of the goods. **ERLE, C.J.**, and **WILLIAMS, J.**, point out distinctly that the mortgage was not a pledge. **WILLIAMS, J.**, says (17 C.B.N.S. at p. 464): F

“It is said that there cannot be a mortgage of a chattel, and therefore that this instrument must operate as a pledge. But why so? There is nothing illegal in making a grant in this form. The books recognise the distinction between a mortgage and a pledge of personal chattels; and there is an express authority in the case of *Flory v. Denny* (2), that there may be a mortgage of chattels, as distinguished from a pledge, without delivery; so that there would seem to be nothing contrary to law in what is ordinarily called a mortgage of personal chattels. The property is absolutely and indefeasibly vested in the grantee if the condition be not performed; and a court of law can look at no other owner than the mortgagee or grantee.” G H

That is a clear authority that in the case of an ordinary mortgage of chattels given by way of security for the payment of money, when the conditions have not been performed, the property in the chattels vests absolutely and indefeasibly in the mortgagee. That disposes of the plaintiff's argument. I

Of course, the forms of mortgages may vary, and we have now to consider what is the true effect of the form prescribed by the Act of 1882. It begins by following the ordinary form of a mortgage, and, by assigning the chattels, passes the property in them to the grantee. Then the proviso at the end imports the provisions of s. 7 into the bill; and, in interpreting the deed, it must be read as if it had been a bill of sale executed before the Act, and containing conditions similar to those



- A** set out in s. 7. The property in the goods being in the grantee, the grantor has the right of possession until one of the five causes mentioned in the section occurs. If the mortgagor seizes before that, he is liable to an action of trespass at common law, or to an action on the deed. Whichever way it is looked at, whether as an action of trespass or on the deed, or on the statute, if the grantee seized before the time came when the property was absolutely and indefeasibly vested in him,
- B** the result would be the same. Here the plaintiff has failed to perform the conditions; he neither paid the money when due, nor made a valid tender, i.e., a tender unlogged with conditions. He therefore lost his right of possession, and as his right of property had already gone, there was nothing left to him on which he could bring any common law action. The tender, I should add, was made too late to be a valid one, and I think there is no pretence for saying that there was any
- C** ground on which a common law action could be maintained. The plaintiff had, nevertheless, an equitable right, not a common law right, to redeem the goods upon terms. If it is by his own default that he is driven to use this remedy, he must pay the costs. The case would be otherwise if he had been driven to this remedy by any oppression on the part of the defendant. In this case there being no oppression the ordinary rule must prevail, and the plaintiff must pay the costs.
- D** As to the injury done to the goods: damages for that would not be recoverable at common law, but in equity, where goods are wasted, an inquiry would be ordered, and the amount found due set off against the debt. It would be ridiculous to send this case down for an inquiry, and I think that we ought to allow to the plaintiff the £10 at which the jury assessed the damages.

- E** **A. L. SMITH, L.J.**—This is an action for trespass to goods, the subject of a bill of sale granted by the plaintiff to the defendant. If the defendant had seized the goods at the time when the instalments were not in arrear, the plaintiff would have had a good cause of action against him. But when the seizure took place the plaintiff was in arrear with the payment of the instalments, and under the terms of the bill of sale the defendant was entitled to enter and seize the goods. For that
- F** act no cause of action for trespass or on the case accrued to the plaintiff. Ten days after the seizure the plaintiff tendered the money due, and afterwards the defendant took the goods away. But the defendant had a legal right to the goods five days after the seizure, and after that date what right had the plaintiff? It seems to me clear that the only right the plaintiff had five days after the seizure was an equitable right to bring a suit for the redemption of the goods. It has been argued that the
- G** tender ten days after the seizure gave the plaintiff some other right. I think that is an entire misapprehension. I agree that the judgment of WRIGHT, J., that there was a common law cause of action must be set aside. The plaintiff was in the same position as an ordinary mortgagor when the mortgagee is in possession. The only right was a right to redeem on payment of the principal sum due, with interest and costs, charges, and expenses.

**H**

*Appeal allowed.*

Solicitors: *Osborne C. Kent; John Westcott.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

## SYNGE v. SYNGE

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), November 30, 1893, January 17, 1894]

[Reported [1894] 1 Q.B. 466; 63 L.J.Q.B. 202; 70 L.T. 221; 58 J.P. 396; 42 W.R. 309; 10 T.L.R. 194; 9 R. 265]

*Contract—Consideration—Promise to bequeath property to wife for life in consideration of agreement to marry—Breach—Conveyance of property to other persons during wife's life—Right of wife to sue at once—Damages—Measure—Present value of life estate.*

The defendant wrote a letter to the plaintiff, whom he was then desirous of marrying, saying: "You thoroughly understand the terms . . . which are, that I leave house and land to you for your lifetime." The plaintiff shortly afterwards married the defendant upon the faith of the above letter. The defendant made a will, leaving the house and land to his wife for her life, but he subsequently destroyed that will, and conveyed the house and land to his daughters absolutely.

**Held:** there was a binding contract to leave the property to the plaintiff, which could be enforced; there was a breach of the contract, by the conveying away of the property, which entitled the plaintiff to sue at once for damages; and the measure of damages was the present value of the possible life estate to which the plaintiff would have been entitled if she had survived her husband.

**Notes.** Applied: *Re Cavendish Broune's Settlement Trusts*, *Horner v. Rawle* (1916), 61 Sol. Jo. 27. Considered: *Farker v. Clark*, [1960] 1 All E.R. 93. Referred to: *Central Trust and Safe Deposit Co. v. Snider*, [1916] A.C. 266.

As to form of contract and anticipatory breach, see 8 HALSBURY'S LAWS (3rd Edn.) 86 et seq., 202; and for cases see 12 DIGEST (Repl.) 53 et seq. As to contracts for settlements, see 34 HALSBURY'S LAWS (3rd Edn.) 440 et seq.; and for cases see 40 DIGEST (Repl.) 507 et seq.

Cases referred to:

- (1) *Hammersley v. De Biel* (1845), 12 Cl. & Fin. 45; 8 E.R. 1312, H.L.; 12 Digest (Repl.) 146, 918.
- (2) *Price v. Jenkins* (1877), 5 Ch.D. 619; 46 L.J.Ch. 805; 37 L.T. 51, C.A.; 25 Digest (Repl.) 253, 606.
- (3) *Hochster v. De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- (4) *Frost v. Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, 2973.

Also referred to in argument:

*Needham v. Kirkman* (1820), 3 B. & Ald. 531; 106 E.R. 755; 40 Digest (Repl.) 528, 384.

*Goilmere v. Battison* (1682), 1 Vern. 48; 1 Eq. Cas. Abr. 17; 23 E.R. 301; sub nom. *Goylmer v. Paddiston*, 2 Vent. 353; 44 Digest 178, 78.

*Alderson v. Maddison* (1880), 5 Ex.D. 293; 49 L.J.Ex. 801; 43 L.T. 349; on appeal (1881), 7 Q.B.D. 174; 50 L.J.Ex. 466; 45 L.T. 334; 46 J.P. 68, C.A.; on appeal sub nom. *Maddison v. Alderson* (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 12 Digest (Repl.) 182, 1245.

*Short v. Stone* (1846), 8 Q.B. 358; 3 Dow. & L. 580; 15 L.J.Q.B. 143; 6 L.T.O.S. 316; 10 Jur. 245; 115 E.R. 911; 12 Digest (Repl.) 388, 3015.

*Lovelock v. Franklyn* (1846), 8 Q.B. 371; 15 L.J.Q.B. 146; 10 Jur. 246; 115 E.R. 916; sub nom. *Frankland v. Lovelocke*, 6 L.T.O.S. 345; 12 Digest (Repl.) 387, 3009.

- A** *Ford v. Tiley* (1827), 6 B. & C. 325; 9 Dow. & Ry. K.B. 448; 5 L.J.O.S.K.B. 169; 108 E.R. 472; 12 Digest (Repl.) 386, 3008.  
*Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; 62 L.J.Ch. 55; 67 L.T. 77; 41 W.R. 120; 36 Sol. Jo. 647; 3 R. 9; 27 Digest (Repl.) 119, 871.

**B** **Appeal** by the plaintiff from a decision of MATHEW, J., upon further consideration in London, after the trial without a jury at Bristol.

On Dec. 24, 1883, the defendant, Sir R. Synge, wrote a letter to the plaintiff, a lady whom he was then desirous to marry, in which he said:

**C** "You, my love, thoroughly understand the terms (and I daresay have told Mr. Woodruff) on which we are to put a stop to all this bother by becoming 'one another,' which are, that I leave house and land to you for your lifetime; but you being otherwise provided for in the 'tin' line, I leave what I have to the girls."

**D** The house and land referred to were a house and land called Ardfield, in which the defendant, Sir R. Synge, then resided with two daughters by a former marriage. The lady had some property of her own, of which Mr. Woodruff was trustee. The marriage between the plaintiff and the defendant took place on Jan. 5, 1884, ten days after the date of the letter.

**E** At the trial the plaintiff said that she answered the letter, but there was no copy, and the original was not produced. When she received the letter she was staying with Mr. Woodruff, and she showed it to him. He advised her to keep the letter, and to have it stamped. She did keep the letter. The lady's property was settled upon herself, but there was no settlement of the defendant's property upon her.

**F** Shortly after the marriage the defendant made a will, by which he left Ardfield to the plaintiff for life. This will was subsequently destroyed, and the defendant made other wills. On Sept. 29, 1892, the defendant, Sir R. Synge, conveyed Ardfield to his two daughters, the other defendants, by deed, having, as he said, totally forgotten the letter of Dec. 24, 1883. The property was leasehold property.

The plaintiff brought this action against the defendant, Sir R. Synge, and his two daughters, asking for a declaration that she was entitled to a certain house and land called Ardfield, and in the alternative, for damages for breach of contract.

**G** At the trial before MATHEW, J., without a jury, the learned judge gave judgment in favour of the defendants, upon the ground that the letter had not been treated by the plaintiff as a contract at all, but as a mere statement of intention by which the defendant, the intended husband, was not to be bound. The plaintiff appealed.

*Bucknill, Q.C., and Blake Odgers, Q.C., for the plaintiff.*

*Coleridge, Q.C., and W. Howland Roberts for the defendants.*

*Cur. adv. vult.*

**H** Jan. 17, 1894. **KAY, L.J.**, read the following judgment of the court. The questions which arise in this case are these: (i) Was there a binding contract? (ii) Was it such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it? (iii) Has the time arrived at which such remedy can be asserted? If the remedy be by way of damages, what amount of damages should be given? The action was tried by a judge without a jury, so that all questions both of fact and law are open on this appeal.

**I** It will be convenient to consider the questions in the order in which they are stated. The alleged contract is contained in a letter of Dec. 24, 1883, by Sir R. Synge, the defendant, to the plaintiff, a lady whom he was desirous to marry, and is in these words:

"You, my love, thoroughly understand the terms (and I daresay have told Mr. Woodruff) on which we are to put a stop to all this bother by becoming



'one another,' which are, that I leave house and land to you for your lifetime; but, you being otherwise provided for in the 'tin' line, I leave what I have to the girls. You know, my darling, most of my income dies with me. You would have enough (at least I suppose so) to keep the pot boiling, whilst they would have nothing. I hope, my darling, you see the thing as I mean it. You know, or ought to know, it is not your 'tin' (for I don't know or care what it is) but yourself, I want. True, it is possible, but highly improbable, that I might come in for the title and should be much better off. Should such a thing happen, we could see what I ought and would do for you."

It is not necessary to quote more of the letter.

There seems to be no doubt that the house and land referred to were the house and a small piece of land called Ardfield, in Devonshire, worth, it is said, about £60 or £70 a year, in which the defendant was then residing with two daughters by a former marriage. The defendant was not then Sir R. Synge. He succeeded to the title afterwards. The lady, who is the plaintiff, had some property of her own, of which Mr. Woodruff was trustee. He was not a solicitor. The construction of the letter is plain. It is a statement of the terms as to property on which the defendant proposed to marry the plaintiff. The marriage took place on Jan. 5, 1884, ten days after the date of the letter. But it is argued that the plaintiff did not understand it to be a binding promise, and did not so treat it. It appears from her cross-examination that she answered the letter; she added "but have no copy only from memory." That seems to intimate that she had some recollection of the terms of her answer. But she was not asked what those terms were by counsel on either side, nor was the letter produced. The plaintiff was staying with Mr. Woodruff when she received the letter from the defendant, and she showed it to Mr. Woodruff. She kept the letter, and says in her evidence that she thought it a binding agreement. Mr. Woodruff says that he advised her to have her own property formally settled upon her, and that upon seeing the letter he explained to her that it "was a fair promise of the house or the use of the house during her life," and, he continued :

"I considered it constituted a good contract, and I advised her that it ought to take the form of a deed, as, although he might make his will, he could revoke it, and her reply was, that he was such a good religious man he would never go back from his promise. Whenever I pressed my view, that was always her answer. She wished to rely upon his promise."

He further says that he advised her to keep the letter and to have it stamped. To this she made no special reply. This witness was not cross-examined.

A settlement of the plaintiff's property was made. It is dated Jan. 4, 1884, and was executed by both the plaintiff and the defendant. It gives no benefit whatever to the defendant, nor does it affect any of his property. Except the letter in question he made no settlement upon the plaintiff. The marriage having taken place on Jan. 5, 1884, about the end of February the plaintiff and defendant went to Arcachon, for the sake of one of his daughters, who was out of health. When there he made a will which has since been destroyed. By that will he certainly gave to the plaintiff an interest in Ardfield after his death, and he communicated the fact to her. It was suggested in cross-examining her that it was not for her life but during widowhood only, and she said in answer to a further question that it did not occur to her to tell him that this was not according to the letter. It is argued from this that she could not have considered the letter binding. But on the other hand, in his answer to interrogatories, and also in a letter dated Mar. 12, 1892, to her solicitor, the defendant says it was left to her for her life, and he does not mention the limitation of widowhood, and one of his daughters, Mrs. Gilbert, says he told her he had left Ardfield to his wife for life. An undated letter is produced, from one of his daughters to the defendant, suggesting that he should leave Ardfield to the plaintiff for her life, and this daughter in her evidence states

**A** that she made that suggestion knowing nothing of the letter of Dec. 24, 1883. The defendant says in his evidence that he had forgotten this letter, and intended to leave Ardfield to his daughters by the will of 1884, but they suggested he should leave it to his wife.

Unhappily dissension arose, and the defendant destroyed the will of 1884, and made other wills, and on Sept. 29, 1892, he, by deed, conveyed the property to  
**B** his daughters, having, as he says, totally forgotten the letter of Dec. 24, 1883. The learned judge who decided this case has held that the letter was not treated by the plaintiff as a contract, although, by the advice of Mr. Woodruff, she preserved it, because she did not adopt his recommendation to have the terms carried out by deed, nor have the letter stamped. He considers the result of the evidence of what passed between her and Mr. Woodruff to be that the plaintiff

**C** "understood that there had been no contract upon the subject, and that she had only had an expression of the intention of her future husband. She declines to have any discussion upon the subject; she declines to have it stamped; and she says she is perfectly willing to rely upon the intention expressed in that letter, because she considered Sir Robert Synge, her intended  
**D** husband, a religious man and a man of honour, and would keep his word."

But what does that amount to? She had a written proposal of terms before the marriage from the defendant, her intended husband, as to the provision he would make for her. She declined to stipulate for a formal deed, which would be an alteration of the terms, because she believed he would keep his word, and leave it to her by his will; and in that belief she married him, and carefully preserved the  
**E** letter. Although we have not her letter in answer, the inference that she accepted the terms, and married on the faith of this promise in writing, seems to us irresistible.

We cannot, with deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the defendant was not to be bound. The law relating to proposals of this kind before marriage was  
**F** stated by LORD LYNDHURST, L.C., in *Hammersley v. De Biel* (1) (12 Cl. & Fin. at pp. 78, 79):

"The principle of law, or at least of equity, is this, that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that  
**G** he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."

We are of opinion that the proposal of terms in this case was made as an inducement to the plaintiff to marry; that she consented to the terms and married the  
**H** defendant on the faith that he would keep his word; and that accordingly there was a binding contract on the defendant's part to leave to the plaintiff the house and land at Ardfield for her life.

Secondly, what is the remedy? Marriage is a valuable consideration for such a contract of the highest order, and when, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already  
**I** quoted:

"A court of equity will take care that the party who marries on the faith of such a proposal is not disappointed, and will give effect to the proposal."

In *Hammersley v. De Biel* (1) the proposal was made on behalf of the intended wife's father by his authority, and was reduced into writing, and was to the effect that the father would pay down £10,000 to be settled on the intended husband and wife and their children, the husband to secure a jointure of £500 a year to the wife if she survived him, and then followed the provision on which the question

arose, by which the father

"proposes for the present to allow his daughter £200 per annum for her private use . . . and also intends to leave a further sum of £10,000 in his will to Miss Thomson to be settled on her and her children."

After the father's death, without having made the promised provision by will, the only child of the marriage, her mother having died before her father, instituted a suit in equity against his grandfather's executors to recover £10,000 out of his assets; LORD LANGDALE, M.R., held that by acceptance the proposal had "ripened into an agreement," and that the plaintiff was entitled to the relief she prayed, i.e., to the sum of £10,000 with interest at 4 per cent. from the end of one year after the father's death, on the footing of a legacy. LORD COTTENHAM affirmed this decision, saying this (12 Cl. & Fin. at p. 62 n.):

"I propose first to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. Thomson, to give an additional £10,000 as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind there may not be found in the memorandum or in the other evidence in the cause proof of any such contract; and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to it will be found that no such formal contract is required."

This was affirmed in the House of Lords by LYNDHURST, L.C., and LORDS BROUGHAM and CAMPBELL, without calling upon the respondents. We have examined the case closely, because it is of the highest authority, not merely as a judgment of the House of Lords, but because it was decided by some of the best equity lawyers of that time. LORD ST. LEONARDS has criticised the decision on the ground that the memorandum in that case might have been construed as a mere expression of an intention, not as a definite proposal which could by acceptance ripen into a contract: SUGDEN'S LAW OF PROPERTY at p. 53. But he does not intimate a doubt that the decision was right if the proposal was not merely of an intention which might be changed. Therefore a definite proposal in writing, so as to satisfy the Statute of Frauds, to leave property by will, made to induce a marriage and accepted, and the marriage made on the faith of it, will be enforced in equity.

Then what is the remedy? When the proposal relates to a defined piece of real property, we have no doubt of the power of the court to decree a conveyance of that property, after the death of the person making the proposal, against all who claim under him as volunteers. It is argued that a court of equity cannot compel a man to make a will; but neither can they compel him to execute a deed. They, however, can decree the heir or devisee, in such a case, to convey the land to the widow for life, and, under the Trustee Acts, can make a vesting order and direct that someone shall convey for him if he refuses. And, under like circumstances, the court has power to make a declaration of the plaintiff's rights; but counsel do not press for such relief or ask for a declaration to bind the house and land. The relief they ask is damages for breach of contract.

It seems to be proved that the grantees of the property under the deeds executed by the defendant took without notice of the letter. They acquired, as we understand, the legal estate by the grant. If there was any valuable consideration moving from them, no relief in the nature of specific performance could be given against them, and it is suggested that, the property being partly leasehold, according to the decision in *Price v. Jenkins* (2), there was such valuable consideration. It is not necessary to examine this argument, as counsel elect to ask for damages only. The defendant had all his lifetime to perform this contract, but in order to perform it he must in his lifetime make a disposition in favour of the plaintiff. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only



A take effect at his death; but the breach must take place in his lifetime; and as, by the conveyance to his daughters, he put it absolutely out of his power to perform this contract, the plaintiff, according to the well-known decisions of *Hochster v. De La Tour* (3) and *Frost v. Knight* (4), had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.

B We have not before us the material for assessing such damages. The amount must depend on the value of the possible life estate which the plaintiff would be entitled to if she survived the defendant. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages. The defendant must pay the costs of the action here and in the court below.

Appeal allowed.

Solicitors: *Torr, Janeway & Co.*, for *Eastley, Jarman & Eastley*, Paignton; *Wood, Bigg & Nash*, for *Kitson, Mackenzie & Hext*, Torquay.

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]

E

## THOMSON AND OTHERS v. CLYDESDALE BANK, LTD.

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Morris and Lord Shand), June 23, 26, 1893]

[Reported [1893] A.C. 282; 62 L.J.P.C. 91; 69 L.T. 156;  
1 R. 255]

Bank—Duty of bank—Inquiry as to customer's right to money paid in—Stockbroker's account—Cheque paid in ordinary course of business—Proceeds of sale of clients' stock—Account overdrawn—Right of bank to retain money as against stockbroker's clients.

G

Debt—Payment—Payment with money received by debtor on account of other person—Validity—Right of creditor to retain as against other person.

Even if a person receiving money knows that that money has been received by the person paying it to him on account of a third person, that of itself, in the absence of notice of any fraud or irregularity connected with the payment, is not sufficient to prevent the payment being a good payment, properly discharging the debt due from the person paying the money to the person who receives it and giving the latter a right to retain the money as against the third person.

H

A stockbroker was instructed by clients to sell certain of their stock and to re-invest the proceeds of the sale. He received payment for the stock sold by a cheque payable to himself, which he paid into his own bank to the credit of his own account, which was overdrawn. The bankers knew that he was a stockbroker, and believed that the money was in his hands as acting for clients in the ordinary way of business.

I

**Held:** the bankers were entitled to retain the money as against the stockbroker's clients, there being no evidence of mala fides, or of anything to put them on inquiry.

**Notes.** Applied: *Re Sangster, Green v. Mockelt* (1894), 10 T.L.R. 184. Referred to: *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary, Ltd.*,

[1900-3] All E.R.Rep. 935; *Rainford v. Keith and Blackman*, [1905] 2 Ch. 147; *Hooper v. Herts* (1906), 94 L.T. 324. **A**

As to receipt of money by banker, see 2 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 3 DIGEST (Repl.) 203 et seq.

Case referred to:

- (1) *London Joint Stock Bank v. Simmons*, ante p. 415; [1892] A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394, H.L.; 3 Digest (Repl.) 304, 950. **B**

Also referred to in argument:

*Re Strachan, Ex parte Cooke* (1876), 4 Ch.D. 123; 46 L.J.Bey. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 43 Digest 1018, 4588.

*Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 3 Digest (Repl.) 199, 405. **C**

*Earl of Sheffield v. London Joint Stock Bank, Ltd.* (1888), 13 App. Cas. 333; 57 L.J.Ch. 986; 58 L.T. 735; 37 W.R. 33; 4 T.L.R. 389, H.L.; 3 Digest (Repl.) 306, 961.

**Appeal** from a decision of the Second Division of the Court of Session in Scotland, reported 18 R. (Ct. of Sess.) 751, affirming unanimously a judgment of the Lord Ordinary. **D**

Thomson, a stockbroker in Edinburgh, kept a current account with the Clydesdale Bank, Ltd., at George Street, Edinburgh, and at Lombard Street, London. The account was opened in the beginning of January, 1889. Frequent operations took place on the account, it was sometimes at debit and sometimes at credit, until March, 1890. In February, 1890, the trustees of Thomas Dunlop instructed Thomson to sell fifty shares held by them in the Commercial Bank of Scotland and to invest the proceeds in their name in colonial securities. The shares were sold by Thomson who received the buying broker's cheque in his favour for the price plus certain sums for commission and other charges. On March 19, 1890, Thomson paid the cheque into his bank account. At that time the account stood at debit to the extent of £4,870 15s. 1d. Thomson requested that of the amount of the cheque £2,000 should be placed to his credit in his Edinburgh account and £900 to his London account. When this was done his account still stood at debit, and it remained still at debit when, a few days later, Thomson absconded. It was proved that everything done by Thomson was in consonance with the ordinary course of business, and that nothing was done which could excite the suspicion of the bank or lead them to suppose that Thomson, their customer, was not entitled to pay the cheque in to the credit of his bank account. On an action by the trustees to recover the sum of £2,900 from the bank, the courts below decided in favour of the bank, and the trustees thereupon brought the present appeal. **E**

*The Lord Advocate (Balfour, Q.C.)* and *Finlay, Q.C.*, for the trustees. **F**

*Sir H. Davey, Q.C.*, and *Ure* (of the Scottish Bar) for the bank, were not called on to argue. **G**

**LORD HERSCHELL, L.C.**, stated the facts and continued: It cannot be questioned that under ordinary circumstances a person, be he banker or other, who takes money from a third person in discharge of a debt, is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the liability which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was money not belonging to their debtor personally, but one which he held or had received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. **H**

I cannot assent to the proposition that, even if a person receiving money knows that that money has been received by the person paying it to him on account of **I**

**A** other persons, that of itself is sufficient to prevent the payment being a good payment, properly discharging the debt due from the person paying the money to the person who receives it. No doubt, if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon the ordinary principles which I need not dwell upon. But in the present case there appears to me to be an absolute absence of any evidence of that kind. Reliance is placed, on behalf of the trustees, entirely upon the answer given by the manager of the bank, which was in these terms:

**C** "I made no inquiry as to whether the money paid in to Mr. Thomson's account was in his hands as broker or otherwise. I believe that it was in his hands as broker acting for clients. (Q) And that, I suppose, would be your belief generally when he made payments into his account of a large amount? (A) Yes. (Q) Did you know whether or not Mr. Thomson was engaged in a speculative account of his own? (A) I had not the least knowledge. (Q) For anything you knew the cheques may have been paid in for dealings in which he was principal? (A) We believed that the cheques were just paid in in the ordinary course of business. (Q) As money belonging to him or at his disposal? (A) Yes."

**D** That is the whole of the evidence upon which reliance is placed, and it seems to me that so far from proving the case sought to be set up on behalf of the trustees it really proves the contrary.

**E** The only point which I have not mentioned, upon which stress was laid, is this, that in the bank books Mr. Thomson is described as a stockbroker; therefore, it was said, his account would be understood to be one relating to matters in which he was acting for principals, and that that, coupled with the answers which I have mentioned, is sufficient to establish the trustees' case. If a stockbroker who was receiving money in respect of transactions for his clients could never properly pay it to his account in discharge of liabilities incurred, there might be something in the case of the trustees; but obviously that is not so. A stockbroker may make advances to his clients in anticipation of sums which he will receive from them. In that case it is perfectly legitimate, he having obtained for that purpose an advance from his bankers, that when he receives the money from his clients he should pay it to his bankers for the purpose of reinstating the account he has overdrawn.

**G** Therefore it is clear that there may well be cases in which a stockbroker, having overdrawn his account, may properly pay money which he has received from his clients into that account. It is obvious that the case of the trustees wholly fails unless they bring home to the bankers much more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course, if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that if, because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in, it would be wholly impossible that the business could be carried on, and I know of no principle or authority for it. I confess, therefore, with all respect for the learned judge who took a different view in the court below, that it seems to me a very clear case. For these reasons I move your Lordships that the appeal be dismissed with costs.

**LORD WATSON.**—I am of the same opinion as the Lord Chancellor, and for the same reasons. When a broker, or other agent entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business, for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can show that the recipient of the money did not transact in good faith



with his agent. In this case a broker, employed by the trustees to sell stock and invest the proceeds, sold, and received payment of the price, by a cheque of the purchasing broker payable to himself. He then passed the cheque to the credit of his current account with the bank, which at the time was largely overdrawn. The course thus followed was a usual one, and in strict accordance with the practice of the Edinburgh Stock Exchange. The payment to the bank was onerous in so far as concerned the bankers, because whenever made, it operated in law as a discharge by them pro tanto of the broker's liability for the debit balance on his account. The broker knew that he was insolvent, and that he was using his customer's money to pay his own debt to the bank, without any reasonable expectation of his being able to replace it. That was an undoubted fraud upon the trustees; but, in my opinion, the broker's fraud is of no relevancy in this case, unless it is coupled with bad faith on the part of the bankers. The onus of proving that they acted *mala fide* rests with the trustees. It is not enough for them to prove that the bankers acted negligently; in order to succeed they must establish that the bankers knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account. The trustees have, in my opinion, failed to prove either of these cardinal facts. I do not think it necessary to examine the evidence, and shall content myself with a reference to the note of the Lord Ordinary, which deals with the facts of the case, and the law applicable to them, to my entire satisfaction.

**LORD MORRIS.**—I concur.

**LORD SHAND.**—I am of the same opinion. It seems to be clear that the broker employed by the trustees acted not only in violation of his duty and obligation as their agent, but also fraudulently. He had special instructions from the trustees to invest the price to be received for the bank shares sold, but in place of doing so he paid the amount received to the bankers in the reduction of the balance then due by him to them on his account. Such a payment might have been made in the hope and with the intention of afterwards drawing the amount for the purpose of investing it as directed. The broker's conduct and the pecuniary circumstances in which he was placed, lead, however, to the inference that he had no such hope or intention, but seem to support the conclusion that he fraudulently applied the money to the payment of his own debt, in order to gain time to make arrangements for absconding as he did a few days afterwards.

But the breach of obligation or fraud of the broker alone cannot entitle the trustees to recover from the bankers the amount of the payment made to them. The trustees entrusted the broker with the money to be employed as they had directed. It is proved, and it is indeed well known, that a broker, according to the ordinary practice as to payment of the price of shares sold, receives the cheque of the buying broker, and in the first instance places the amount to the credit of his own bank account. Thereafter he gives a cheque on his own bank account to his employers for the amount received less his charges, or he gives his cheques to others if, as in this case, he has directions to make re-investments. In this way the broker has the possession of the money and the power of disposal which possession gives, and it is in accordance with the usual practice that the money should be mixed with and form part of his general funds. He has thus the opportunity, and may take advantage of this, to misapply and to appropriate to his own use the money entrusted to him by a customer, and the principal's only remedy lies against his agent whom he has so trusted. Where questions arise with third parties into whose hands the money can be traced, as in this instance, liability against them for recovery of the money misapplied arises only where it can be shown directly, or as the reasonable inference from facts proved, that these parties were cognisant that the money was being wrongfully used in violation of the agent's duty and obligation.

Accordingly it was not maintained in the argument in the present case that if

**A** the agent had employed the money in question, or a large part of it, in the payment of debts due by him to the different tradesmen with whom he might have dealt, in ignorance on their part of any violation of his obligation to employ the funds otherwise, the trustees would have had any claim excepting against the agent himself. Indeed, although a different view was at first maintained, it seemed to be conceded before the close of the argument that the same principle must apply **B** to the ordinary case of bankers with whom stockbrokers deal, and with whom they keep their bank accounts; and the argument for the trustees was rested entirely on the special circumstances said to exist in this case.

However this may be, I am of opinion that the same principle which applies to third parties generally is equally applicable to the case of dealings between stockbrokers and their bankers, and that the only circumstances in which money **C** misapplied by a broker in payment to the banker of a debt due to him can be recovered from the banker by the principal to whom the money belonged, is where it can be shown directly or by inference from the facts proved that the banker or his representative in the transaction knew that the money was being misapplied. It has been shown in the present case, and indeed is notorious, that a stockbroker is often in advance for his customers, and that on settlement days and at other **D** times he may require temporary advances which will in due course be repaid shortly afterwards when the broker receives payment of the prices of stocks sold and delivered by him. Accordingly the knowledge of the banker that money paid in by which a broker reduces or extinguishes an overdraft on his account consists of the prices received for customers' stocks delivered, or of the price of stock belonging to a particular customer, is nothing more than knowledge of what is **E** constantly occurring in the ordinary course of business. The broker may or may not owe the price to his principal. In the general case he does, but in others he may have already advanced the amount to his principal, and he may have had other stock transactions which leave a balance in the broker's favour, or the arrangement between the parties may be that the broker is to retain the fund for an interval of more or less time for the purpose of re-investment or otherwise.

**F** It appears to me that it would be impossible that such business could be carried on if it were held to be obligatory on a banker, in order to save himself from the consequences of a possible breach of duty or obligation or of the fraud of an agent to his principal, that the banker should examine into the particulars of the various transactions resulting in the payments by brokers or agents to the credit of their accounts on each occasion on which such payments are made; and that the only **G** rule that can be applied in practice, and one which, as I think, rests on sound principle is that liability for repayment of funds which can be traced or followed into the banker's hands and have been applied in payment of the agent's debt, shall arise only where it can be shown that there was knowledge, on the banker's part, not merely that the fund was received from the broker's principal, but knowledge also that the payment was a misapplication of the fund, made in violation **H** of the agent's duty and obligation.

With regard to the specialties which are founded on in this case as distinguishing it from the general case, it appears to me, after full consideration of the argument of the trustees, that the case fails. The only specialty, I think, that was latterly founded on was that the overdrawn account was said to have got into what is called a chronic condition, that is to say, that for a considerable length of time the **I** balance had been steadily against the broker. I do not know that, however much that might be so, it would make a difference in the result of the case; but, on looking over the broker's account, which we have before us for fifteen months from Jan. 2, 1889, I find that, consisting as it does of about twelve pages of closely printed matter, there is a constant and fluctuating balance throughout almost the whole period. At one time the balance was a good deal against the broker; at another time it was somewhat in his favour: but so recently as Mar. 15, 1890, the transaction in question having occurred on March 19, 1890, I find that the total amount to the broker's debit was the sum of £1,285. I can see nothing suspicious

in the state of the broker's account and nothing to indicate to the bankers that any funds to be now paid in to wipe out the balance in whole or in part were being obtained by any fraud, and I agree with the Lord Chancellor in thinking that there is no evidence whatever here which could have put the bankers on inquiry or can be founded on as showing that they must have believed or known that this was a misapplication of funds.

A number of authorities were referred to in the argument. The only one which has not been dealt with in the court below, I think, is *London Joint Stock Bank v. Simmons* (1). That case does not appear to me to have any very direct application to the present, because there there was, if I mistake not, an onerous transaction at the time; there was value given for the securities taken; while here it cannot be said that there was any value given in return for the money that was paid in. The circumstances were not the same; there was a different state of things. But in that case there are undoubtedly a number of dicta of the judges which have a bearing upon the present case. As to the other authorities, and, indeed, as to the facts of the case, I agree with LORD WATSON in thinking that they are most satisfactorily dealt with in the able and short judgment of the Lord Ordinary.

*Appeal dismissed.*

Solicitors: *Gadsden & Treherne* for *Mackenzie & Black*, Edinburgh; *Murray, Hutchins, Stirling & Murray* for *Morton, Smart & Macdonald*, Edinburgh.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## Re BLAZER FIRE LIGHTER, LTD.

[CHANCERY DIVISION (Vaughan Williams, J.), November 21, 1894]

[Reported [1895] 1 Ch. 402; 64 L.J.Ch. 161; 71 L.T. 665;  
43 W.R. 364; 11 T.L.R. 65; 39 Sol. Jo. 81; 1 Mans. 530;  
13 R. 52]

*Company—Winding-up—Rates—Occupation of premises by liquidator—Liability of liquidator for rates incurred after commencement of liquidation.*

The test whether or not a liquidator is liable to pay rates in respect of company premises retained by him after the commencement of the liquidation is whether there is "beneficial occupation" within the meaning of the rating statutes. Where there is such occupation the liquidator is bound to pay in full the rates becoming due after the commencement of the liquidation, and in default of that payment liberty to distrain ought to be granted.

*Re Watson, Kipling & Co.* (1) (1883), 23 Ch.D. 500 (in so far as it draws a distinction between rent and rates) not applied.

Dictum of BOWEN, L.J., in *Re National Arms and Ammunition Co.* (2) (1885), 28 Ch.D. at p. 482, applied.

**Notes.** As to rateable occupation by liquidator and rateable occupation generally, see 6 HALSBURY'S LAWS (3rd Edn.) 696 and *ibid.*, vol. 32 at p. 16 et seq.; for cases see 10 DIGEST (Repl.) 1024, 1025 and *ibid.*, vol. 38 at pp. 476 et seq.

Cases referred to:

(1) *Re Watson, Kipling & Co.* (1883), 23 Ch.D. 500; 52 L.J.Ch. 473; 49 L.T. 115; 31 W.R. 574; 10 Digest (Repl.) 1024, 7055.



- A (2) *Re National Arms and Ammunition Co.* (1885), 28 Ch.D. 474; 54 L.J.Ch. 673; 33 W.R. 585; 1 T.L.R. 240; 49 J.P.Jo. 90; sub nom. *Re National Arms and Ammunition Co., Ltd., Ex parte Birmingham Corpn.*, 52 L.T. 237, C.A.; 10 Digest (Repl.) 1125, 7836.
- (3) *Re West Hartlepool Iron Co., Ltd., Ex parte West Hartlepool Improvement Comrs.* (1876), 34 L.T. 568; 10 Digest (Repl.) 994, 6832.
- B (4) *Re Oak Pits Colliery Co.* (1882), 21 Ch.D. 322; 51 L.J.Ch. 768; 30 W.R. 759; sub nom. *Re Oak Pits Colliery Co., Ltd., Eyton's Claim*, 47 L.T. 7, C.A.; 10 Digest (Repl.) 1023, 7050.

Also referred to in argument:

*Re International Marine Hydropathic Co.* (1884), 28 Ch.D. 470; 33 W.R. 587, C.A.; 10 Digest (Repl.) 1024, 7056.

- C *Hicks v. Dunstable Overseers* (1883), 48 J.P. 326, D.C.; 38 Digest (Repl.) 485, 73.
- Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; 40 L.J.Ch. 588; 24 L.T. 922; 35 J.P. 692; 19 W.R. 609, L.J.J.; 10 Digest (Repl.) 1023, 7047.

**Application** in the winding-up of the Blazer Fire Lighter, Ltd., by the Vestry of St. Mary, Islington, to discharge an order restraining them from levying a distress on the company's premises in respect of certain rates which had been made by them after the date of the commencement of the winding-up.

The company occupied for the purposes of their business certain leasehold premises at 232A, York Road, in the parish of St. Mary, Islington, for which it had paid rates since March, 1891. On Mar. 2, 1894, the company passed an extraordinary resolution for a voluntary liquidation, and appointing a liquidator. At that date the company had for some time ceased to carry on its business. The liquidator shortly after his appointment took possession of the company's premises, and placed them in charge of a caretaker, who remained in possession solely in order to prevent trespass upon or injury to the property, and not with a view of carrying on the business of the company or of selling it as a going concern, though the liquidator intended as soon as possible to sell the premises and the plant. No profit or benefit whatever was derived by him on behalf of the company from retaining such possession; but, on the contrary, the cost of preservation was incurred. On Mar. 24, 1894, after the commencement of the winding-up, the vestry made a poor rate, a lighting rate, a general rate, and a sewers rate for the half-year ending Sept. 29, 1894, payable in two portions on April 2, 1894, and July 2, 1894, respectively. In April, 1894, the vestry's collector left a demand note for £3 2s. 4d., being the first portion of the rates, with the caretaker, and in July a demand note for £3 2s. 4d., being the second portion of such rates. On May 29, 1894, the liquidator was served with a magistrate's summons for the amount of the rates. The liquidator opposed this summons; but an order was made for the payment of the rates forthwith, and the vestry threatened to distrain for the amount thereof on the company's premises. On June 20, 1894, the liquidator applied to ROMER, J., who was then sitting for VAUGHAN WILLIAMS, J., for an order restraining the vestry until further order from levying a distress upon the property for the payment of the rates. His LORDSHIP made an order on the undertaking of the liquidator to be personally answerable for damages. The premises and plant were sold by the liquidator on Sept. 6, 1894.

The present summons asked that the order of ROMER, J., might be discharged, and that the liquidator might be ordered to pay the vestry £6 6s. 6d., or such damages as the court should be of opinion that they had sustained by reason of the order. The summons was adjourned into court to be treated as a motion. It appeared from the evidence of the vestry's collector that, when he called for payment of the rates in April and June, there was sufficient plant upon the premises, if distrained upon, to raise the amount of the rates.

*Chester Jones* for the vestry.

*J. G. Wood* for the liquidator.

**VAUGHAN WILLIAMS, J.**—I think that the parish authorities are entitled to have these rates paid in full. That is, in other words, I think they ought to be allowed to distrain for them, and that I ought to discharge the order restraining them from so doing, and to leave them to their rights on that basis. A

There has been a considerable difference of opinion in the various cases cited, and I do not think that any amount of legal ingenuity could maintain the proposition that all the judgments can stand together. I certainly give up that task. I am going to adopt the view of **BOWEN, L.J.**, in *Re National Arms and Ammunition Co.* (2). No later case than that has been cited to me. I do not say that that is a decision of the Court of Appeal in favour of the view I am about to take; but **BACON, V.-C.**, had suggested in *Re West Hartlepool Iron Co., Ltd., Ex parte West Hartlepool Improvement Comrs.* (3), that the test of whether the rates were payable in full was whether there had been a beneficial enjoyment by the liquidator, mere possession or occupation not being sufficient. Upon that **BOWEN, L.J.**, says (28 Ch.D. at p. 482): B C

“I wish to add that I am not satisfied that the test given by **BACON, V.-C.**, in *Re West Hartlepool Iron Co.* (3) is the true one. I am disposed to think that the true test is, whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open in case it should ever call for decision.” D

I intend to adopt that view. It is not contended here, and it could not be contended, that if that test is adopted there has been a beneficial occupation within the ordinary meaning of the term in the cases as to rating. I thought that possibly there might be a dispute as to that, so I referred during the course of the argument to the provisions of the rating statutes upon which there have been decisions as to what is a beneficial occupation. It is not, however, necessary to consider that point, as it is admitted that in this case there has been a beneficial occupation within the ordinary meaning of the words used in those statutes. E

Having said that I am going to adopt the view of **BOWEN, L.J.**, I should like to give the reasons which have led me to that conclusion. The Companies Acts take away the power of distress upon the property of a company after the commencement of a winding-up; but they give the court a discretion to allow the distress to go on. The question therefore is, whether the court should in its discretion allow it to go on in this case. It is admitted that the rate, in so far as it constitutes a debt, constituted a debt which was incurred after and not before the liquidation, so that it is not a case in which it can be said that the persons to whom the rate is due ought to come in and prove *pari passu* with the other persons who were creditors at the date of the liquidation. The vestry are creditors; they have become so since the commencement of the liquidation. I confess that I cannot see why a debt for rates should not be paid just as much as a debt for rent of premises or in respect of anything else which a liquidator thinks it necessary to acquire or use after the commencement of the liquidation. He may have to hire new premises, in which case he would have to pay the rent in full; or he may have to occupy the old premises, and keep the landlord out of possession. If he does that he would have to pay also. In either case, whether he acquires new premises or continues to hold the old ones, he would have to pay the rates in respect of the occupation which he has. Under these circumstances, I think that the test proposed by **BOWEN, L.J.**, is much the plainest and simplest, namely, has there been a beneficial occupation by the liquidator of these premises within the ordinary meaning of the words in the rating statutes? and it cannot be disputed that in this case there has been such occupation. F G H I

Having said that, I wish to make one observation about the effect of the decision of the court as distinguished from the observations of the judges in *Re National Arms and Ammunition Co.* (2). It seems to me that, after the decision in that case, it is impossible to say that the decision in *Re Watson, Kipling & Co.* (1) can stand, in so far as it draws any distinction between rates and rent. I think that

**A** all the lords justices in *Re National Arms and Ammunition Co.* (2) decided that case on the basis that rates must for this purpose be dealt with as being upon the same footing; but even if this were a case of rent, counsel for the liquidator could not be heard to say that the rent would not be payable in full if there was only an occupation for the purpose of obtaining a good price, even though the premises might be used in the meantime for the storage of the plant and machinery of the company. Certainly, that does not seem to be warranted by anything laid down by **B** KAY, J., in *Re Watson, Kipling & Co.* (1). He says there (23 Ch.D. at p. 507):

“I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. Rigby, and I agree that it is a substantial distinction; in the case of a landlord the company occupying his property are keeping him out of possession, and if the company have, and deliberately exercise, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full.”

**C** I should say that he means by that that, if the liquidator chooses to occupy premises while waiting to get a good price, he would have to pay the rent in full, and I do not think that counsel for the liquidator can rely upon that judgment in support of his argument.

This case is really unarguable unless one is to fall back upon the test laid down by BACON, V.-C. According to that, mere possession or occupation is not sufficient to make the liquidator liable; but there must be some beneficial enjoyment also. It seems to me that, having regard to the subsequent cases, that case can no longer stand. In *Re Oak Pits Colliery Co.* (4) LINDLEY, L.J., says (21 Ch.D. at p. 331):

“No authority has yet gone the length of deciding that a landlord is entitled to distrain for, or be paid in full, rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee.”

**F** He does not, however, go to the length of affirming the test laid down by BACON, V.-C. It seems to me that, if the liquidator deliberately chooses to occupy the premises because he thinks he may get a better price by waiting before selling them, and a loss to the company would be avoided by his so waiting, he must pay the rates in respect of his occupation in full. The order of June 20 must therefore be discharged.

**G** Solicitors: *William Lewis; H. & W. Priest.*

[Reported by W. IVIMEY COOK, ESQ., Barrister-at-Law.]



## BOXSIUS v. GOBLET FRÈRES

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.J.J.), February 28, 1894]

[Reported [1894] 1 Q.B. 842; 63 L.J.Q.B. 401; 70 L.T. 368; 58 J.P. 670; 42 W.R. 392; 10 T.L.R. 324; 38 Sol. Jo. 311; 9 R. 224]

*Libel—Privilege—Qualified privilege—Privileged occasion—Letter dictated by solicitor to clerk and copied by another clerk.*

If a solicitor, in the discharge of his duty to, and in the interests of, his client, dictates a defamatory letter to one clerk which is copied by another clerk, the publication to the clerks is upon a privileged occasion, it being reasonably necessary and usual in the course of a solicitor's business to dictate a letter and to have it copied.

*Pullman v. Hill & Co.* (1), [1891] 1 Q.B. 524, distinguished.

**Notes.** Considered: *Edmondson v. Birch & Co., Ltd.*, [1904-7] All E.R. Rep. 996. Applied: *Morgan v. Wallis* (1917), 33 T.L.R. 495; *Isaacs v. Cook*, [1925] 2 K.B. 391. Considered: *Osborn v. Thomas Boulter & Son*, [1930] All E.R. Rep. 154. Referred to: *Greenlands v. Wilmshurst and London Association for Protection of Trade*, [1913] 3 K.B. 507; *Roff v. British and French Chemical Manufacturing Co. and Gibson*, [1918] 2 K.B. 677.

As to publication of a libel, see 24 HALSBURY'S LAWS (3rd Edn.) 33 et seq.; as to qualified privilege, see *ibid.* at pp. 56 et seq. For cases see 32 DIGEST 76 et seq. and 112 et seq.

Cases referred to :

- (1) *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, 1069.
- (2) *Baker v. Carrick*, [1894] 1 Q.B. 838; 63 L.J.Q.B. 399; 70 L.T. 366; 58 J.P. 669; 42 W.R. 338; 38 Sol. Jo. 286; 9 R. 283, C.A.; 32 Digest 126, 1580.

Also referred to in argument :

*Lawless v. Anglo-Egyptian Cotton Co.* (1869), L.R. 4 Q.B. 262; 10 B. & S. 226; 38 L.J.Q.B. 129; 33 J.P. 693; 17 W.R. 498; 32 Digest 116, 1481.

*Lake v. King* (1670), 1 Mod. Rep. 58; 1 Lev. 240; 1 Saund. 131; 86 E.R. 729; 32 Digest 109, 1420.

*Toogood v. Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.

*Henwood v. Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, 1735.

*Tuson v. Evans* (1840), 12 Ad. & El. 733; 4 Per. & Dav. 396; 5 J.P. 209; 113 E.R. 991; 32 Digest 133, 1641.

*Dickson v. Earl Wilton* (1859), 1 F. & F. 419, N.P.; 32 Digest 156, 1831.

*Bruton v. Downes* (1859), 1 F. & F. 668; 32 Digest 92, 1237.

**Appeal** by the defendants from a decision of LAWRENCE, J., on the trial with a jury of an action to recover damages for an alleged libel.

The defendants, Messrs. Goblet Frères, alleged that a debt was due to them from the plaintiff, and instructed their solicitors to take steps to obtain payment of that debt. The solicitors wrote a letter to the plaintiff demanding payment of the alleged debt, and making statements defamatory of the plaintiff. This letter was dictated by the solicitors to a shorthand clerk by whom it was transcribed; it was then copied by another clerk into the letter-book.

At the trial before LAWRENCE, J., and a jury, the jury found that the defendants honestly and bona fide believed in the truth of the statements made in the letter.

A A verdict was found for the plaintiff with damages, and judgment entered accordingly. The defendants appealed.

*Montague Lush and R. J. McNeill* for the defendants.

*Blake Odgers, Q.C., and H. A. Forman* for the plaintiff.

B **LORD ESHER, M.R.**—In this action for libel we have to consider whether there has been a miscarriage of justice, and whether there ought not to have been a verdict and judgment for the defendants.

C In *Pullman v. Hill & Co.* (1) we held in this court that, if a merchant writes about a customer or other person a libel which if sent to the customer himself would be sent upon a privileged occasion, and dictates it to a clerk in his office, or gives it to a clerk to copy, that is a publication to the clerk, and is not written  
D on a privileged occasion at all. We so held upon the ground that it is not within the ordinary course of the business of a merchant to write defamatory letters, and that, if he does write defamatory letters, it is not reasonably necessary in so doing, and is not in the ordinary course of his business, to dictate the letters to, and get them copied by, a clerk in his office. That we laid down in the case of a merchant. The question now arises in the case of a solicitor. In this case a solicitor was instructed by a client to obtain payment of an account for him, and to press for payment of that account to the extent of telling the debtor that he is seeking to evade payment by a shabby or criminal trick, and he wrote to the debtor to that effect.

E The first point taken is, that doing this was not part of the ordinary business of a solicitor. We overruled that objection in *Baker v. Carrick* (2) because of the knowledge of business which we possess, especially as to legal practice. We said that it was part of the ordinary business of a solicitor before action to endeavour to obtain payment for his client by threatening to take proceedings of some kind. That being so, this solicitor was instructed to do that very thing, to obtain payment and to threaten legal proceedings. What he did, then, was in the ordinary  
F course of his business. It is a usual and frequent part of the ordinary business of a solicitor to write defamatory matter relating to those persons to whom the letters are written. Everyone knows that it is so, and that a solicitor could not perform his duty to his clients without doing it. That distinguishes the case of a solicitor from that of a merchant who has no such duty to perform. We held in *Baker v. Carrick* (2) that if what is written by the solicitor would, if written by the client, be written upon a privileged occasion, then the occasion is privileged on the part  
G of the solicitor. This solicitor, therefore, being instructed by the client to obtain payment of his account by pressure, if the letter if written by the client would have been written on a privileged occasion, it was written by the solicitor upon a privileged occasion. In this case, therefore, the letter was written to the plaintiff upon a privileged occasion on the part of the solicitor because, if Goblet Frères had written it, it would have been written on a privileged occasion.

H This letter, then, was written by the solicitor upon a privileged occasion. It is said, however, that the solicitor could not claim the privilege as between himself and the shorthand and copying clerk, in his office. Upon consideration that point seems to come to this: It was the duty of the solicitor to write this letter. Does it not follow that it was his duty to do so in the ordinary reasonably necessary way  
I of performing that duty? A solicitor has duties to perform for many clients, and he has to perform all those duties with due diligence. The court, knowing what is the usual and necessary practice of a solicitor's office, is prepared to say, even without the assistance of the jury, that the court can hold that a solicitor, who had been instructed to write defamatory matter on behalf of a client, is allowed to do so in the ordinary and reasonably necessary manner of performing his duty to his client, and that that involves having such communications copied by a clerk. It has often been held that it is the proper mode of doing business in a solicitor's office to have letters copied. This case, therefore, is distinguishable from that of a

merchant. When a merchant writes his own letters, it is no part of his business as a merchant to write libels at all, and not, therefore, to have them dictated to or copied by a clerk. If he does so, he does it at his risk. A solicitor, however, is bound to do so in performing his duty to his client. It is consonant with justice and good sense to hold that, in doing what he is obliged to do in the ordinary course of business for the purpose of performing his duty to his client, he is doing it on a privileged occasion. I think that where he is doing what would be done on a privileged occasion for him as regards the person written to, it being his duty to do it for his client, and it being a reasonable and necessary manner of carrying out his duty to his client to dictate the letter and have it copied, if he does it in that way, the occasion is clearly privileged, and he is not liable in an action for libel unless malice in fact is proved. In this case the jury found that there was no malice in fact, and the defendants are therefore entitled to judgment.

**LOPES, L.J.**—I am of the same opinion. Two questions are raised in this case. The first is, whether there was any evidence of the publication of the libel; and the second is, whether the occasion of publication was a privileged occasion. As to publication, it appears to me that there was evidence of publication of the defamatory matter to third persons; that is, to the clerks in the solicitor's office. The libel, therefore, was published by the defendants.

The other question is one of more importance and difficulty. It is difficult to define in a general way what is a privileged occasion, and to say what kind or amount of duty or interest is necessary in all cases to make an occasion privileged. For the purposes of the present case I am prepared to lay down this rule: that, if a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of his client, the occasion is privileged.

There would be no doubt in this case if the publication had been directly to the plaintiff, but the difficulty arises because the communication was not made directly by the solicitor to the plaintiff, but through a clerk. It is said that there was no privileged occasion as between the solicitor and his clerks. In my opinion that occasion was privileged. I think that it was reasonably necessary for the solicitor to make the communication to his clerk, and that it was usual for him to do so in discharge of his duty to his client, and in the interest of his client. We have been much pressed in argument with *Pullman v. Hill* (1), which to some extent was a novel decision. That case, however, is clearly distinguishable. The whole ground of the decision in that case was that it was not in the usual course of a merchant's business to write defamatory matter and to communicate it to his clerks. I adhere to what I said in that case, as follows ([1891] 1 Q.B. at p. 530):

"It is said that business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences."

I venture to think that there is nothing wrong in that statement. The course of business in a solicitor's office is entirely different. It would be impossible to carry on the business of a solicitor unless defamatory matter was sometimes communicated to clerks in the office. That is the usual course of business in a solicitor's office. I am of opinion, therefore, that this occasion was privileged. If the occasion was privileged, the plaintiff must fail unless there is evidence of malice in fact. The jury have found that there was no malice in fact. The communication, therefore, was privileged, and the defendants are entitled to verdict and judgment.



**A** **DAVEY, L.J.**—I am of the same opinion. This case is distinguishable from *Pullman v. Hill* (1) upon the grounds which have been stated, and I think that our decision in this case is justified by the earlier authorities, and by good sense.

*Appeal allowed.*

Solicitors: *Wrensted & Sharp; Skipper & Tucker.*

**B** [*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]

**C**

## ROGERS v. RICE

**D** [COURT OF APPEAL (Lord Coleridge, L.J., Lindley and Kay, L.J.J.), April 27, 1892]

[Reported [1892] 2 Ch. 170; 61 L.J.Ch. 573; 66 L.T. 640;  
40 W.R. 489; 8 T.L.R. 511; 86 Sol. Jo. 445]

*Landlord and Tenant—Lease—Forfeiture—Relief—Application after re-entry by landlord.*

**E** A tenant **held** not to be entitled to obtain relief against forfeiture under the Conveyancing Act, 1881, s. 14 [now the Law of Property Act, 1925, s. 146] once the landlord has recovered possession of the premises.

Dicta to this effect in *Quilter v. Mapleson* (1) (1882), 9 Q.B.D. 672, approved. Decision of **KEKEWICH, J.**, affirmed.

**F** **Notes.** The Conveyancing Act, 1881, s. 14 (1) and (2), has been repealed and replaced by the Law of Property Act, 1925, s. 146 (1) and (2).

Referred to: *Lock v. Pearce* (1892), 61 L.J.Ch. 606; *Egerton v. Jones*, [1939] 3 All E.R. 889.

As to relief against forfeiture, see 23 **HALSBURY'S LAWS** (3rd Edn.) 674 et seq.; and for cases see 31 **DIGEST** (Repl.) 545. For the Law of Property Act, 1925, s. 146, see 20 **HALSBURY'S STATUTES** (2nd Edn.) 739.

**G** Cases referred to:

(1) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 81 W.R. 75, C.A.; 31 **Digest** (Repl.) 546, 6678.

(2) *North London Freehold Land and House Co. v. Jacques* (1883), 49 L.T. 659; 48 J.P. 405; 32 W.R. 283; 31 **Digest** (Repl.) 538, 6620.

**H** **Appeal** by the plaintiff, J. Rogers, from a decision of **KEKEWICH, J.**, refusing to grant him relief against the forfeiture of a lease by the defendant landlord, Charles Rice, jun.

By an indenture, dated July 17, 1861, Charles Rice granted to William Nash Round, his executors, administrators, and assigns, by the direction and at the request of James Church, a lease of a piece of land with the messuage and premises thereon erected, known as No. 5, Sutherland Terrace, Coldharbour Lane, Brixton, for the term of seventy-two years, less ten days, from Dec. 25, 1850, at the yearly rent after the first half-year of such term of £7 payable quarterly.

**I** The lease contained certain covenants to repair, and also a clause for re-entry on the rent or any part thereof being in arrear for six months or not paid within one calendar month after the same became due and demanded by a notice in writing delivered to W. H. Round, his executors, administrators, or assigns, or fixed upon some conspicuous part of the premises; and also a clause for re-entry in case the

premises should be suffered to be dilapidated or out of repair to the value of £20 or upwards and not repaired within three calendar months after notice in writing for that purpose should have been delivered or affixed as thereinbefore mentioned. A

On May 4, 1855, Charles Rice died, having by his will devised all his interest and estate of and in No. 5, Sutherland Terrace, to his widow Catherine Rice. On Dec. 22, 1890, Catherine Rice died. Charles Rice, jun., was the sole executor of the will of Catherine Rice, and her interest in No. 5, Sutherland Terrace, became vested in him. In 1875 the interest of W. N. Round under the lease was purchased by Mrs. Rogers, but since about the year 1881 her son J. Rogers had paid the rent of the premises, and had become practically the lessee thereof. In 1890 the premises became dilapidated, and were out of such repair as was required by the covenant in the lease. Accordingly, on Sept. 4, 1890, Rice duly served on Rogers notice, pursuant to the Conveyancing Act, 1881, specifying the breaches complained of, and requiring him to remedy the same, and requiring him to make compensation in money for such breaches, but Rogers failed so to do within a reasonable time. B

On Feb. 13, 1891, Rice commenced an action against Rogers in the Queen's Bench Division for recovery of possession of the premises in accordance with the proviso for re-entry contained in the lease, and claiming the sums of £5 2s. 4d. for arrears of rent and £50 damages for dilapidation; also mesne profits, and costs. Rogers appeared thereto in person, and Rice subsequently delivered a statement of claim, and on Mar. 13, 1891, Rogers delivered a statement of defence therein, in which he denied Rice's right of action, or that the house was out of repair so as to entitle Rice in such an action to sue. On July 18, 1891, the action came on for trial, when Rogers did not appear, he being absent from London not expecting his case to be reached, and judgment was given for recovery of possession of the premises by Rice, and also for £5 2s. 4d. rent and £50 damages and costs to be paid by Rogers to Rice. A writ of possession was issued on July 25, 1891, and on July 28, 1891, possession of the premises was delivered by the sheriff to Rice. The costs were taxed, and Rice endeavoured, without success, to obtain payment of the taxed amount and of the rent and damages. In August, 1891, Rogers applied to the Queen's Bench Division to extend the time for moving to set aside the verdict and judgment obtained in the action of *Rice v. Rogers*, and that such verdict and judgment might be set aside; but that application the court refused to grant. On Nov. 10, 1891, Rogers commenced the present action of *Rogers v. Rice* by originating summons in the Chancery Division, asking, under s. 14 of the Conveyancing Act, 1881, for relief against the re-entry or forfeiture. C

By s. 14 of the Conveyancing Act, 1881: D

"(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. (2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit." E

A On Feb. 5, 1892, the summons came on to be heard before KEKEWICH, J., and he dismissed the summons. From that decision Rogers now appealed.

*Renshaw, Q.C.*, and *Bramwell Davis* for the plaintiff Rogers.

*Warmington, Q.C.*, and *W. Baugh Allen* for the defendant Rice.

B LORD COLERIDGE, C.J.—I am of opinion that the judgment of KEKEWICH, J., should be affirmed. It seems to me quite clear that this is a case to which sub-s. (2) of s. 14 of the Conveyancing Act, 1881, does not apply. A proper notice under sub-s. (1) was given by the lessor, and he proceeded to enforce the forfeiture of the lease. The action was not hurried on and the judgment was not snapped, but the lessee took no steps to prevent the forfeiture. The action proceeded to judgment and execution, so far at least as regards recovery of possession. As to re-entry the C “proceeding” has been taken by the lessor, and has been successful. It is not a case of a lessor “proceeding” to enforce his right. He has proceeded to enforce it and has enforced it, and it is now too late, therefore, for the lessee to seek relief. On the words of the Act alone, I should have said that it was perfectly clear that it was too late now to apply for relief against the forfeiture.

D I cannot help saying that the point, though not actually before the judges of the Court of Appeal for decision in *Quilter v. Mapleson* (1), was clearly present to their minds, and was considered by them and commented upon in a sense adverse to the claim of the plaintiff. BOWEN, L.J., expressed his opinion almost in the words which I adopt as my own as to the proper construction of the Act. The plaintiff has come too late. The appeal must, therefore, be dismissed with costs.

E LINDLEY, L.J.—This case seems to me to be almost too plain for argument when once the facts are understood. *North London Freehold Land and House Co. v. Jacques* (2) before BACON, V.-C., which has been cited, is obviously distinguishable from the present case, because there the proper notice had not been given. It was an informal notice. But here that was not so.

F KAY, L.J.—I entirely agree. I have nothing to add.

*Appeal dismissed.*

Solicitors: *Francis Miller & Co.*; *Collins & Collins.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]



LOVELL AND CHRISTMAS *v.* BEAUCHAMP

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne and Lord Macnaghten), July 30, 31, August 2, 14, 1894]

[Reported [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587;  
43 W.R. 129; 10 T.L.R. 682; 1 Mans. 467; 11 R. 45]

*Bankruptcy—Infant—Partnership—Receiving order against partnership firm—  
Liability of infant—Form of order.*

An infant may become a partner in a trading firm, but he cannot contract debts for goods supplied to the firm, and cannot be made subject to the bankruptcy laws in respect of any debt contracted by the firm. He is not entitled to any share of the partnership assets till the debts of the firm are paid.

In a case in which judgment had been obtained and a receiving order made against a firm in the partnership name, in which one of the partners was an infant,

**Held:** the receiving order against the firm could not stand in that form, but the order and the judgment might be amended by adding after the firm name "other than" the infant partner.

**Notes.** Applied: *Re A Debtor*, [1922] 2 K.B. 109. Distinguished: *Re Debtors* (No. 807 of 1922), *Ex parte Debtor* (1922), 92 L.J.Ch. 120. Applied: *Re A. and M.*, [1926] All E.R.Rep. 350. Considered: *Re Debtor* (No. 564 of 1949), *Ex parte Customs and Excise Comrs. v. Debtor*, [1950] 1 All E.R. 308. Referred to: *Re Low*, *Ex parte Gibson* (1895), 72 L.T. 450; *Re Farnham* (1895), 3 Mans. 109; *Re Handford*, *Ex parte Handford* (1899), 68 L.J.Q.B. 386; *Leslie, Ltd. v. Shiell*, [1914-15] All E.R.Rep. 511; *Hawkins and Sunderland v. Duché & Sons*, [1921] All E.R.Rep. 673.

As to persons subject to bankruptcy laws, see 2 HALSBURY'S LAWS (3rd Edn.) 255 et seq.; and for cases see 4 DIGEST (Repl.) 28 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Case referred to:

- (1) *Harris v. Beauchamp Brothers*, [1893] 2 Q.B. 534; 63 L.J.Q.B. 99; 69 L.T. 373; 42 W.R. 37; 9 T.L.R. 651; 37 Sol. Jo. 715; 4 R. 550, C.A.; 36 Digest (Repl.) 524, 878.

Also referred to in argument:

*Re Howes*, *Ex parte Hughes*, ante p. 546; [1892] 2 Q.B. 628; 62 L.J.Q.B. 88; 67 L.T. 213; 40 W.R. 647; 36 Sol. Jo. 629; 4 R. 4, C.A.; 4 Digest (Repl.) 102, 915.

*Re Burrows*, *Ex parte Taylor* (1856), 8 De G.M. & G. 254; 25 L.J.Bcy. 35; 26 L.T.O.S. 266; 2 Jur.N.S. 220; 4 W.R. 305; 44 E.R. 388, L.J.J.; 4 Digest (Repl.) 277, 2540.

*Re De Prado*, *Ex parte Liddel* (1814), 2 Rose, 34; 4 Digest (Repl.) 485, 4271.

*Re Cooke*, *Ex parte Adam* (1813), 2 Rose, 36; sub nom. *Ex parte Adam*, 1 Ves. & B. 493; 35 E.R. 191, L.C.; 4 Digest (Repl.) 482, 4243.

*Re Sawers*, *Ex parte Blain* (1879), 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334, C.A.; 4 Digest (Repl.) 24, 203.

*Jackson v. Litchfield* (1882), 8 Q.B.D. 474; 51 L.J.Q.B. 327; 46 L.T. 518; 30 W.R. 531, C.A.; 36 Digest (Repl.) 524, 876.

*Whittingham v. Hill* (1619), Cro. Jac. 494; 79 E.R. 421; sub nom. *Hill v. Whittingham*, 2 Roll. Rep. 45; sub nom. *Hill and Wittington's Case*, 2 Dyer, 104 b, n.; 28 Digest (Repl.) 518, 349.

*Ex parte Henderson* (1798), 4 Ves. 163; 31 E.R. 84; 4 Digest (Repl.) 29, 241.

*Ex parte Layton*, *Ex parte Hardwicke* (1801), 6 Ves. 434; 31 E.R. 1131; 4 Digest (Repl.) 29, 243.

- A** *Western National Bank of City of New York v. Perez, Triana & Co.*, [1891] 1 Q.B. 304; 60 L.J.Q.B. 272; 64 L.T. 543; 39 W.R. 245; 7 T.L.R. 177, C.A.; 36 Digest (Repl.) 520, 835.
- Worcester City and County Banking Co. v. Firbank, Pauling & Co.*, [1894] 1 Q.B. 784; 63 L.J.Q.B. 542; 70 L.T. 443; 42 W.R. 402; 10 T.L.R. 345; 38 Sol. Jo. 324; 9 R. 367, C.A.; 36 Digest (Repl.) 518, 824.
- B** *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373; 44 L.J.Bey. 63; 32 L.T. 138; 23 W.R. 433, L.J.J.; 4 Digest (Repl.) 124, 1109.
- Goode v. Harrison* (1821), 5 B. & Ald. 147; 106 E.R. 1147; 36 Digest (Repl.) 451, 222.

**C** **Appeal** from a decision of the Court of Appeal (LORD ESHER, M.R., LOPES and KAY, L.J.J.), reported, [1894] 1 Q.B. 1, setting aside a receiving order made by a registrar in bankruptcy against the respondents.

**D** At the date of the petition the respondent, Gilbert Walter Beauchamp, an infant, was a partner in the firm of Beauchamp Brothers, who carried on business as provision dealers in the Brompton Road, in the county of London. The appellants were provision merchants, and on Sept. 11, 1893, they presented the petition against Beauchamp Brothers in respect of a judgment debt of £358 for goods sold and delivered, and a receiving order was made by the registrar. The respondent Gilbert Walter Beauchamp appealed, and before the Court of Appeal raised the point that the fact of his infancy rendered the whole proceedings in bankruptcy against him void. The Court of Appeal so held, and they ordered the petition of the appellants to be dismissed with costs.

**E** *Finlay, Q.C., Cooper Willis, Q.C., and Wedderburn* for the appellants.  
*Sir Henry James, Q.C., and A. Powell* for the respondents.

Their Lordships took time for consideration.

Aug. 14, 1894. The following opinions were read.

**F** **LORD HERSCHELL, L.C.**—I do not think there can be any doubt as to the substantial rights of the parties in this case. The form which the proceedings have taken gives rise to greater difficulty. The respondent Gilbert Walter Beauchamp, was a partner in the firm of Beauchamp Brothers. He was and is an infant. Goods which had been supplied upon the order of the firm by the appellants not having been paid for, an action was brought against the firm in the firm's name. An appearance was entered for Ralph Beauchamp and for Gilbert Walter Beauchamp, the infant, by his guardian ad litem. The appellants, plaintiffs below, having applied to sign judgment under Ord. 14, it was objected that Gilbert Walter Beauchamp, being an infant, was not liable. An order was, however, made adjudging that the plaintiffs should recover against the defendants, the firm of Beauchamp Brothers, £358 8s. 10d., and costs to be taxed. A judgment having been obtained in the same terms by Harris, another person who had supplied goods to the firm, and issued a writ against them, it was, on an appeal to the Divisional Court to set aside that order, ordered that the defendants' application be dismissed with costs. But it was also ordered that execution was not to issue against the separate property of Gilbert Walter Beauchamp, infant, or against his share, if any, of the partnership profits. The Court of

**G**

**H**

**I** Appeal refused to disturb the order thus made by the Divisional Court.

On Aug. 7, 1893, the plaintiffs in the action, served a bankruptcy notice on Beauchamp Brothers founded on the judgment, intimating that, if the requisitions of the notice were not complied with, an act of bankruptcy would be committed. The money not having been paid, the appellants Lovell and Christmas, presented a petition for a receiving order in respect of the estate of Beauchamp Brothers. Upon this petition an order was made for the appointment of a receiver. This order was discharged by the Court of Appeal, upon the ground that one of the partners of Beauchamp Brothers being an infant the receiving order could not

properly be made against the firm. The Court of Appeal granted leave to appeal to this House, but on the terms that the orders made by the Divisional Court and the Court of Appeal in *Harris v. Beauchamp* (1) should be treated as made also in the action brought by the present appellants. A

I proceed now to state what I conceive to be the true position of the parties. I think it clear that there is nothing to prevent an infant trading or becoming partner with a trader, and that until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors. It is also clear that, even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankruptcy laws in respect of any debts contracted by the firm of which he is a partner. B C

The plaintiffs were, no doubt, entitled to issue a writ against the firm in the firm's name. But it is to be observed that the order [R.S.C., Ord. 48A] which sanctions such a proceeding provides by r. 5 D

"that persons sued as partners in the name of the firm shall appear individually in their own names."

As soon as it appeared that a member of the firm was an infant, I do not think that it was proper to sign judgment against the firm. The Divisional Court appear to have taken the view that, inasmuch as one of the partners was an infant, the firm might be treated for the purposes of the action as consisting only of the other partner, but I do not think this is so. Although an infant he was a partner, and the firm name Beauchamp Brothers applied as much to him as to an adult partner. The Court of Appeal took the view that the judgment against the firm was good, and might be made available against the partnership property, though it would be ineffectual as against the infant partner. I have a difficulty in seeing how it can be supported. Although the judgment may be pronounced against the firm in the firm's name, it is in reality a judgment against all the persons who are in fact members of the firm; and it is because such a judgment exists that the right of execution follows. It cannot be regarded as a judgment merely against the assets of the firm. The right of execution, whatever it may be, arises from the fact that certain persons have been adjudged debtors. I have already said that, in my opinion, the infant could not be so adjudged. It is true that Ord. 48A, r. 8, which sanctions, in a case of a judgment against a firm, execution against the property of the partnership, restricts any further execution except in specified cases without leave of the court or judge. But I do not think this affords warrant for a judgment against a firm including a person who, though a member of the firm, was not a debtor. E F G H

It appears to me, therefore, that the judgment should either have been against Ralph Beauchamp alone or against the firm, excepting Gilbert Walter Beauchamp. If the judgment had been in either one or the other of these forms, a receiving order might no doubt have been obtained, upon the petition of Lovell and Christmas against Ralph Beauchamp, and in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm. The respondent insists that the bankruptcy proceedings were properly set aside, inasmuch as the receiving order against the firm would operate under the Bankruptcy Rules, 1886, r. 262 [see now 1952 Bankruptcy Rules, r. 285] as if it were a receiving order made against each of the persons who, at the date of the order, was a partner in the firm, and therefore as a receiving order against him. I



**A** I agree with the courts below in thinking that the receiving order in the form in which it was made by the registrar cannot stand. The question is, under those circumstances, what ought to be done? I am most unwilling, if it can be avoided, to deal with the receiving order in a manner which would liberate Ralph Beauchamp from its operation and render fresh bankruptcy proceedings necessary. If the judgment and receiving order stand as against him, he will certainly suffer no injustice; while if the receiving order be set aside absolutely and a fresh petition is thus rendered necessary, transactions which might be avoided under the present receiving order in the interests of creditors might become incapable of avoidance under a receiving order of a later date. I see no difficulty in amending the judgment by adding after the words "defendants" the words "other than Gilbert Walter Beauchamp." There is, I think, nothing irregular in a judgment against a firm in the firm's name excluding one of the partners. It may be, in many cases, of advantage to a plaintiff to obtain such a judgment where he fails to establish the liability of a member of a firm, inasmuch as the judgment would bind not only the partners who have appeared but also any dormant partners who have not appeared. This might be a reason for taking the judgment in that form rather than as a judgment against the known members of the firm who were liable for the debt.

**D** Supposing the judgment thus amended, I think the bankruptcy proceedings may be amended in conformity therewith by adding throughout after the words "Beauchamp Brothers" the words "other than Gilbert Walter Beauchamp." The Bankruptcy Act, 1883, gives ample powers of amendment. By s. 105 (3) [see now s. 109 (3) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) **E** 420)] the court may at any time

"amend any written process or proceeding under this Act on such terms, if any, as it may think fit to impose."

Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute **F** as from its date a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors. I think there should be no costs on either side of these proceedings. If any have been paid they should be repaid or allowed in account as against costs due from the other party.

**G** **LORD ASHBOURNE.**—I concur. It would be most unfortunate if the adult members of a partnership could evade liability because one of the partners was a minor. If this was laid down minors would be found in many partnerships. The powers of amendment referred to by my noble and learned friend on the woolsack enable a court to recognise adequately the position of the minor, without freeing **H** any adult member of the partnership from any legal liability he may be under.

**LORD WATSON** and **LORD MACNAGHTEN** concurred.

*Order accordingly.*

Solicitors: *Godfrey & Webb; Harper & Battcock.*

**I** [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

## GROSVENOR HOTEL CO. v. HAMILTON

[COURT OF APPEAL (Lindley, Lopes and Davey, L.J.J.), May 29, 31, June 1, 1894]

[Reported [1894] 2 Q.B. 836; 63 L.J.Q.B. 661; 71 L.T. 362;  
42 W.R. 626; 10 T.L.R. 506; 9 R. 819]

*Landlord and Tenant—Derogation from grant—Damage to demised premises by working by landlord of engines on adjacent land—Measure of damages.*  
*Nuisance—Vibration—Engines on adjoining land—Damage to premises—Measure of damages.*

In an action brought by the plaintiff company as landlords against the defendant, their tenant, for rent due, the defendant counterclaimed for damages on the ground that structural damage had been caused to the demised premises by the vibration of engines worked on adjacent land by the plaintiff company, and that, as a result, the demised premises were condemned as dangerous structures and the defendant was forced to leave and seek other premises. He claimed damages for nuisance, or, in the alternative, for interference in the quiet enjoyment of the premises contrary to the plaintiff company's covenant, as a result of which his business had been damaged.

**Held:** (i) the plaintiff company could not derogate from its grant of the lease by using the adjoining land so as to interfere with the enjoyment by the defendant of the demised premises, and, therefore, they were liable to the defendant in damages; (ii) the measure of the damages recoverable by the defendant was not confined to the damage flowing from the loss of the lease, but included compensation for whatever was the natural consequence of the wrongful acts of the plaintiff company, such as the expense of taking new premises and the cost of removal.

**Notes.** Considered: *Browne v. Flower*, [1908-10] All E.R.Rep. 545. Distinguished: *Malzy v. Eichholz*, [1916] 2 K.B. 308. Considered: *Hoare & Co., Ltd. v. Sir Robert McAlpine, Sons & Co.*, [1922] All E.R.Rep. 759. Referred to: *Markham v. Paget*, [1908] 1 Ch. 697; *Port v. Griffith*, [1938] 1 All E.R. 295.

As to measure of damages for nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 164 et seq.; and for cases see 36 DIGEST (Repl.) 325 et seq.

Cases referred to:

- (1) *Line v. Stephenson* (1838), 4 Bing.N.C. 678; 6 Scott, 447; on appeal, 5 Bing.N.C. 188; 1 Arn. 294; 7 Scott, 69; 182 E.R. 1075; 31 Digest (Repl.) 181, 2685.
- (2) *Bamford v. Turnley* (1862), 3 B. & S. 62, 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex. Ch.; 36 Digest (Repl.) 262, 123.
- (3) *Caledonian Rail. Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.
- (4) *Elliott v. North Eastern Rail. Co.* (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 19 Digest (Repl.) 179, 1202.
- (5) *Rigby v. Bennett* (1882), 21 Ch.D. 559; 48 L.T. 47; 47 J.P. 217; 31 W.R. 222, C.A.; 19 Digest (Repl.) 50, 275.
- (6) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 48, 269.

Also referred to in argument:

- Robinson v. Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, 2676.  
*Adams v. Gibney* (1830), 6 Bing. 656; 4 Moo. & P. 491; 8 L.J.O.S.C.P. 242; 130 E.R. 1434; 31 Digest (Repl.) 134, 2729.

- A** *Gas Light and Coke Co. v. St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q.B.D. 1; 54 L.J.Q.B. 414; 53 L.T. 457; 49 J.P. 470; 33 W.R. 892; 1 T.L.R. 452, C.A.; 26 Digest (Repl.) 493, 1779.
- Crump v. Lambert* (1867), L.R. 3 Eq. 409; 15 L.T. 600; 31 J.P. 485; 15 W.R. 417; affirmed, 17 L.T. 133, L.C.; 36 Digest (Repl.) 250, 22.
- Walter v. Selge* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; on appeal (1852), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, 1.
- B** *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- National Telephone Co. v. Baker*, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 36 Digest (Repl.) 296, 417.
- C** *Williams v. Burrell* (1845), 1 C.B. 402; 14 L.J.C.P. 98; 4 L.T.O.S. 415; 9 Jur. 282; 135 E.R. 596; 31 Digest (Repl.) 129, 2669.
- Lock v. Furze* (1866), L.R. 1 C.P. 441; Har. & Ruth. 379; 35 L.J.C.P. 141; 15 L.T. 161; 30 J.P. 743; 14 W.R. 403, Ex. Ch.; 31 Digest (Repl.) 147, 2858.
- Hadley v. Barendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

**D** **Appeal** by the plaintiff company and application for the new trial of an action tried before GRANTHAM, J., with a jury, on the ground of misdirection and that the verdict found for the defendant on his counterclaim was unreasonable and the damages awarded excessive.

The action was brought to recover the sum of £62 10s., being one quarter's rent due in respect of certain buildings which had been demised by the plaintiff company to the defendant, Henry Thomas Hamilton, by an indenture dated Mar. 25, 1887, for a term of fourteen years, subject to a proviso enabling the plaintiff company to put an end to the lease at any time upon giving six months' notice to the defendant. The lease contained a covenant by the plaintiff company that the defendant, his executors, administrators, and assigns, duly paying the rent, and performing and observing the covenants thereby reserved and contained, might at all times during the continuance of the term thereby granted quietly enter into, hold, enjoy, receive, and take the rents, issues, and profits of the demised premises without any claim or demand to the contrary by the plaintiff company, their successors or assigns, or any person rightfully claiming by, under, or in trust for them. By his amended statement of defence the defendant denied that he owed the plaintiff company the sum of £62 10s., or any sum. He stated that he was a printer and publisher, and had carried on his business in the buildings held under the lease, and that he and his predecessors in title for more than twenty years before the commencement of this action had been entitled to have and had of right the buildings supported by the land adjacent thereto. He alleged that shortly after he entered under the lease the plaintiff company wrongfully excavated, and in a careless and negligent manner, the land owned by them adjacent to his buildings, and wrongfully removed the land, or part of it, placing on the land engines for boring and working artesian wells for the purpose of supplying a hotel, the property of the plaintiff company, with water, and other engines for working dynamos for supplying the hotel with electric light. He alleged that the engines were placed and worked in a negligent and careless manner, and lessened and damaged the support to his buildings by vibration; that they were thereby deprived of the support to which they were entitled, and cracked, bulged, started, warped, and became dangerous; that upon June 24, 1893, on the application of the London County Council to a metropolitan police magistrate, the buildings were condemned as dangerous structures, and were ordered to be renovated and repaired; and that, consequently, he, with his family and under-tenants, was obliged to leave the buildings, and ceased to carry on his business therein. In the alternative the defendant alleged that he had been interfered with in the quiet enjoyment of the buildings, and been deprived of the use and advantages thereof, contrary to the plaintiff



company's covenant, and that his business had thereby been damaged. By his counterclaim the defendant claimed damages, alleging that by reason of the condition of the premises he had been obliged to obtain other buildings wherein to carry on his business, and in so doing had suffered loss of profit while the business was being moved. The plaintiff company, in reply, alleged that the buildings at the time when they were demised to the defendant were old and in an unstable condition, that the engines complained of had been previously erected, and that the defendant knew these facts at the time of taking the lease. It was proved at the trial that the defendant's buildings at the date of the lease were in an unstable condition.

The action was tried before GRANTHAM, J., and a common jury on April 23 and 24, 1894, when his Lordship directed the jury that, if the defendant's buildings were in fact brought down by the vibrations from the plaintiff company's engines, the plaintiff company was liable in damages to the defendant on the counterclaim. The jury found a verdict for the plaintiff company on the claim for £62 10s. (the amount of the rent), and a verdict for the defendant on the counterclaim for £308 5s. with costs of the action, and judgment was entered accordingly. The plaintiff company appealed, and applied for a new trial as to the counterclaim on the ground of misdirection in that the learned judge was wrong in directing the jury that the defendant was entitled to a verdict on the counterclaim if they found that the vibrations from the plaintiff company's engines had injured the defendant's buildings; that the learned judge ought to have directed the jury that the plaintiff company would only be liable if there was such an amount of vibration from the engines as would have affected houses of ordinary stability; and, further, that the verdict found for the defendant on the counterclaim was unreasonable and against the evidence, that the damages were excessive, and some of the damages awarded by the jury were too remote and not recoverable in point of law.

*J. G. Witt, Q.C., and Hume-Rothery (T. Terrell with them) for the plaintiff company.*

*Coleridge, Q.C., and T. Dale Hart for the defendant.*

**LINDLEY, L.J.**—This case raises a question of some importance. The action is by the plaintiff company as landlords against the defendant as tenant for a quarter's rent. That is met by a counterclaim to the effect that the plaintiff company has by working certain pumping and dynamo engines in the immediate vicinity of the tenant's house shaken the house down. The vibration caused by working the engines was, it is said, so great that the tenant was obliged to move. He complains that he has been put to expense through what has been done by the plaintiff company.

The first question is this: Is there any cause of action on the counterclaim at all? Counsel for the plaintiff company argued that there was not. He said that the tenant's house was a weak, delicate house, and that in consequence of that the tenant was seeking to impose on his landlords a more extensive burden than an ordinary person would have. He argued that, in order to support the action on the counterclaim, the vibration must have been such as to be a nuisance to a person occupying a reasonably well-built house. As between persons not standing in the relation of landlord and tenant that might be so; but this is a case of landlord and tenant—not a case of strangers, merely neighbours to each other—and that is a different matter. The house at the time it was shaken down was an old house. It was described by one of the witnesses as being a delicate house. It was built on piles in a place which had formerly been a marsh, and was twelve inches out of the perpendicular. This must have been known to the landlords at the time the house was let. The landlords have shaken the house down, and yet it is said that the tenant has no cause of action. In my opinion, the tenant has on the counterclaim a cause of action which arises from the vibration which shook the house down, and in consequence of the relationship of landlord and tenant existing

A between the parties, the landlords are estopped from saying that the house was a weak house. Otherwise we should be allowing the landlords to derogate from their own grant, and that cannot be the law. I agree that the derogation from the grant would not of itself be a cause of action. But the cause of action here is the shaking down of the house. This view gets rid of all difficulty about implying a covenant for quiet enjoyment more extensive than the express covenant contained in the lease. This is a very limited covenant which would not cover this case; and *Line v. Stephenson* (1) shows that, where a lease contains an express covenant for quiet enjoyment, it excludes any more extensive covenant being implied. The effective cause of action here is nuisance, not the breach of any implied covenant.

C A question was raised as to the amount of damages. It is said that the true measure of damages is the loss of the value of the lease. Unquestionably, if the lease had any value, that would have to be taken into consideration in estimating damages, and the term of the lease would be material. But the damages, in my opinion, are not confined to the damage (if any) which flowed from the loss of the lease. The true principle to be applied is that which is applicable to cases of tort, i.e., that the injured party is entitled to damages for whatever is the natural consequence of the wrongful act. Here it was a natural consequence of the wrongful act of his lessors that the tenant was obliged to take another house, and he is entitled to damages for the expenses of removal. The jury have assessed the damages on a somewhat too liberal scale, and we think that the right course will be to reduce the damages on the counterclaim to a sum of £200, which seems to be what is fairly attributable to the wrongful act of the lessors. As, however, the appeal has in substance failed, the plaintiffs must pay the costs.

E **LOPES, L.J.**—I am of the same opinion. The point that we have to consider arises upon the defendant's counterclaim. The defendant says that the plaintiffs have shaken down his house. The lease contains an express covenant for quiet enjoyment of a limited character, and *Line v. Stephenson* (1) shows that the defendant cannot avail himself of any implied covenant of a more extensive character. Therefore the counterclaim cannot be based upon implied covenant. But the vibration of the plaintiff company's engines has shaken down the defendant's house, and it cannot be denied that what the plaintiff company has done constituted an interference with the comfortable and convenient use and occupation of his house by the defendant. That is a nuisance, and is, therefore, a cause of action. The plaintiffs cannot by way of answer rely on the fact that they were only using their own premises in a reasonable manner. That is no answer: see *Bamford v. Turnley* (2). But the plaintiffs say that the defendant's house was an old and delicate one, and that if it had been a reasonably stable house there would have been no nuisance. It is unnecessary to say how that might be as between strangers. But the fact that the house was unstable cannot be taken advantage of by the plaintiffs, because they let the house in that state and condition of instability to the defendant. The plaintiffs are, therefore, estopped from setting up the instability of the house as an excuse for what they have done, because that would be derogating from their own grant. As regards the amount of damages I think that the defendant received more than he was entitled to; and I think that £200 is the proper sum.

I **DAVEY, L.J.**—I am of the same opinion. Notwithstanding the able and ingenious argument of counsel for the plaintiff company, I think that the defendant is entitled to recover on his counterclaim. I agree that the right of action cannot be based on any implied covenant for quiet enjoyment. The right of action, in my opinion, is based on trespass or nuisance; and it depends on the fact that the plaintiffs have derogated from their own grant. It is an absolute rule of law that a grantor cannot derogate from his own grant. He cannot use his adjoining land so as to interfere with the enjoyment of the demised premises. That principle is clearly stated in *Caledonian Rail. Co. v. Sprot* (3); *Elliott v. North Eastern Rail.*

Co. (4) and *Rigby v. Bennett* (5). It is sometimes put as a case of implied obligation, and sometimes as a grant of a quasi-easement—something in the nature of an easement—to place the lessee in the position of not being interfered with by any dealing by the lessor with his adjoining land. That is the way in which SIR GEORGE JESSEL, M.R., put it in *Rigby v. Bennett* (5). He said this (21 Ch.D. at p. 567):

“If the corporation had granted a lease of land on which a house was to be built, and it was built in a reasonable manner, it appears to me impossible to say that they could afterwards be entitled to let the land down by dealing with the adjacent land belonging to them. If, again, they granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it, if I may say so, the easement or the implied obligation or warranty that the house should not be let down by anything done on their adjoining land.”

The rule of law as to that is also treated very elaborately from the same point of view by THESIGER, L.J., in *Wheeldon v. Burrows* (6). In my opinion, therefore, the tenant is entitled to recover on this counterclaim. I should arrive at the same result if I dealt with the right of the lessee as a grant—in the nature of an easement which he has purchased—of being undisturbed by any dealing by the lessors with their adjoining land. As to the damages, I agree with the view of the other lords justices.

*Appeal dismissed.*

Solicitors: *Mossop & Rolfe; J. M. McDonnell.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

## KENNEDY v. THOMAS

[COURT OF APPEAL (Lindley, Lopes and Davey, L.JJ.), July 4, 1894]

[Reported [1894] 2 Q.B. 759; 63 L.J.Q.B. 761; 71 L.T. 144;  
42 W.R. 641; 10 T.L.R. 572; 38 Sol. Jo. 616; 9 R. 564]

*Bill of Exchange—Dishonour—Bill payable “on the last day of grace”—Accrual of cause of action—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 14 (1), s. 47.*

By s. 14 (1) of the Bills of Exchange Act, 1882, where a bill is not payable on demand, the bill is due and payable “on the last day of grace.” Accordingly, the holder of a bill of exchange payment of which is refused by the acceptor on the last day of grace cannot commence an action against the acceptor until the expiration of that day, although he can at once give notice of dishonour to the drawer and the endorser.

*Wells v. Giles* (1) (1836), 2 Gale, 209, applied.

Dictum of BULLER, J., in *Leftley v. Mills* (2) (1791), 4 Term Rep. at p. 174, explained.

**Notes.** As to dishonour of a bill of exchange by non-payment, see 3 HALSBURY'S LAWS (3rd Edn.) 201; and for cases see 6 DIGEST (Repl.) 237. As to effect of days of grace, see 3 HALSBURY'S LAWS (3rd Edn.) 168; and for cases see 6 DIGEST (Repl.) 326 et seq. For the Bills of Exchange Act, 1882, s. 14 and s. 47, see 2 HALSBURY'S STATUTES (2nd Edn.) 513, 529.

Cases referred to:

(1) *Wells v. Giles* (1836), 2 Gale, 209; 6 Digest (Repl.) 326, 2374.



- A** (2) *Leftley v. Mills* (1791), 4 Term Rep. 170; 100 E.R. 955; 6 Digest (Repl.) 326, 2376.
- (3) *Hartley v. Case* (1825), 4 B. & C. 339; 1 C. & P. 555, 676; 6 Dow. & Ry.K.B. 505; 9 L.J.O.S.K.B. 262; 107 E.R. 1085; 6 Digest (Repl.) 255, 1832.
- (4) *Haynes v. Birks* (1804), 3 Bos. & P. 599; 127 E.R. 323; 6 Digest (Repl.) 247, 1773.
- B** (5) *Burbridge v. Manners* (1812), 3 Camp. 193, N.P.; 6 Digest (Repl.) 244, 1741.

Also referred to in argument:

*Osborn v. Moncure*, 3 Wend. 170.

*Hopping v. Quin*, 12 Wend. 517.

**C** **Appeal** by the defendant from a decision of CAVE, J., in an action by the plaintiff to recover £75, the amount due to the plaintiff as the holder of a bill of exchange for that amount, dated Oct. 16, 1893, drawn on and accepted by the defendant. The bill was made payable three months after date, and was accepted payable at a specified bank. January 19, 1894, was the third of the days of grace. The bill was presented for payment on the afternoon of that day, and payment was refused. Later on the same day the writ in the action was issued. By his defence the defendant raised inter alia the objection that the action had been commenced prematurely before the expiration of the three days of grace allowed by s. 14 of the Bills of Exchange Act, 1882, and it was contended that, the acceptance being what is defined by s. 19 as a "general" one, payment might have been made by the defendant at any time before the expiration of the last day of grace, and that consequently no cause of action against the defendant had arisen when the writ was issued.

**E** By s. 14 of the Bills of Exchange Act, 1882:

"Where a bill is not payable on demand the day on which it falls due is determined as follows: (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace."

**F** By s. 47:

"(1). A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid. (2). Subject to the provisions of this Act, when a bill is dishonoured by non-payment an immediate right of recourse against the drawer and endorsers accrues to the holder."

**G** CAVE, J., gave judgment for the plaintiff for £27 10s., the amount which he had paid for the bill. The defendant appealed.

*E. B. Calvert* (*Lister Drummond* with him) for the defendant.

**H** *R. A. Germaine* for the plaintiff.

**I** **LINDLEY, L.J.**, stated the facts, and continued: There is no doubt that, on payment of the bill being refused, the plaintiff had an immediate right of recourse against those secondarily liable, viz., the drawer and endorsers. But the question which we have to consider is whether the plaintiff had then a cause of action against the acceptor—whether the acceptor could be sued on the bill before the expiration of the last of the three days of grace—in other words, whether the acceptor was not entitled to the whole period up to the end of that day in which to pay the bill.

Prima facie, I should have thought it plain that, according to ordinary principles of law, he was so entitled. But we are asked to hold the contrary, partly on the construction of the Bills of Exchange Act, 1882, and partly in deference to the opinion expressed by BULLER, J., in *Leftley v. Mills* (2) (4 Term Rep. at p. 174).

When we look at the Act, we see that it does not go to that extent. It certainly seems a little paradoxical that a bill of exchange should be treated as dishonoured

for one purpose and not for another. But it is clear that, when payment of a bill is refused on its presentation at any time during the day on which it falls due, the holder has an immediate right of recourse against the drawer and the endorsers. He can at once give notice of dishonour to the drawer and the endorsers. But he is not entitled to commence an action against those parties any more than against the acceptor before the expiration of the last day of grace. If we were to hold the contrary, we should really be cutting down the days of grace. It is true that, in *Leftley v. Mills* (2), BULLER, J., dissented from the view expressed by LORD KENYON, C.J. LORD KENYON thought that, in the case of a bill of exchange, as in the case of other contracts, if a man was bound to pay money within a certain time, "the party bound had till the last moment of the day to deliver himself from the obligation by paying." BULLER, J., said that the acceptor's undertaking was "to pay the bill on demand on any part of the third day of grace," and that the bill was "payable any time within the last day of grace on demand, provided that demand be made within reasonable hours." But the point there before the court was not the right of the holder to bring an action on a dishonoured bill, but his right to protest the bill, or to give notice of dishonour, and, as to that, the view expressed by BULLER, J., was clearly accurate.

The point which we have to decide is not a new one; it was actually decided in *Wells v. Giles* (1), though that case is not referred to in BYLES ON BILLS. But it is a clear decision that an action on a dishonoured bill cannot be commenced on the third day of grace. The same thing has been decided in America, as is shown by the cases which have been cited to us, and it is not inconsistent with the provisions of the Bills of Exchange Act, 1882. *Hartley v. Case* (3) is rather in favour of this view than against it. The argument addressed to us on behalf of the plaintiff is not, as it appears to me, supported by any English authority; and there is the direct authority of *Wells v. Giles* (1) to the contrary, which is in accordance with the general understanding of merchants. In my opinion, judgment must be entered for the defendant, with costs. The defence is a technical one, but it was distinctly raised on the pleadings.

**LOPES, L.J.**—I am of the same opinion. Section 14 of the Bills of Exchange Act, 1882, says that a bill of exchange is "due and payable on the last day of grace," and I read that as meaning that the bill is due and payable at the end of the last day of grace, and that no cause of action by the holder against the acceptor exists until the end of the third day of grace. Presumably, the object is to give the acceptor the opportunity of paying the bill at any time during the three days of grace. If he has not the whole of the third day during which to meet the bill I cannot see how he gets three days of grace. That was evidently the view of BYLES, J., for he says in his work on BILLS (14th Edn.), at p. 278:

"Three days of grace are in every case (unless otherwise provided in the bill or note) added to the time of payment, and the bill or note falls due on the last of these."

And again, at p. 281:

"A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties."

And again, at p. 299:

"The acceptor has the whole of that day [the day on which the bill falls due] within which to make payment; and, though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonour, yet, if he subsequently on the same day makes payment, the payment is good, and the notice of dishonour becomes of no avail."

In my opinion, the true view is that the acceptor is entitled to the full benefit of the three days of grace, and, notwithstanding the able argument which has been

A addressed to us, and the cases which have been cited, I am of opinion that an action cannot be brought against the acceptor until after the expiration of the last of those three days. The appeal ought, therefore, to be allowed, and with costs.

B DAVEY, L.J.—I am of the same opinion, and I should add nothing but for the fact that we are differing from the judgment of the court below. But for the very able argument of counsel for the plaintiff, and for the fact that a different view was taken by the learned judge, I, personally, should not have thought the point an arguable one. I should have thought that both under the Bills of Exchange Act, 1882, and under the law merchant, which is part of the common law, when three days of grace are allowed for the payment of a bill of exchange the acceptor has the whole of the last day in which to pay the bill, subject to his doing so within reasonable hours, and that he cannot, for the purpose of an action being brought against him on the bill, be said to have made default in payment until the end of the third day of grace. In other words, no right of action accrues to the holder of the bill against the acceptor until the expiration of the third day of grace.

C Although there is no other express decision on the point, there is *Wells v. Giles* (1), and the opinion of BYLES, J., to the same effect is clearly expressed in the passage which has been read by LOPES, L.J. We are asked to take a different view by reason of some of the words of the Act and other cases which have been referred to. But those authorities do not seem to me to be in point. They are all directed to the point whether notice of the dishonour of a bill can be given to the drawer and endorsers on the last day of grace, so as to entitle the holder subsequently to recover from them. It is true that in *Leftley v. Mills* (2), BULLER, J., expressed an opinion different from that of LORD KENYON, C.J.; but the point to which his observations were directed was whether notice of dishonour given on the third day of grace was sufficient to charge an endorser of the bill. The same point arose in *Haynes v. Birks* (4). There, the question was whether a bill having become due on Saturday, and having been dishonoured, notice of dishonour given to an endorser on the following Tuesday was sufficient to charge him; and in dealing with that question, LORD ALVANLEY, C.J., referred to the opinion expressed by BULLER, J., in *Leftley v. Mills* (2), and he came to the conclusion that the notice was sufficient to enable the holder to have recourse to the endorser. The case had nothing to do with the accrual of a right of action on the bill. The same point was dealt with in *Burbridge v. Manners* (5). In *Hartley v. Case* (3), both the judgments of ABBOTT, C.J. (that at the trial and that in banc), assume, I think, that the acceptor has the whole of the last day of grace in which to pay the bill, although non-payment on presentation of the bill at any time on the last day is such a dishonour as entitles the holder to give notice of dishonour to the drawer and endorsers. Those, I think, were all the cases referred to by counsel for the plaintiff.

H As regards s. 47 of the Act, I do not construe it as counsel for the plaintiff does. It does not say that, on the presentment and dishonour of the bill, an immediate right of action against the drawer and endorsers accrues to the holder, and I do not think that that is the meaning. It would be very anomalous if, in respect of the same bill of exchange, rights of action against different persons were to accrue at different times. In my opinion, s. 47 means only that the holder of the bill I may, immediately on payment being refused by the acceptor, give notice to the drawer and the endorsers, telling them that he shall hold them liable on it. But they, as well as the acceptor, still have the whole of the last day of grace in which to pay the bill, and, if it is not paid before the end of that day, the holder's right of action against them becomes complete. It is for the benefit of the holder that he should be able to give notice of dishonour on the last day of grace, because, by so doing, he obtains a right of action against the drawer and the endorsers earlier than he otherwise would. I agree that the appeal should, under the



circumstances, be allowed, with costs, and that judgment should be entered for the defendant.

*Appeal allowed.*

Solicitors: *Frederick C. Sydney; Edward Kennedy.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

## ATTORNEY-GENERAL AND OTHERS *v.* MANCHESTER CORPN.

[CHANCERY DIVISION (Chitty, J.), February 17, 18, 24, March 2, 1893]

[Reported [1893] 2 Ch. 87; 62 L.J.Ch. 459; 68 L.T. 608;  
57 J.P. 340; 41 W.R. 459; 9 T.L.R. 315; 37 Sol. Jo. 325;  
3 R. 427]

*Injunction—Quia timet action—Nuisance—Need to show strong case of probability of mischief—Temporary small-pox hospital.*

A person seeking an injunction to restrain an alleged future nuisance, be it public or private, must show a strong case of probability that the apprehended mischief will arise.

The defendant corporation having proposed to establish a small-pox hospital on land belonging to them which was near a cemetery, the Attorney-General, at the relation of a local authority and private persons, owners of property near the site of the hospital, applied for an injunction to restrain the defendants from establishing the hospital so as to cause a nuisance to the inhabitants of the neighbourhood or to persons frequenting the cemetery.

**Held:** on the evidence adduced by the plaintiffs they had failed to show that there was a probability, much less a high degree of probability, that the apprehended danger would ensue, and, therefore, the injunction was refused.

**Notes.** Considered: *Pethick v. Plymouth Corpn.* (1894), 70 L.T. 304; *A.-G. v. Nottingham Corpn.*, [1904] 1 Ch. 673; *East London Railway v. Thames Conservatory* (1904), 68 J.P. 302; *Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), Ltd.*, [1918-19] All E.R.Rep. 1075; *Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 235. Referred to: *Mudge v. Penge U.D.C.* (1916), 80 J.P. 441; *A.-G. v. Cory, Kennard v. Same* (1919), 88 L.J.Ch. 410.

As to an injunction to restrain a nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 165 et seq.; and for cases see 36 DIGEST (Repl.) 327 et seq.

Cases referred to:

- (1) *Crowder v. Tinkler* (1816), 19 Ves. 617; 34 E.R. 645, L.C.; 28 Digest (Repl.) 785, 349.
- (2) *Earl of Ripon v. Hobart* (1834), 3 My. & K. 169; Coop. temp. Brough. 333; 3 L.J.Ch. 145; 40 E.R. 65, L.C.; 28 Digest (Repl.) 784, 342.
- (3) *Haines v. Taylor* (1847), 2 Ph. 209; 9 L.T.O.S. 193; 11 Jur. 73; 41 E.R. 922, L.C.; 28 Digest (Repl.) 782, 333.
- (4) *Hepburn v. Lordan* (1865), 2 Hem. & M. 345; 5 New Rep. 301; 34 L.J.Ch. 293; 13 L.T. 59; 29 J.P. 228; 11 Jur.N.S. 132; 13 W.R. 368, 1004; 71 E.R. 497; on appeal, 11 Jur.N.S. 254; 28 Digest (Repl.) 784, 343.
- (5) *A.-G. v. Kingston-on-Thames Corpn.* (1865), 7 New Rep. 248; 34 L.J.Ch. 481; 12 L.T. 665; 29 J.P. 515; 11 Jur.N.S. 596; 13 W.R. 888; 28 Digest (Repl.) 782, 335.

- A** (6) *Salvin v. North Brancepeth Coal Co.* (1874), 9 Ch. App. 705; 44 L.J.Ch. 149; 31 L.T. 154; 22 W.R. 904, L.J.J.; 28 Digest (Repl.) 889, 1183.
- (7) *Fletcher v. Bealey* (1885), 28 Ch.D. 688; 54 L.J.Ch. 424; 52 L.T. 541; 33 W.R. 745; 1 T.L.R. 233; 28 Digest (Repl.) 784, 344.
- (8) *Fleet v. Metropolitan Asylums Board, Darent Small-pox Camp Case* (1884), 1 T.L.R. 80; affirmed (1886), 2 T.L.R. 361, C.A.; 36 Digest (Repl.) 330, 742.
- B** (9) *R. v. Vantandillo* (1815), 4 M. & S. 73; 105 E.R. 762; 38 Digest (Repl.) 200, 241.
- (10) *R. v. Burnett* (1815), 4 M. & S. 272; 105 E.R. 835; 38 Digest (Repl.) 200, 242.
- (11) *R. v. Lister and Biggs* (1857), Dears. & B. 209; 26 L.J.M.C. 196; 21 J.P. 422; 3 Jur.N.S. 570; 5 W.R. 626; 7 Cox, C.C. 342, C.C.R.; 36 Digest (Repl.) 270, 230.
- C** (12) *Baines v. Baker* (1752), Amb. 158; 27 E.R. 105; sub nom. *Anon.*, 3 Atk. 750, L.C.; 36 Digest (Repl.) 310, 577.

**D** **Motion** in an action by the Attorney-General, at the relation of the Withington Local Board, and certain owners of property in the district, for an injunction restraining the defendants, Manchester Corporation, until the trial of the action from establishing in the southern cemetery at Withington, near Manchester, any hospital or hospitals for the reception of persons suffering from small-pox, or other infectious diseases, so as to cause a nuisance to the inhabitants of the neighbourhood, or to persons frequenting the cemetery.

**E** The city of Manchester had for some time been suffering from an epidemic of small-pox. The small-pox patients had been accommodated at Monsall Hospital, within the city, but that hospital having become full and overcrowded, the defendants, as the urban sanitary authority, proposed to erect a temporary additional hospital at the west end of the cemetery at Withington, belonging to the defendants, sufficient for the reception of not more than sixty patients.

**F** *Sir Horace Davey, Q.C., Farwell, Q.C., and O. L. Clare* in support of the motion. *Sir Richard Webster, Q.C., Byrne, Q.C., and Macmorran* for the defendants.

**G** **CHITTY, J.**—This is the third motion which has been made against the defendants in respect of the hospital which they propose to open in the district of the Withington Local Board, for the reception of small-pox patients. The present action is brought by the Attorney-General, not ex officio, but at the instance of relators, and also by private persons as plaintiffs; but the case of the private plaintiffs was not argued at the Bar. The foundation of the motion is an apprehended public nuisance, the nuisance being not an actual or existing nuisance, but a future nuisance, which, it is alleged, will arise if the hospital is opened. The action, then, is what is technically known as a *quia timet* action.

**H** The question as to the principle on which the court proceeds in granting or refusing an injunction in such actions has been the subject of numerous decisions, among which are *Crowder v. Tinkler* (1); *Earl of Ripon v. Hobart* (2); *Haines v. Taylor* (3); *Hepburn v. Lordan* (4); *A.-G. v. Kingston-on-Thames Corpn.* (5); *Salvin v. North Brancepeth Coal Co.* (6); *Fletcher v. Bealey* (7). The principle appears to be the same whether the alleged future nuisance is public or private.

**I** In one of the cases to which I have referred, the alleged nuisance was a public nuisance; in others it was a private nuisance. In some, acts had been done which, it was alleged, would result in future mischief or injury, but had not already resulted in injury or substantial damage; in others, there was mere threat or intention. But in regard to all such cases the principle is the same. Where it is certain that the injury will arise, the court will at once interfere by injunction; as, for instance, in the case of a threat to cut a permanent ditch across a public highway. But the court does not require absolute certainty before it intervenes; something less will suffice: see LORD BROUGHAM's judgment in *Earl of Ripon v.*

*Hobart* (2). In *Crowder v. Tinkler* (1) (the gunpowder case), LORD ELDON, who granted the injunction, spoke (19 Ves. at p. 622) of "extreme probability of irreparable injury." In *A.-G. v. Kingston-on-Thames Corpn.* (5), WOOD, V.-C., who refused the injunction, considered the question to be whether there was evidence of an actual nuisance committed, or "evidence of the extreme probability of a nuisance if that which was being done was allowed to continue." In *Fleet v. Metropolitan Asylums Board, Darenth Small-pox Camp Case* (8), where the hospital was in actual operation, the court refused the injunction, COTTON, L.J., in his judgment, laying it down (2 T.L.R. at p. 362) that

"the plaintiffs must make out that there was real danger, otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction."

The principle which I think may be properly and safely extracted from the quia timet authorities is that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise.

Before stating the facts, I will make a few observations in regard to public nuisance at common law. The plaintiffs' case is that the defendants are proposing to do acts which, if done, will constitute a common or public nuisance, and, as such, will constitute an indictable offence. A great variety of instances of the different kinds of public nuisances will be found collected in RUSSELL ON CRIMES (5th Edn.), Vol. 1, p. 418 et seq. and in STEPHEN'S CRIMINAL DIGEST (3rd Edn.), p. 126, including *R. v. Vantandillo* (9) and *R. v. Burnett* (10), both small-pox cases, and cited at the Bar in argument before me. Those two cases show that, although no actual mischief had arisen from the acts done, there may be an indictable offence if there is danger to the public health. In *R. v. Lister and Biggs* (11), the naphtha case, the keeping of large quantities of a highly inflammable fluid near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In the *Darenth* case (8), SIR E. FRY appears to have adopted, as applicable in such cases, COCKBURN, C.J.'s statement of the law, that it must be shown that there is "a well-founded and reasonable apprehension of danger." The apprehended future danger in the present case is danger to the public health.

Undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shows that the maintenance of a small-pox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If LORD HARDWICKE is rightly reported in the case of Coldbath Fields Small-pox Hospital—*Baines v. Baker* (12)—he appears to have entertained some such question, when he stated his opinion that the hospital was "a charity like to prove of great advantage to mankind." But, although I throw out these observations as being possibly worthy of future consideration, I state expressly that they do not form any ground of my decision on this motion.

In the present case the plaintiffs' counsel extracted from the affidavits the proposition that a small-pox hospital is a centre from which the disease, somehow or other (it was not for them to say how), spreads to an extent dangerous to public health for the distance of a half-mile radius. It was necessarily admitted that the burden of proof lay on the plaintiffs, but at one time it seemed as if the argument were being put as dividing the evidence into two parts, and as contending that the plaintiffs had made out a prima facie case which shifted on to the defendants a



A burden which they had failed to discharge. But the argument was not so put in the reply, the contention being that there was to be found running through the evidence of the defendants an admission, express or implied, that it was not safe to leave an intervening clear space of less than 200 yards. I am unable to find any such admission; the substance of the defendants' evidence is that this hospital, situate and carried on as it will be, will not give rise to any appreciable danger to public health.

Much reliance was placed by the plaintiff's counsel on the report on the Sheffield small-pox epidemic, 1897-88, which, however, presented essentially different conditions from those in the present case. The hospital was placed on the verge of a poor and densely-populated district; there were grave faults in the administration of the hospital, both within and without, and there was a recklessness displayed by the population which seems almost incredible. Each case depends on its own facts; other cases may afford assistance to the experts, but they are not guides which the court is bound to follow. So far as concerns any former case, whether decided in a court of justice or not, the report on the Fulham smallpox hospital, 1885-6, and the *Darenth* case (8) appear to be more apposite to the present than the report on the Sheffield epidemic. In the *Darenth* case (8), the camp hospital contained 1,000 patients, and the clear space left round it was only fifty yards; yet it was held that the plaintiff had not made out real danger; and this decision was arrived at on the trial, and after the witnesses had been cross-examined. The plaintiff's counsel resorted to the argument of convenience and inconvenience and the propriety of maintaining the existing status quo, urging that, if the injunction was refused, irreparable damage might fall on the inhabitants of Withington, whereas if it were granted but little or no harm would be sustained by Manchester. But this argument cannot prevail; the granting of an injunction might result in penning back this scourge on the citizens, and thus inflict on them irreparable injury.

In my opinion, however, the evidence in favour of the plaintiffs' case is not sufficiently cogent to make the question of granting or refusing the injunction turn on the consideration of convenience or inconvenience. I have purposely refrained from dealing with the medical testimony in detail. It is seldom advisable in a case of this sort to submit conflicting evidence to any critical examination on a motion. The conclusion at which I have arrived is that the plaintiffs have failed on this motion to make out that there is a probability, much less that there is a high degree of probability, that the apprehended danger will in fact ensue. In parting with the case, I think it right to say that the court ought to exercise great caution before it accepts any general proposition of fact which might tend to the closing of many a well-ordered small-pox hospital in the country. The necessity for caution is all the greater because the doctrine of coming to a nuisance has long since been excluded. I, for the reasons given, refuse the injunction. Costs will be costs in the action.

H Solicitors: *Chester & Co.*, for *Crofton & Craven*, Manchester; *Austin & Austin*, for *W. H. Talbot*, Town Clerk, Manchester.

[Reported by G. WELBY-KING, ESQ., Barrister-at-Law.]

## LEE v. BUTLER

[COURT OF APPEAL (Lord Esher, M.R., Bowen and Kay, L.J.J.), August 2, 1893]

[Reported [1893] 2 Q.B. 318; 62 L.J.Q.B. 591; 69 L.T. 370;  
42 W.R. 88; 9 T.L.R. 631; 4 R. 563]

*Hire-Purchase—Factors Act—Possession of goods under hire-purchase agreement—*

*Hire and purchase agreement—Sale of goods by hirer—Receipt by purchaser in good faith—Factors Act, 1889 (52 & 53 Vict., c. 45), s. 2 (1), s. 9.*

By the Factors Act, 1889, s. 2 (1): "Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same. . ."

By s. 9: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods . . . the delivery or transfer, by that person . . . of the goods . . . under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner."

L., who was in possession of furniture under a hire-purchase agreement which was assigned by the owner of the furniture to the plaintiff, before all the rent had been paid sold and delivered the furniture to the defendant who received it in good faith, and without notice of the plaintiff's right in respect of it.

**Held:** the sale and delivery to the defendant was a sale and delivery within the provisions of s. 9 of the Factors Act, 1889, and, therefore, the defendant acquired a good title to the furniture.

**Notes.** Distinguished: *Helby v. Matthews*, [1895-9] All E.R.Rep. 821. Followed: *Hull Ropes Co. v. Adams* (1895), 65 L.J.Q.B. 114; *Payne v. Wilson*, [1895] 1 Q.B. 653; *Thompson and Shackell v. Veale* (1896), 74 L.T. 130; *Wylde v. Legge* (1901), 84 L.T. 121. Distinguished: *Belsize Motor Supply Co. v. Cox*, [1911-13] All E.R.Rep. 1084; *Lewis v. Thomas*, [1918-19] All E.R.Rep. 497. Followed: *Taylor v. Thompson* (1929), 69 L.Jo. 116.

As to hire-purchase transactions, see 19 HALSBURY'S LAWS (3rd Edn.) 510 et seq.; and for cases see 26 DIGEST (Repl.) 658 et seq. For the Factors Act, 1889, s. 2 and s. 9, see 1 HALSBURY'S STATUTES (2nd Edn.) 30, 33.

Case referred to in argument:

*Wood v. Rowcliffe (Roecliffe)* (1846), 6 Hare, 183; 11 Jur. 707; on appeal (1847), 2 Ph. 382; 17 L.J.Ch. 83; 10 L.T.O.S. 281; 11 Jur. 915; 41 E.R. 990; 1 Digest (Repl.) 385, 502.

**Appeal** by the plaintiff from a decision of WRIGHT, J., at the trial without a jury, in Middlesex.

Mrs. Lloyd entered into a hire-purchase agreement for some furniture with one Hardy, a furniture dealer, and was in possession of the furniture under that agreement. Hardy assigned the agreement and all his interest thereunder to the plaintiff. Before all the payments of rent under the agreement had been made, Mrs. Lloyd sold and delivered the furniture to the defendant. The defendant did not know that Mrs. Lloyd was in possession of the furniture under the agreement, and bought in good faith and without notice of the plaintiff's rights. In an action by the plaintiff for the return of the furniture from the defendant or for damages for conversion, WRIGHT, J., held that the case came within s. 9 of the Factors Act, 1889, which afforded a good defence to the action.

A The plaintiff appealed.

*Stephen Lynch* for the plaintiff.

*C. L. Attenborough* for the defendant.

B LORD ESHER, M.R. It seems to me that this case is quite clear. The meaning of s. 9 of the Factors Act, 1889, is plain, and only one construction can be put on it. In one set of sections the Act deals with "Dispositions by mercantile agents," and in another set of sections, including s. 9, with "Dispositions by sellers and buyers of goods." The words of s. 9 are as plain as they can be, and this case is clearly within them. Mrs. Lloyd had agreed to buy the goods by means of a hire-purchase agreement, and the goods were put into her possession by the owner. The goods were sold by Mrs. Lloyd to the defendant, who bought them without notice of the right of the original seller, and in good faith. If the defendant had known that Mrs. Lloyd was in possession under a hire-purchase agreement, in my opinion he would have had sufficient notice of the right of the plaintiff, but he had no such knowledge, and acted in good faith. Section 9 was enacted with reference to this very kind of case, and does apply to this case. The judgment of WRIGHT, J., was right, and this appeal must be dismissed.

D BOWEN, L.J.—I am of the same opinion.

E KAY, L.J.—This agreement is clearly an agreement to purchase. It begins by stating that it is an agreement for the hire and purchase of the goods. The next clause provides that the hirer agrees to pay by way of rent for the hire and use of the furniture the total sum of £97 4s., and the last clause provides that the furniture shall become the sole and absolute property of the hirer when that sum has been paid. Then follows a schedule describing all the furniture. That is an agreement to buy the goods; and the case clearly comes within s. 9 of the Factors Act, 1889, which was, I suppose, passed to cover this very kind of transaction. The appeal must be dismissed.

F *Appeal dismissed.*

Solicitors: *Alfred Ashley; John Attenborough.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]



ULTZYEN *v.* NICHOLS

[QUEEN'S BENCH DIVISION (Charles and Wright, JJ.), November 1, 1893]

[Reported [1894] 1 Q.B. 92; 63 L.J.Q.B. 289; 70 L.T. 140;  
58 J.P. 103; 42 W.R. 58; 10 T.L.R. 25; 38 Sol. Jo. 26;  
10 R. 13]

*Bailee—Liability—Restaurant keeper—Loss of customer's coat.*

On the plaintiff's entering the defendant's restaurant to dine, his coat was taken from him by a waiter who hung it up immediately behind the plaintiff. When the plaintiff had finished the meal his coat was missing.

**Held:** the defendant was liable in negligence and as bailee for the loss of the plaintiff's coat.

**Notes.** Distinguished: *Orchard v. Bush*, [1898] 2 Q.B. 284. Considered: *Tinsley v. Dudley*, [1951] 1 All E.R. 252.

As to gratuitous bailment, see 2 HALSBURY'S LAWS (3rd Edn.) 97 et seq.; and for cases see 3 DIGEST (Repl.) 55 et seq.

Case referred to:

(1) *Smith v. Baker & Sons*, ante p. 69; [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, 812.

Also referred to in argument:

*Holder v. Soulby* (1860), 8 C.B.N.S. 254; 29 L.J.C.P. 246; 2 L.T. 219; 25 J.P. 311; 6 Jur.N.S. 1031; 8 W.R. 438; 141 E.R. 1163; 3 Digest (Repl.) 90, 210.

*Richards v. London, Brighton and South Coast Rail. Co.* (1849), 7 C.B. 839; 6 Ry. & Can. Cas. 49; 18 L.J.C.P. 251; 13 L.T.O.S. 139; 13 Jur. 986; 137 E.R. 332; 8 Digest (Repl.) 135, 869.

*Great Western Rail. Co. v. Bunch* (1888), 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128; 52 J.P. 147; 36 W.R. 785; 4 T.L.R. 356, H.L.; 8 Digest (Repl.) 134, 861.

**Appeal** by the defendant from a decision of the Westminster County Court in an action in which the plaintiff claimed from the defendant the value of a coat lost in the circumstances set out in the headnote, or, alternatively, for damages for loss of the coat of which the defendant was bailee. The jury found that there was want of reasonable care on the part of the defendant, and the learned judge held that the coat was bailed by the plaintiff to the defendant.

*Longstaffe* for the defendant.

*R. M. Bray and Beard* for the plaintiff.

**CHARLES, J.**—This appeal must be dismissed. There are two questions which we have to consider: first, whether the defendant was a bailee of the coat; secondly, whether there was on his part any negligence owing to a want of reasonable care. There was, in my opinion, ample evidence of negligence. The first point is more troublesome—whether the facts show a bailment of the coat, or merely that it was taken by the waiter as an act of good nature or service, without any intention of taking charge of it. I think that the jury were justified in finding, on the evidence before them, that the coat was bailed to the defendant. The evidence really came to this, that it was the waiter who relieved the plaintiff of his coat and selected the place where it was put. As I suggested during the argument, there might have been a waiter at the door of the dining-room or in the vestibule to take the coats of guests before they entered the dining-room. If such a person takes a customer's coat, the mere fact of his taking and disposing of it where he chooses would be evidence that the restaurant keeper was a bailee of the coat, for such a system might obviously add to the popularity of the restaurant, and would

**A** probably be adopted with that very object in view. In my opinion, there is only a difference in degree between the case of the restaurant keeper providing a servant to take his customers' coats in that way and the present case.

**B** **WRIGHT, J.**—I agree with my learned brother that, if there was a bailment, there was sufficient evidence of negligence. The point as to the question of bailment not having, it appears, been clearly raised at the trial in the court below, in my opinion, according to *Smith v. Baker & Sons* (1), there is no need for us to decide it. For the purpose of this decision I must assume that there was a bailment.

*Appeal dismissed.*

**C** Solicitors: *Beard & Sons; Tyrrell, Lewis & Co.*

[*Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.*]

**D**

## UNDERWOOD, SON AND PIPER v. LEWIS

**E** COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Davey, L.J.J.), May 7, 1894]

[*Reported* [1894] 2 Q.B. 306; 64 L.J.Q.B. 60; 70 L.T. 833;  
42 W.R. 517; 10 T.L.R. 465; 38 Sol. Jo. 479; 9 R. 440]

**F** *Solicitor—Retainer—Common law action—Duty to carry on action to its end—Refusal to do so without good cause—Action on bill of costs—Competency.*

**G** A solicitor retained in an ordinary common law action cannot without good cause give his client notice determining his retainer before the action is concluded and then sue for his charges up to the notice of determination. The retainer is one entire contract so that, unless some well-known exception to the rule arises, the solicitor cannot sue for his costs until his obligation under the contract has been entirely fulfilled.

**Notes.** Applied: *Court v. Berlin*, [1897] 2 Q.B. 396. Considered: *Re Wingfield and Blew*, [1904] 2 Ch. 665; *Warmingtons v. McMurray*, [1936] 2 All E.R. 745.

As to the duration of a solicitor's retainer, see 36 HALSBURY'S LAWS (3rd Edn.) 67 et seq.; and for cases see 42 DIGEST 51 et seq.

**H** Cases referred to:

(1) *Cresswell v. Byron* (1807), 14 Ves. 271; 33 E.R. 525, L.C.; 42 Digest 306, 3410.

(2) *Vansandau v. Browne* (1832), 9 Bing. 402; 1 Dowl. 715; 2 Moo. & S. 543; 2 L.J.C.P. 34; 131 E.R. 667; 42 Digest 53, 442.

**I** (3) *Harris v. Osbourn* (1834), 2 Cr. & M. 629; 4 Tyr. 445; 3 L.J.Ex. 182; 149 E.R. 912; 42 Digest 54, 447.

(4) *Re Hall and Barker* (1878), 9 Ch.D. 538; 47 L.J.Ch. 621; 26 W.R. 501; 42 Digest 51, 414.

(5) *Whitehead v. Lord* (1852), 7 Exch. 691; 21 L.J.Ex. 239; 19 L.T.O.S. 113; 115 E.R. 1126; 42 Digest 55, 457.

(6) *Re Romer and Haslam*, [1893] 2 Q.B. 286; 69 L.T. 547; 42 W.R. 51; 4 R. 486; sub nom. *Re Romer, Ex parte Snell*, 62 L.J.Q.B. 610, C.A.; 42 Digest 51, 416.

Also referred to in argument :

*Wadsworth v. Marshall* (1832), 2 Cr. & J. 665; 1 L.J.Ex. 250; 149 E.R. 279; 42 Digest 54, 452.

*Bryan v. Twigg* (1834), 3 L.J.Ch. 114; 42 Digest 54, 443.

*Nicholls v. Wilson* (1843), 2 Dowl.N.S. 1031; 11 M. & W. 106; 12 L.J.Ex. 266; 152 E.R. 734; 42 Digest 54, 448.

*Hawkes v. Cottrell* (1858), 3 H. & N. 243; 27 L.J.Ex. 369; 157 E.R. 462; 42 Digest 312, 3465.

*Harris v. Quine* (1860), L.R. 4 Q.B. 653; 10 B. & S. 644; 38 L.J.Q.B. 331; 20 L.T. 947; 17 W.R. 967; 32 Digest 339, 226.

*Stokes v. Trumper* (1855), 2 K. & J. 232; 25 L.T.O.S. 140; 3 W.R. 503; 69 E.R. 766; on appeal, 25 L.T.O.S. 278, L.J.J.; 42 Digest 314, 3488.

*Beck v. Pierce* (1889), 23 Q.B.D. 316; 58 L.J.Q.B. 516; 61 L.T. 448; 54 J.P. 198; 38 W.R. 29; 5 T.L.R. 672, C.A.; 32 Digest 334, 189.

*Rowson v. Earle* (1829), Mood. & M. 538, N.P.; 42 Digest 54, 455.

**Motion** for judgment or a new trial by the defendant in an action brought by the plaintiff upon a bill of costs.

The defendant had orally retained the plaintiff to act as his solicitor in three actions in the Queen's Bench Division and the plaintiff had accepted the retainer. Before any of the actions had been concluded the plaintiff gave notice to the defendant that he would not act for him any longer, and he then brought this action for costs incurred in the actions up to the date when he had given notice to the defendant. The defendant counterclaimed for negligence and for damages for breach of contract. At the trial of the action before GRANTHAM, J., sitting with a jury, the defendant began and was examined in chief. The learned judge stopped the cross-examination of the defendant on the ground that the plaintiff was entitled to determine his retainer whenever he liked, subject to giving his client a notice reasonable in point of time, and then to sue for his bill of costs. As the defendant admitted that the plaintiff's notice was reasonable in point of time, he refused to receive any evidence as to the grounds on which the plaintiff had given the notice. Upon the question of negligence the jury found a verdict for the plaintiff. The learned judge gave judgment for the plaintiff.

*Sir Henry James, Q.C.*, and *Jelf, Q.C.* (*Bankes* with them), for the defendant.

*Lockwood, Q.C.*, and *Tindal Atkinson* (*Winch, Q.C.*, with them) for the plaintiff.

**LORD ESHER, M.R.**—I confess that I cannot agree with the law as laid down by GRANTHAM, J. When the matter is considered, it seems clear that the contract which we have to deal with here is what is called an entire contract. When a client employs a solicitor in a lawsuit, he does not employ him to take merely one step in the action and to wait for fresh instructions before taking another, and so on. The solicitor is employed to act on behalf of the client in the suit. A solicitor is a skilled person, and it would be of no use to employ him except for the purpose of taking all the steps necessary to bring the suit to an end. If that is the nature of his employment, his contract is an entire one to carry on the action to its conclusion.

It was the view taken by judges in former days that in the case of an ordinary retainer of a solicitor in a lawsuit without any specific terms, the implication of law was that the contract was to carry on the litigation to its conclusion. That is what was held by LORD ELDON, and was acted on by him when he was Chief Justice of the Court of Common Pleas. In *Cresswell v. Byron* (1), he used these words (14 Ves. at p. 273):

"The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill."

Those words are exactly in point in the present case. It is true that it might be argued that LORD ELDON's words mean that under no possible circumstances



A could a solicitor bring an action successfully for work done and disbursements made before quitting his client. If that be the meaning of LORD ELDON's words, I may say that the law has since been modified, but the engrafting of a modification upon a rule is not the same thing as setting the rule aside.

B I will not go through all the cases that have been cited. It seems to me that the effect of them is that ever since LORD ELDON's time a retainer of a solicitor in a common law suit has always been held to be one entire contract, so that, unless some recognised exception to the rule arises, the solicitor cannot sue for his bill of costs until his obligation under the contract has been entirely fulfilled. One of those recognised exceptions, if they can rightly be called exceptions, is that a solicitor cannot reasonably be asked to pay out of his own pocket disbursements which he may possibly never recover. Therefore, if he asks his client to provide money for immediate disbursements, and the client refuses to do so, the solicitor is entitled to refuse to act further for the client in the litigation. C In addition to this, lest the solicitor, by throwing up his retainer suddenly at a critical moment should ruin his client, it has been decided that the client is entitled to have reasonable notice of the solicitor's intention not to act any more for him.

D It is not denied that that was the law up to the time of the decision in *Van-sandau v. Browne* (2). In that case the judges seem to me to have decided no more than that before suing on his bill a solicitor must give his client reasonable notice that he intends not to act for him any longer. *Harris v. Osbourn* (3) seems to me a much more satisfactory case. LORD LYNTHURST, C.B., there says (2 Cr. & M. at p. 682):

E "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination."

In that sentence the words "special contract" mean "implied contract," and they are used by way of antithesis to a general contract under which the solicitor might sue as upon a quantum meruit for each step in the action which he might F from time to time take on behalf of his client. LORD LYNTHURST goes on (*ibid.*):

"I do not mean to say that under no circumstances can he put an end to this contract."

G LORD LYNTHURST there recognises the fact that there are certain circumstances under which a solicitor can justify his putting an end to his retainer. He goes on (*ibid.*): "but it cannot be put an end to without notice." He seems to me to mean by that that, unless a valid notice is given to the client, the solicitor cannot treat his contract of retainer as at an end and sue upon his bill.

The next argument was that the earlier cases must be treated as overruled since a decision of SIR GEORGE JESSEL, M.R., in *Re Hall and Barker* (4). If that decision were inconsistent with the earlier decisions I think it ought to be overruled, but H I do not think that it is inconsistent. The effect of SIR GEORGE JESSEL's judgment is that whatever meaning may be implied at common law in a contract by which a solicitor is retained in a common law action, it would be wrong in the case of a Chancery suit to imply an agreement by the solicitor to carry on the suit to its termination before he is entitled to payment, because Chancery suits are often of a very complicated nature, and sometimes last for years. It would be unjust, I he says, in a suit lasting for many years, to forbid the solicitor from enforcing payment for the work he has done until the completion of the suit, and therefore such an agreement is not to be implied. It may be that in the case of a retainer in a Chancery suit there is an implication that the solicitor shall continue the litigation to the end, but SIR GEORGE JESSEL declined to imply any agreement that the solicitor should not be entitled to payment of his bill until the suit is finished. But with that decision we have nothing to do in the case which is before us. We have only to deal with an ordinary common law action.

The plaintiff was employed as solicitor in three such actions, none of which is finished. He maintains that he is entitled by simply giving notice to his client, reasonable as to time, to put an end to his retainer at his own will and pleasure, without giving any other excuse, and then immediately to bring an action to recover the costs already incurred. I can find no authority which would justify us in holding that to be the law. Every authority which has been cited to us seems to me to be opposed to that contention. I, therefore, think that GRANTHAM, J., was wrong in his ruling, and that the trial ought to have gone on in order to find out whether the solicitor had any reasonable ground for refusing to carry on the three actions to their termination. What are reasonable grounds for such a refusal I am not at present able to say. I doubt whether anything which may happen to the solicitor without any fault on the part of his client would be a sufficient ground for his suing for his costs before he has completed the litigation as he had agreed to do. It was suggested that if any great misfortune happened to him, such as a severe illness, which prevented him from giving personal attention to the litigation, it would not only put an end to his retainer, but would also enable him to sue for his bill of costs for work done up to that time. I do not know that it is necessary to decide that point on the present occasion, but I am strongly of opinion that such a misfortune to the solicitor would not put an end to his contract, and he would not be entitled to sue for the work he had done or the disbursements he had made. Such misfortunes happen in the case of other entire contracts. Take for instance the case of a captain who has agreed to navigate a ship from Liverpool to the Cape upon the terms that he is to be paid a certain sum at the end of the voyage. Would his death in the middle of the voyage enable his executors to sue for the work he had done, and alter the contract from one by which he had agreed to do a certain thing for a certain sum into one by which he was to be paid week by week a reasonable sum for what he had done? I think that, if any such misfortune happened to the solicitor which prevented him from carrying on the litigation, it might, perhaps, be a ground which would protect him if an action was brought against him, but I do not think that it is a ground for saying that his retainer was changed into an agreement to pay for his services on a quantum meruit so as to entitle him to sue for his costs before he has completed that which he contracted to complete. The obligation of the client is to pay his solicitor at the end of the action, unless he does something which justifies the solicitor in putting an end to the retainer and suing for a quantum meruit. I am of opinion that the judgment of GRANTHAM, J., cannot be supported, and we must, therefore, order a new trial.

**A. L. SMITH, L.J.**—The question in this case is whether or not the plaintiff, who is a solicitor, and brings this action upon a bill of costs, is entitled to maintain the action. I wish to confine my observations to the facts of this case which apply solely to a retainer in an action at common law, because I look upon this retainer in the same light as if there had been a separate retainer in these three actions.

If there is one thing clearer than another from the authorities which have been cited to us since 1801, LORD ELDON's time, down to the present day, it is that the contract of a solicitor with his client upon a retainer like this is an entire contract, and it is his duty to go on with the action until the litigation is finished. I find that laid down hard and fast in LORD ELDON's time, and, subject to some conditions which appear to have crept in, it will be found to have been laid down in *Vansandau v. Browne* (2), and by LORD LYNDHURST in *Harris v. Osbourn* (3), where he says (2 Cr. & M. at p. 632):

"I consider that when an attorney is retained to prosecute or defend a cause he enters into a special contract to carry it on to its determination."

I find it laid down in *Whitehead v. Lord* (5) by PARKE, B., where he says (7 Exch. at p. 694):

A "The rule as applicable to this case was correctly laid down in *Harris v. Osbourn* (3) that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final determination, and he cannot sue for his bill until that time has arrived."

B I find that not dissented from by SIR GEORGE JESSEL, M.R., in *Re Hall and Barker* (4) as applicable to common law actions. He referred to *Harris v. Osbourn* (3), where it was held that as a general rule an attorney or solicitor retained to conduct a suit was under an obligation to conduct it to its termination, and that he could not sue for his bill of costs until that period had arrived. That was the old principle at common law. The Master of the Rolls did not adopt that principle of common law in the suit which was then before him, but he enunciated that as the principle of common law which has been traced out before us by the learned counsel in the cases which have been produced today. But the authorities go a bit further in my judgment, because in *Re Romer and Haslam* (6) BOWEN and KAY, L.JJ., enunciate the same proposition.

C Therefore, the prima facie obligation which a solicitor undertakes when he accepts a retainer from a client in a common law action is this. He has entered into an entire contract to carry on the litigation for the client to the end, and until he has carried on that litigation to the end he cannot sue his client for costs. That is the prima facie obligation which he undertakes; but, on the other hand, it seems to me upon the cases that a solicitor may be put into a position by a client in which he may withdraw from the retainer. The point which we have to decide in this case is whether a solicitor can for no reason whatever, in the middle of a common law action, throw up the retainer provided that he gives his client due notice that he is going to do so, and then sue the client for the bill of costs which has been incurred up to that date. That is the point of law which we have to decide. It seems to me to be the result of *Vansandau v. Browne* (2) and the later cases that have been cited that a client may put his solicitor into such a position that the solicitor becomes entitled to treat the retainer as at an end. For instance, if the client refuses to furnish his solicitor with funds, the solicitor is not bound by his retainer to finish at his own costs the litigation which he has begun for the client. Again, if the client insists upon his solicitor doing something which the solicitor knows to be dishonourable or disgraceful, then I think, speaking for myself, that the solicitor would be justified in refusing to act any longer. There may be other cases in which a client may put his solicitor into such a position that it would be only right that the solicitor should have an option of refusing to act any longer under the retainer. Under those circumstances, as it appears to me, the solicitor would be entitled to sue for his costs out of pocket and his costs up to that date.

F But that is not the case which we have to decide now. The sole point of law here is whether a solicitor without rhyme or reason can throw up his retainer, having given the client due notice that he is going to throw it up, and then sue him for the costs incurred up to that date. The only difficulty I have had about this case is this. I have no difficulty about the judgment of PARKE, B., in *Harris v. Osbourn* (3). The difficulty which did arise in my mind, but I think it is explainable, is in *Whitehead v. Lord* (5), where PARKE, B., explains, as I understand, what he meant in *Harris v. Osbourn* (3). The result of all the cases which have been cited since *Vansandau v. Browne* (2) in 1832 may be summed-up thus, that at any rate a solicitor cannot get rid of a retainer without giving due notice to a client. I believe that to be the real decision in all these cases. The decision in most of them turned upon the Statute of Limitations. A solicitor having sent in a bill for costs, part of which had been incurred more than six years before the suit, and the client having set up the Statute of Limitations, the question was, whether or not the retainer which the plaintiff had accepted from the client had ever been put an end to. What the learned judges said in those cases was that, inasmuch as no notice was given by the



solicitor to the client, the retainer was a continuing one—it was an entire contract and, therefore, the Statute of Limitations had not begun to run. That seems to me to be perfectly consistent with LORD LYNDHURST's judgment in *Harris v. Osbourn* (3) where he says (2 Cr. & M. at p. 632):

"I do not mean to say that under no circumstances can he [that is, the solicitor] put an end to this contract; but it cannot be put an end to without notice."

PARKE, B., in effect says the same thing. It seems to me that that is the correct interpretation of that judgment. The learned counsel for the plaintiff were quite right to rely upon what was said by PARKE, B., in *Whitehead v. Lord* (5), when he said (7 Exch. at p. 694):

"The rule as applicable to this case was correctly laid down in *Harris v. Osbourn* (3), that an attorney under a retainer to conduct a suit undertakes to conduct the suit to its final determination, and he cannot sue for his bill until that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives."

The learned baron did not have his mind directed to the point which we have now before us, namely, whether, upon giving due notice, a solicitor, as I said before, may, without rhyme or reason, throw up his retainer.

In my judgment, the authorities are too strong against the plaintiff's contention. The law is that in a common law action he cannot do so. My brother GRANTHAM stopped the case in limine, and I, therefore, agree that it must go down for a new trial.

DAYEY, L.J.—I am of the same opinion. I only desire to say that I express no opinion, since it is unnecessary to do so, as to what might be the effect of a solicitor's death or permanent incapacity upon a contract to conduct his client's case.

*New trial ordered.*

Solicitors: *Underwood, Son & Piper; Letts Brothers.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

## SADLER v. WORLEY AND OTHERS

[CHANCERY DIVISION (Kekewich, J.), February 28, March 1, 4, 1894]

[Reported [1894] 2 Ch. 170; 63 L.J.Ch. 551; 70 L.T. 494;  
42 W.R. 476; 10 T.L.R. 364; 8 R. 194]*Company—Debenture holder—Floating charge—Right of debenture holder to foreclosure on company's property including uncalled capital.*

The holder of a debenture which creates a charge on all property, funds, assets and effects of a company, whatsoever and wheresoever, both present and future, including its uncalled capital, is entitled to the remedy of foreclosure.

**Notes.** Applied: *Halifax and Huddersfield Union Banking Co. v. Radcliffe*, [1895] W.N. 63. Considered: *Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511; *Re Corporate Equitable Property Society, Ltd., Giardam v. Corporate Equitable Property Society*, [1940] Ch. 654.

As to the remedies of foreclosure and sale, see 6 HALSBURY'S LAWS (3rd Edn.) 518 & 519; and for cases see 10 DIGEST (Repl.) 836 et seq.

Cases referred to:

- (1) *Blaker v. Herts. and Essex Waterworks Co.* (1889), 41 Ch.D. 399; 58 L.J.Ch. 497; 60 L.T. 776; 37 W.R. 601; 5 T.L.R. 421; 1 Meg. 217; 10 Digest (Repl.) 836, 5479.
- (2) *Gardner v. London, Chatham and Dover Rail. Co. (No. 1), Drawbridge v. Same, Gardner v. Same (No. 2), Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.J.J.; 10 Digest (Repl.) 1273, 8993.
- (3) *Carter v. Wake* (1877), 4 Ch.D. 605; 46 L.J.Ch. 841; 9 Digest (Repl.) 434, 2829.
- (4) *James v. James* (1873), L.R. 16 Eq. 153; 42 L.J.Ch. 386; 21 W.R. 522; 35 Digest 556, 2866.
- (5) *General Credit and Discount Co. v. Glegg* (1888), 22 Ch.D. 549; 52 L.J.Ch. 297; 48 L.T. 182; 31 W.R. 421; 35 Digest 353, 961.
- (6) *Tennant v. Trenchard* (1869), 4 Ch. App. 537; 38 L.J.Ch. 169, 661; 20 L.T. 856, L.C.; 35 Digest 500, 2309.
- (7) *Woolley v. Colman* (1882), 21 Ch.D. 169; 51 L.J.Ch. 854; 46 L.T. 737; 30 W.R. 769; 35 Digest 370, 1129.

Also referred to in argument:

*Re Pyle Works*, [1891] 1 Ch. 173; 60 L.J.Ch. 114; 63 L.T. 628; 39 W.R. 235; sub nom. *Re Pyle Works, Ltd., McIlwraith and Gatto's Case*, 2 Meg. 327; 10 Digest (Repl.) 756, 4916.

*Page v. International Agency and Industrial Trust, Ltd.* (1893), 62 L.J.Ch. 610; 68 L.T. 435; 3 R. 596; 10 Digest (Repl.) 766, 4980.

*Slade v. Rigg* (1843), 3 Hare, 35; 67 E.R. 286; 35 Digest 494, 2250.

*Wayne v. Hanham* (1851), 9 Hare, 62; 20 L.J.Ch. 530; 17 L.T.O.S. 151; 15 Jur. 506; 68 E.R. 415; 35 Digest 573, 3048.

**Summons** taken out by the plaintiff, Nicholas Sadler, the holder of a first series of debentures of Idlesleigh Mansions, Ltd., asking that an account might be taken of what was due to him for principal, interest, and costs on his debentures, and that the debentures might be enforced by foreclosure or sale, and for possession and a receiver and manager. The defendants were the holders of a second series of debentures of the same company which was also joined as a defendant.

The first series of debentures were dated Nov. 23, 1891, and were of £500 each carrying interest at 6 per cent. By the debentures the company agreed to pay on Nov. 9, 1896, to the registered holder for the time being thereof the sum of £500 with interest at the rate of 6 per cent. quarterly. The company thereby charged

with such payments all its property, funds, assets and effects, whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to an existing mortgage of £12,000 or any mortgage or mortgages created in substitution thereof. The debentures were issued subject to the conditions endorsed thereon. Condition 1 provided:

"This debenture is one of a series of debentures each for securing the principal sum of £500 issued, or about to be issued, by the company. The debentures of this issue are to rank *pari passu*, subject as within mentioned, as a charge on the property hereby charged, and so that such charge shall be a floating security."

By condition 4:

"The principal money hereby secured shall immediately become payable if (a) the company makes default for a period of one calendar month in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal money, or (b) an order is made or an effective resolution is passed for the winding-up of the company."

Interest was paid to the plaintiff until Feb. 9, 1893, but then ceased. On Nov. 8, 1893, at an extraordinary general meeting of the company a resolution was passed to wind up the company voluntarily and a liquidator was appointed. The company's property was subject to a mortgage to secure £12,000 and interest dated Nov. 23, 1891.

*Bramwell Davis* for the plaintiff.  
*Eve* for the defendants.

*Cur. adv. vult.*

March 14, 1894. **KEKEWICH, J.**, read the following judgment. The plurality of debentures may in some cases be a matter of importance, as where one debenture holder purports to sue on behalf of all, or other debenture holders are before the court but do not support the plaintiff; but in this case it is a matter of absolute indifference. All the debentures of the first series are held by the plaintiff, and his position is the same as if a single debenture had been issued to him. Again, these are the debentures of a company incorporated under the Companies Act, 1862, and I am not troubled with the authority of *Blaker v. Herts. and Essex Waterworks Co.* (1), or the principle laid down in *Gardner v. London, Chatham, and Dover Rail. Co.* (2), on which that authority proceeded.

The plaintiff's debentures are in a form now familiar, that of a floating charge, and the amount thereby secured is expressed to be charged by the company,

"on all its property, funds, assets, and effects whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the mortgage for £12,000 now existing, or any mortgage or mortgages created in substitution thereof."

The floating character of the charge ceased according to condition 4 endorsed on the debenture on Dec. 8, 1893, when an extraordinary resolution was passed for the voluntary winding-up of the company. On that day the subject of the charge, which until then had been necessarily uncertain was ascertained, and from that time the debentures have been a charge on all the property then existing of the company. I am told that this includes leasehold property, which is the most valuable asset, but, apparently, there are some other items, and I am not at liberty to consider the case on the hypothesis, which would remove many difficulties, of the leaseholds being the only property available. Can the remedy by foreclosure be properly applied, not only to them, but also to such other items as exist, including in particular the uncalled capital? That is the question for my decision.



A What is foreclosure? The answer shall be given in the words of SIR GEORGE JESSEL in *Carter v. Wake* (3) (4 Ch.D. at p. 606):

"The principle on which the court acts . . . is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference is gone by non-payment of the debt the court simply removes the stop it has itself put on."

B That is in strictness applicable only to a legal mortgage in the full sense of the term; that is to say, it is not in strictness applicable even to an equitable mortgage such as a puisne mortgage necessarily is, though expressed in legal form, and it is still less applicable to a mortgage by way of charge. Nevertheless, the court has got over the difficulty where the charge has been made by deposit of title deeds, and notwithstanding the absence of an accompanying memorandum with or without an agreement to execute a legal mortgage. In these cases, using again the words of SIR GEORGE JESSEL in *Carter v. Wake* (3) (*ibid.*)

C "The court treats the deposit of title deeds as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

D It is sometimes stated that the remedy of an equitable mortgagee is foreclosure rather than sale, but no distinct authority to this effect was cited to me, and I have found none. There are many authorities that the remedy of an equitable mortgagee by deposit of title deeds is foreclosure: see for instance *James v. James* (4); but they do not extend beyond that particular class. There are, however, cases in which equitable mortgagees of property, other than land, have been held entitled to foreclosure. In one case cited in this connection (*General Credit and Discount Co. v. Glegg* (5)) BACON, V.-C., granted the remedy to lenders on the security of railway shares and debenture stock, but it appears from the report that such shares and stock had been transferred into their names, with power of sale, and, therefore, the authority is scarcely apposite. There are, however, more pointed instances to be found in SETON ON DECREES (5th Edn.), vol. 2. In these cases the judgment of foreclosure has been perfected by direction not always actually given, but necessarily consequent, that the mortgagor do make over the mortgaged property to the mortgagee, so as to complete his irredeemable title by legal ownership. One of these (p. 1661) deals with a mortgage of a pension, which was apparently assigned to the mortgagees, but in such a form that an irrevocable power of attorney to enable them to receive it was required in event of foreclosure, so that something was necessary to complete the legal title, and the mortgage was in substance equitable. Another (p. 1659) deals with consols in court, and the notes (pp. 1662 et seq.) mention further cases on the same lines. In an earlier note (p. 1583) it is stated, and I believe with accuracy, that the remedy of a judgment creditor has been, after some conflict of authority, settled to be foreclosure, and not sale.

H Is there any good reason why these authorities should not be extended, as apparently they never yet have been, to such a charge as is now under consideration? If there be any adverse principle of law or rule of practice, the question must be answered in the negative, but otherwise it is well to remember that foreclosure is not likely to be asked, and is still less likely to be asked successfully, except where the security is deficient, and that in that class of cases the remedy is peculiarly appropriate, and has a value for the mortgagee which can attach to none other. Of course I accept the judgment of SIR GEORGE JESSEL in *Carter v. Wake* (3), that foreclosure is not applicable to a pledge of chattels. Perhaps that rule may be found to be inconsistent with some decrees of the court, but without pursuing that inquiry, suffice it to say that there is no pledge here. *Tennant v. Trenchard* (6) was cited, but the judgment in that case seems to me to proceed entirely on the special character of the contract, which made it improper for the

trustee to destroy the trust property. But these are the assets of the company, and some of them cannot be realised except by the exercise of powers which are vested by statute and articles of association in the company itself as represented by directors or liquidator. To take the most extreme and most embarrassing item, how can there be foreclosure of uncalled capital? It cannot be vested in the mortgagee, and the extreme limit of his right must be to have the power of calling on the directors or liquidator to exercise their power on his behalf. This sounds somewhat anomalous. But it must be remembered that a mortgage of uncalled capital can be effectually made, and the decisions sanctioning that would be idle if they did not also sanction the realisation of the mortgaged security. If it be urged that such realisation must be by sale, the answer is that a sale is open to the same objection. Supposing the uncalled capital to be sold and assigned to a purchaser, how is he in any better position than the mortgagee; or rather, why should he be entitled to means of enjoying his property to which the mortgagee is not? A  
B  
C

I am reluctant to make an order, the like of which has never been made before. On the other hand, I ought not to hesitate to apply a principle to facts, to which it seems to me to be properly applicable, merely because it has never yet been so applied. I fail to see why an agreement to execute an assignment on default of payment of the money lent should be implied on a deposit of title deeds or certificates of shares (which I think has been done, though I have not been able to put my hand on the case) and not to other property capable as between borrower and lender, and according to the reasonable experience of mankind, of being made the subject of similar contracts. There is this further to be considered. Even if this debenture does not give, one might easily be framed so as to give, a right of foreclosure as regards the leasehold property comprised in it, and it would be difficult, I think, to recognise the right of foreclosure as regards part, and to deny it as regards other part of the property comprised in the same debenture. I will not pursue this thought further now, but, if ever it has to be pursued, the doctrine of the court as regards opening foreclosure must be borne in mind. D  
E

On the whole, I am of opinion that there should be an order declaring the plaintiff entitled to foreclosure, and directing the company at the plaintiff's request to assign to him the several items of property comprised in the debentures. This will require some little consideration in detail. The order must follow as far as possible the usual form, and provide for redemption by any parties entitled to redeem. Counsel for holders of debentures of the second series, intimated that, though not now prepared to apply for a sale, he might wish to do so at a later stage. This, it seems, he can do without special reservation of liberty to apply for that purpose, which therefore I do not propose to insert, but he must take warning that his application can only be granted if at all upon fair terms to the plaintiff on the principle of *Woolley v. Colman* (7). F  
G

Solicitors: *Hughes, Hooker, Buttanshaw & Thunder; Poole & Robinson.*

[Reported by F. E. ADY, Esq., Barrister-at-Law.]

A

## R v. INSTAN

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Hawkins, Cave, Day and Henn Collins, JJ.), February 4, 1893]

B

[Reported [1893] 1 Q.B. 450; 62 L.J.M.C. 86; 68 L.J. 420; 57 J.P. 282; 41 W.R. 368; 9 T.L.R. 248; 37 Sol. Jo. 251; 17 Cox, C.C. 602; 5 R. 248]

*Criminal Law—Manslaughter—Neglect—Sick and helpless person—Failure to supply food and medicine—Acceleration of death.*

C

A woman who lived alone with her sick and helpless aunt failed to provide her with food, or sufficient food, and medical attendance, and this neglect accelerated the aunt's death.

**Held:** the moral obligation to assist a sick and helpless person imposed a legal duty not to withhold such assistance, and the prisoner was properly convicted of manslaughter.

D

**Notes.** Applied: *R. v. Pittwood* (1902), 19 T.L.R. 37. Approved: *R. v. Gibbins and Proctor* (1918), 82 J.P. 287.

As to manslaughter by neglect, see 10 HALSBURY'S LAWS (3rd Edn.) 715 et seq.; and for cases see 15 DIGEST (Repl.) 957-960.

Cases referred to in argument:

E

*R. v. Shepherd* (1862), Le. & Ca. 147; 31 L.J.M.C. 102; 5 L.T. 687; 26 J.P. 101; 8 Jur.N.S. 418; 10 W.R. 297; 9 COX, C.C. 123, C.C.R.; 15 Digest (Repl.) 960, 9289.

*R. v. Friend* (1802), Russ. & Ry. 20; 15 Digest (Repl.) 1033, 10,150.

*R. v. Marriott* (1838), 8 C. & P. 425; 15 Digest (Repl.) 959, 9280.

**Case Stated** for the opinion of the court by DAY, J.

F

The prisoner, who was unmarried and had no means of her own, was indicted for feloniously killing her aunt, Ann Hunt, a woman of seventy-three years of age, with whom she lived and by whom she was maintained. Until a few weeks before her death the deceased was healthy and able to take care of herself. No one lived in the house with or attended to the deceased but the prisoner. Shortly before her death the deceased suffered from gangrene in the leg which rendered her, during the last ten days of her life, unable to attend to herself or to move about, or to do anything to procure assistance. No one but the prisoner had previously to the death of the deceased any knowledge of her condition. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople. She did not give nor procure any medical or nursing attendance to or for the deceased, nor did she give notice to any neighbour of her condition or wants, although she had abundant opportunity and occasion to do so. On Aug. 2, while the prisoner was still living in the house, the body of the deceased was found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previously to the death. All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbours, of whom there were several living in adjoining houses, or to the relations of the deceased, who lived within a few miles.

I

The learned judge left it to the jury to say, having regard to the circumstances under which the prisoner lived with the deceased, and continued to occupy the house and to take the food provided at the expense of the deceased while the deceased was, as she knew, unable to procure necessities for herself, whether the prisoner did or did not impliedly undertake with the deceased either to wait upon



and attend to her herself or to communicate to persons outside the house the knowledge of her helpless condition, and directed the jury that, if they came to the conclusion that the prisoner did so undertake, and that the death of the deceased was substantially accelerated by her failure to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her. The jury found the prisoner guilty. A

*Vachell* for the prisoner. B

The Crown was not represented.

Feb. 4, 1893. **LORD COLERIDGE, C.J.**, read the following judgment of the court: It is not correct to say that every moral obligation is a legal duty, but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than the taking upon oneself the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the deceased so much of that food, which was taken into the house for both, and paid for by the deceased, as was necessary to sustain her life. The deceased could not get it for herself; she could only get it through the prisoner. It was the prisoner's clear duty at common law to supply it to the deceased, and that duty she did not perform. Nor is there any question that the prisoner's failure to discharge her legal duty, if it did not directly cause, at any rate accelerated, the death of the deceased. There is no case directly on the point, but it would have been a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation, and a legal duty founded upon it; a duty wilfully disregarded, and the death was at least accelerated, if not caused, by the non-performance of the legal duty. I am therefore of opinion, and I express the opinion of all my brethren, that the evidence confirmed all that it was necessary to show, and that the conviction was proper and must be upheld. C  
D  
E

*Conviction affirmed.* F

Solicitors: *Ivens & Morton*, Kidderminster.

[*Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*]

## R. v. TYRRELL

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Mathew, Grantham, Lawrance and Henn Collins, JJ.), December 16, 1893]

[Reported [1894] 1 Q.B. 710; 63 L.J.M.C. 58; 70 L.T. 41; 42 W.R. 255; 10 T.L.R. 167; 38 Sol. Jo. 130; 17 Cox, C.C. 716; 10 R. 82]

*Criminal Law—Carnal knowledge—Girl between thirteen and sixteen years—Aiding, abetting, soliciting, and inciting—Liability to conviction—Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), s. 5 (1).*

A girl under the age of sixteen cannot be convicted of aiding and abetting the commission upon herself of the offence of unlawful carnal knowledge, nor can she be convicted of soliciting and inciting the commission of such an offence upon her.

**Notes.** The Criminal Law Amendment Act, 1885, was repealed by the Sexual Offences Act, 1956, s. 51, Sched. 4. Section 6 of the 1956 Act re-enacts s. 5 of the 1885 Act in substantially the same form for the purposes of this case. For the Sexual Offences Act, 1956, s. 6, see 36 HALSBURY'S STATUTES (2nd Edn.) 219.

As to aiding and abetting and incitement, see 10 HALSBURY'S LAWS (3rd Edn.) 297, 309; and as to the offence of carnal knowledge, see *ibid.*, pp. 751, 752; for cases see 14 DIGEST (Repl.) 87 et seq., and *ibid.* vol. 15, pp. 1018, 1019.

Cases referred to in argument:

*R. v. Whitchurch* (1890), 24 Q.B.D. 420; 59 L.J.M.C. 77; 62 L.T. 124; 54 J.P. 472; 6 T.L.R. 177; 16 Cox, C.C. 743, C.C.R.; 14 Digest (Repl.) 123, 859.

*R. v. Higgins* (1801), 2 East, 5; 102 E.R. 269; 14 Digest (Repl.) 119, 822.

**Case Stated** by Robert Malcolm Kerr, Esq., one of the Commissioners of the Central Criminal Court, for the consideration of the court.

On Sept. 15, 1893, Jane Tyrrell was arraigned before the Central Criminal Court, and pleaded Not Guilty to an indictment containing counts charging (i) that being a girl above the age of thirteen years and under the age of sixteen years she aided and abetted the commission upon herself of the offence of carnal knowledge, contrary to s. 5 of the Criminal Law Amendment Act, 1885; and (ii) that she solicited and incited the commission of such offence upon her. The evidence for the prosecution proved that the defendant, who was under the age of sixteen, aided and abetted and solicited and incited Thomas Froud to have unlawful carnal connection with her, for which offence the defendant was convicted. Counsel for the defence, in arrest of judgment, submitted that the indictment disclosed no offence in law. This objection was overruled, but at the request of the defendant's counsel, the following question was reserved for the opinion of the court: Whether it was an offence for a girl between thirteen years and sixteen years of age, to aid and abet a male person in the commission of the misdemeanour of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanour.

By s. 5 (1) of the Criminal Law Amendment Act, 1885:

"Any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years, and under the age of sixteen years . . . shall be guilty of a misdemeanour . . ."

*Clarke Hall* (with him *Campbell*) for the defendant.

*Dutton* for the Crown.

**LORD COLERIDGE, C.J.**—I believe that I am expressing the opinion of my learned brothers when I say that this conviction must be quashed. What was intended by the legislature in passing the Act of 1885 was to protect girls against themselves, and it cannot be said that an Act which says nothing at all about the

girl inciting or anything of that kind, and the whole object of which is to protect women against men, is to be construed so as to render a girl against whom an offence is committed equally liable with the man by whom the offence is committed. In my opinion this conviction cannot be sustained, and must therefore be quashed.

**MATHEW, J.**—I am of the same opinion. I fail to see how this argument on the construction of the statute can be supported. The consequences of upholding this conviction would, as has been pointed out in the course of the argument, be most serious, there being scarcely a section in the Act which would not, upon the construction sought to be put upon the Act, support a criminal prosecution against a girl. There is no trace anywhere in the Act of any intention on the part of the legislature to deal with the woman as a criminal, and I am of opinion that the Act does not create the offence alleged in the indictment.

**GRANTHAM, LAWRENCE** and **HENN COLLINS, JJ.**, concurred.

*Conviction quashed.*

Solicitor: *Morton Phillips.*

[Reported by **R. CUNNINGHAM GLEN, ESQ.**, Barrister-at-Law.]

## DOUGAL v. McCARTHY

[COURT OF APPEAL (Lord Esher, M.R., Lopes, and A. L. Smith, L.JJ.), April 22, 25, 1893]

[Reported [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402]

*Landlord and Tenant—Yearly tenancy—Holding over—Holding over on termination of yearly lease—No new terms agreed—Tenant holding over on terms of original lease.*

Where there has been a lease for one year, and the tenant afterwards remains in possession with the consent of the landlord, a new tenancy from year to year, upon the terms of the former lease, will be implied, if nothing has been said or done to rebut that implication.

**Notes.** Considered: *Re Leeds and Batley Breweries and Bradbury's Lease*, *Bradbury v. Grimble & Co., Ltd.*, [1920] All E.R. Rep. 270. Distinguished: *Swift v. Ambrose* (1931), 47 T.L.R. 594; *Meye v. Electric Transmission, Ltd.*, [1942] Ch. 290. Referred to: *Cole v. Kelly*, [1920] All E.R. Rep. 537; *Lowther v. Clifford*, [1926] All E.R. Rep. 290.

As to creation of a tenancy from year to year, see 23 HALSBURY'S LAWS (3rd Edn.) 510-516; and for cases see 31 DIGEST (Repl.) 58-61.

Case referred to:

(1) *Right d. Flower v. Darby and Bristow* (1786), 1 Term Rep. 159; 99 E.R. 1029; 31 Digest (Repl.) 58, 2149.

Also referred to in argument:

*Richardson v. Langridge* (1811), 4 Taunt. 128; 128 E.R. 277; 31 Digest (Repl.) 92, 1891.

*Bishop v. Howard* (1823), 2 B. & C. 100; 3 Dow. & Ry. K.B. 293; 1 L.J.O.S.K.B. 243; 107 E.R. 320; 31 Digest (Repl.) 54, 2110.



- A** *Doe d. Hollingsworth v. Stennett* (1799), 2 Esp. 717, N.P.; 31 Digest (Repl.) 35, 1917.  
*Waring v. King* (1841), 8 M. & W. 571; 11 L.J.Ex. 49; 151 E.R. 1166; 31 Digest (Repl.) 55, 2118.  
*Digby v. Atkinson* (1815), 4 Camp. 275, N.P.; 31 Digest (Repl.) 58, 2152.  
*Hyatt v. Griffiths* (1851), 17 Q.B. 505; 18 L.T.O.S. 74; 117 E.R. 1375; 31 Digest (Repl.) 59, 2158.
- B** *Doe d. Hull v. Wood* (1845), 14 M. & W. 682; 15 L.J.Ex. 41; 6 L.T.O.S. 102; 9 Jur. 1060; 153 E.R. 649; 31 Digest (Repl.) 49, 2082.  
*Braithwayte v. Hitchcock* (1842), 10 M. & W. 494; 152 E.R. 565; sub nom. *Braithwaite v. Hitchcock*, 12 L.J.Ex. 38; 6 Jur. 976; 30 Digest (Repl.) 413, 569.
- C** *Jones v. Shears* (1836), 4 Ad. & El. 832; 2 Har. & W. 43; 6 Nev. & M.K.B. 428; 5 L.J.K.B. 153; 111 E.R. 997; 31 Digest (Repl.) 53, 2105.  
*Oakley v. Monck* (1866), L.R. 1 Exch. 159; 4 H. & C. 251; 35 L.J.Ex. 87; 14 L.T. 20; 30 J.P. 180; 12 Jur.N.S. 213; 14 W.R. 406, Ex. Ch.; 31 Digest (Repl.) 58, 2147.

**D** **Appeal** by the plaintiff from a decision of HAWKINS, J., at the trial without a jury in Middlesex, dismissing an action by which he claimed to recover the sum of £70 for two quarters' rent of rooms on the first and third floors of No. 62, Strand, London, payable in advance, on Feb. 14 and May 14, 1892.

By an agreement in writing dated Feb. 16, 1891, between the plaintiff, of the one part, and the defendant and six other persons, directors of the National Press Association, Ltd., of the other part, it was agreed that the plaintiff should let the premises for one year commencing from Feb. 1, 1891, at a rent of £140 a year, payable quarterly in advance on Feb. 14, May 14, Aug. 14, and Nov. 14. This agreement was made also as a separate and personal agreement by each of the directors as tenants. All the rent due for the one year ending on Feb. 1, 1892, was paid. The tenants continued in possession of the premises after Feb. 1, 1892, until some time after May 14, and on Feb. 25, 1892, the plaintiff wrote to them as follows:

"Will you kindly send me a cheque for £35 for the quarter's rent due on the 14th."

To this letter no answer was given. On Mar. 24 the agent of the tenants wrote a letter to the plaintiff as follows:

"I am instructed by Mr. McCarthy (and the six other persons) to inform you that it is their intention to discontinue their present tenancy of the offices at 62, Strand, London, at present occupied by them for the purposes of this company, and I am directed to give you notice that they will not continue the same beyond the period required under their agreement. I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier. We shall of course give you every facility for the securing of a new tenant, and I am sure you will meet us in the same spirit."

The plaintiff's solicitors replied that the tenants were yearly tenants, and must determine their tenancy by notice to quit. After May 14, 1892, the plaintiff demanded payment of two quarters rent, and brought this action against Mr. McCarthy alone.

At the trial before HAWKINS, J., without a jury, the learned judge held that there was no yearly tenancy after Feb. 14, 1892, but only a tenancy at will. He offered to allow the plaintiff to amend by making a claim for use and occupation upon terms, but the plaintiff refused to amend, and the learned judge gave judgment for the defendant. The plaintiff appealed.

*J. E. Bankes* for the plaintiff.  
*McCarthy* for the defendant.

**LORD ESHER, M.R.**—I cannot agree with the decision of **HAWKINS, J.**, in this case. There is no real dispute as to the facts. The defendant **McCarthy** and some others became tenants to the plaintiff upon agreed terms for the term of one year, which was to expire on Feb. 1, 1892. The agreement for the tenancy contained terms as to the amount of, and the payment of, rent. This tenancy expired by effluxion of time, no notice to quit being necessary, on Feb. 1, 1892. The tenants did not then go out of possession; they remained in possession from Feb. 1, when the lease expired, for a considerable time afterwards. It is evident that the plaintiff consented to their remaining in possession as tenants: he treated them as tenants, and took the view that they were remaining in possession as tenants upon the terms of the old agreement, that is to say, as tenants for another year and from year to year upon the old terms. He demanded rent from them upon that footing. Up to Mar. 24 the tenants remained in possession and said nothing at all. Upon that day the letter was written upon which the defendant relies.

In my opinion, the doctrine laid down by **LORD MANSFIELD** in *Right d. Flower v. Darby and Bristow* (1) is correct. He says (1 Term Rep. at p. 162):

"If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract."

In this case there was the consent of the landlord; the tenant remained in possession, and the landlord consented to his remaining in possession. It was a question for the jury, therefore, whether both parties consented that the tenant should continue in possession after the expiration of the year. The mere fact of remaining in possession must be left to the jury as evidence, though the jury ought to come to the conclusion that there has been consent to remain as tenant. If the tenant makes a statement which is inconsistent with a consent by him to remain as tenant, then he does not agree to remain as tenant; or, if he expressly says that he will not continue to remain in possession as tenant, and tells his landlord to turn him out as best he can, then he does not agree to remain as tenant. If the tenant makes some other stipulation which is not consistent with the inference that he is remaining in possession as tenant upon the old terms, whether that will justify the jury in finding that such inference is done away with, I do not now determine. If, however, the jury find, in the words of **LORD MANSFIELD**, that by consent of both parties the tenant continues in possession, then the law implies a tacit renovation of the contract; that is, that a new tenancy from year to year has been created upon the old terms. In *Right d. Flower v. Darby* (1), **BULLER, J.**, says (1 Term Rep. at p. 163):

"The reason of it is, that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year."

If, therefore, there is the consent of both parties that a man shall continue in possession as tenant, and there is nothing to rebut the inference of law, then by inference of law there is a tenancy from year to year upon the old terms.

Is there in this case a consent to hold over and remain in possession as tenant? From the mere fact of holding over, the jury should infer that the tenant intended to remain in possession as tenant, and not as a mere trespasser. The tenant, however, goes further than that, for in the letter of Mar. 24 he says that he intends to "discontinue their present tenancy of the offices at present occupied by them." The tenancy for the first year was at an end, and, therefore, he must have been tenant in the succeeding year, when speaking of his "present tenancy." That tenancy in the succeeding year was a tenancy from year to year to be determined by the proper notice to quit, and by that letter such notice was given. The letter does not allege any right to give up possession on May 14, but asks to do so as a

**A** favour. That letter is not consistent with a tenancy at will, and clearly admits that there was a tenancy. I am of opinion that the proper inference from the facts is that the tenant consented to remain in possession as tenant, and did not attempt to impose any terms inconsistent with the old terms, and that he, therefore, became tenant from year to year on the terms of the old agreement so far as they were not inconsistent with a tenancy from year to year. I think that the agreement to pay the rent in advance was not inconsistent with a yearly tenancy, and that it therefore became a term of the new tenancy. The plaintiff is consequently entitled to recover the two quarters' rent in advance, and the judgment of **HAWKINS, J.**, cannot be upheld. The appeal must be allowed with costs.

**LOPES, L.J.**—In *Right d. Flower v. Darby* (1) **LORD MANSFIELD** says (1 Term Rep. at p. 162):

“If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract.”

**D** I will take the case of a tenant holding over after the expiration of one year's tenancy where nothing is said either by the landlord or the tenant. In such a case the proper direction to a jury is this: there has been a holding over and nothing said as to terms, and therefore there follows from the holding over an inference of law that a tenancy has been created upon the terms of the lease which has expired so far as they are not inconsistent with a tenancy from year to year, and the jury ought to so find.

**E** I will take the case where after the expiration of the term certain letters or communications pass between the landlord and tenant. When such a case arises the question for the jury is, whether the consent of both parties has been such as to create a yearly tenancy. Has there been consent in this case? It is clear that the landlord did consent. If the case stopped there, and there was no answer on the part of the tenant, it is clear that the inference of law would arise. If the letter of Mar. 24 can be construed so as to negative that inference of law, there is, I think, a question for the jury. Does that letter negative the implication which, I think, had arisen? I think that it does not, but that it rather confirms it; it admits that a new tenancy has been created, and asks for indulgence. The tenancy which had so been created could only be ended by a notice to quit at the end of the year. I think, therefore, that **HAWKINS, J.**, has placed a wrong construction upon that letter, and has drawn a wrong inference from the facts. The appeal must be allowed, and judgment entered for the plaintiff.

**A. L. SMITH, L.J.**—**HAWKINS, J.**, held that there was no evidence against the defendant that he was tenant from year to year upon the terms of the old agreement. What is the law applicable to a case where a tenancy has expired and the tenant holds over and the landlord allows him to do so? The law is that, if it is shown that the landlord consented to the tenant holding over, and that the tenant agreed to hold over, there is an inference of law that the tenant holds over upon the old terms as tenant from year to year.

**H** What happened in this case at the expiration of the lease for one year? There was a direct statement from the landlord to the tenant that he consented to the tenant holding over. Speaking for myself, I say that, where the tenant does nothing but hold over with notice that the landlord is demanding rent from him as tenant upon the terms of the old agreement, the proper inference is that the tenant assents to hold over on the terms of the old agreement by remaining in possession and saying nothing at all. What is the result? As **LORD MANSFIELD** said, there is a tenancy from year to year on the terms of the old agreement, so far as they are consistent with a yearly tenancy. Something might be said or done by the tenant to negative that inference, but there is nothing of that kind here; the letter of



Mar. 24 confirms the inference that the tenant agreed to remain as tenant. The judgment, therefore, of HAWKINS, J., ought to be reversed, and this appeal allowed. A

*Appeal allowed.*

Solicitors: *Burch, Whitehead & Davidson; Kime & Hammond.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.] B

## THE P. CALAND (Owners) v. GLAMORGAN STEAMSHIP CO., LTD. THE P. CALAND C

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Ashbourne and Lord Morris), December 8, 9, 12, 1892, February 27, 1893]

[Reported [1893] A.C. 207; 62 L.J.P. 41; 68 L.T. 469;  
9 T.L.R. 309; 7 Asp.M.L.C. 317; 1 R. 138] D

*Shipping—Collision—Ship not under command—Test—Ship proceeding through water—Liability to get out of way.*

*House of Lords—Jurisdiction—Review of finding of fact—Concurrent findings of courts below—Findings must be clearly erroneous—Balance of probabilities insufficient.*

A vessel which was “not under command” within art. 5 of the Regulations for Preventing Collisions at Sea, 1884, **held** nevertheless to be justified in making way through the water, for instance, to avoid some imminent danger or if she were very near to some port. A vessel is “not under command” if she cannot get out of the way; if she can be steered and can be stopped and can go ahead she is under command, unless, perhaps, she can only do so after great and unusual delay or if there is an imminent danger of a breakdown of her propelling power. E

The House of Lords will only reverse the concurrent finding of two courts below upon a question of fact if it is clearly or tolerably clearly demonstrated that such finding is erroneous, not upon a balance of probabilities. F

**Notes.** The present regulations applying to collisions are the Collision Regulations, 1948. G

Applied: *McIntyre v. McGavin*, [1893] A.C. 268. Explained: *Montgomerie v. Wallace-James*, [1904] A.C. 73. Considered: *Hatfield (Owners) v. Glasgow (Owners)*, *The Glasgow*, [1914-15] All E.R.Rep. 1137; *H.M.S. Drake*, [1919] P. 362; *Mendip Range (Owners) v. Radcliffe*, [1921] All E.R.Rep. 224. Followed: *Willmot v. Anglo-American Oil Co.* (1923), 67 Sol. Jo. 678. Referred to: *The Calyx* (1910), 27 T.L.R. 166; *Johnston v. O'Neill*, [1911] A.C. 552; *Cooper v. General Accident, Fire and Life Insurance* (1923), 92 L.J.P.C. 168; *Re A Solicitor*, [1945] 1 All E.R. 445. H

As to vessels not under command, see 35 HALSBURY'S LAWS (3rd Edn.) 611-612; as to the jurisdiction of the House of Lords as to questions of fact, see 9 HALSBURY'S LAWS (3rd Edn.) 363; and for cases see 41 DIGEST 718 et seq., and 36 DIGEST (Repl.) 364 et seq. I

Case referred to:

(1) *Gray v. Turnbull* (1870), L.R. 2 H.L.Sc. 53.

Also referred to in argument:

*The Fanny M. Carvill (Owners) v. The Peru (Owners)* (1875), 13 App. Cas. 455, n.; 44 L.J.Adm. 34; 32 L.T. 646; 24 W.R. 62; 2 Asp.M.L.C. 565; 41 Digest 716, 5536.

- A** *Eastern Steamship Co. v. Smith, The Duke of Buccleuch*, [1891] A.C. 310; 65 L.T. 422; 7 Asp.M.L.C. 68, H.L.; 41 Digest 797, 6576.
- Baker v. Theodore H. Rand (Owners), The Theodore H. Rand* (1887), 12 App. Cas. 247; 56 L.J.P. 65; 56 L.T. 343; 35 W.R. 781; 6 Asp.M.L.C. 122, H.L.; 41 Digest 797, 6582.
- B** *The Hibernia* (1874), 31 L.T. 805; 24 W.R. 60; 2 Asp.M.L.C. 454, P.C.; 41 Digest 797, 6580.
- The Ripon* (1885), 10 P.D. 65; 54 L.J.P. 56; 52 L.T. 438; 33 W.R. 659; 5 Asp.M.L.C. 365; 41 Digest 797, 6574.
- The Dunelm* (1884), 9 P.D. 164; 53 L.J.P. 81; 51 L.T. 214; 32 W.R. 970; 5 Asp.M.L.C. 304, C.A.; 41 Digest 720, 5576.

**C** **Appeal** by the owners of the *P. Caland* from a decision of the Court of Appeal (LORD ESHER, M.R., FRY and LOPES, L.J.J., with nautical assessors), reported [1892] P. 191, affirming a decision of JEUNE, J., assisted by Trinity Masters, reported [1891] P. 313, by which he found the steamship *P. Caland* alone to blame for a collision which took place in the Straits of Dover on April 15, 1891, between that vessel and the steamship *Glamorgan*.

**D** The collision occurred between the steamships *P. Caland* and the *Glamorgan*, in the Straits of Dover, on the night of April 15, 1891. On that night the *P. Caland*, a screw-steamship of 2,584 tons gross, propelled by engines of 350-horse power nominal, was in the Straits of Dover, laden with a general cargo on a voyage from New York to Amsterdam. At about 8 p.m. she had passed the Varne Light, at a speed of about eleven knots. At about 8.15 p.m. a nut in the slide of the valve of the high-pressure cylinder worked loose, but, in consequence of the ship's proximity to the Varne Shoal, she could not be stopped to allow the engineer to repair the accident. Accordingly the slides of the high and low pressure cylinders were worked by hand, and an average speed of three to four knots was obtained. It was also stated by witnesses that there was reasonable apprehension that the engines might stop at any moment, and that it took longer time than usual to reverse them. In these circumstances the starboard anchor of the *P. Caland* was got ready to let go if necessary, her masthead light was taken down, and three red lights indicating a vessel "not under command" were substituted for it. There was a conflict of evidence as to what was done with the side lights, the owners of the *Glamorgan* alleging that the red light (the material light) was not exhibited till just before the collision, the owners of the *P. Caland* alleging that they had never been taken in, and were kept exhibited to indicate that the *P. Caland* was under way.

**E** In these circumstances the steamship *Glamorgan*, while on a voyage from Antwerp to Cardiff, was in the English Channel, when those on board of her sighted an unsteady white light on board the *P. Caland*, and shortly after the three red lights were seen on the starboard bow, when the white light disappeared. The *Glamorgan's* engines were thereupon eased to slow, and the helm was starboarded.

**H** But when the three red lights bore about five points on the *Glamorgan's* starboard bow, the red light of the *P. Caland* came into view, and she was seen to be coming ahead so as to cause risk of collision. The helm of the *Glamorgan* was at once hard-a-starboarded, and her engines were reversed at full speed, but the *P. Caland* came on and with her stem struck the starboard side of the *Glamorgan*, causing her to sink.

**I** By the Regulations for Preventing Collisions at Sea, 1884 :

"Art. 5 (a). A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles; . . . (c) The ships referred to in

this article, when not making any way through the water shall not carry the side lights, but when making way shall carry them. (d) The lights . . . required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way . . .”

*Sir Richard Webster, Q.C., Raikes and Pritchard* for the appellants, the owners of the *P. Caland*.

*Sir Walter Phillimore and Holman* for the respondents.

Their Lordships took time for consideration.

Feb. 27, 1893. The following opinions by LORD HERSCHELL and LORD WATSON were read.

**LORD HERSCHELL, L.C.**—This action was brought in respect of a collision which happened in the Straits of Dover between the steamships *P. Caland* and *Glamorgan*, by which the latter vessel was lost. The most important question raised depends upon the construction of the fifth article of the Collision Regulations. At the time of the collision the *P. Caland* had at her masthead, in place of the regulation white light, three red lights, indicating that she was not under command. The question is whether she was justified in exhibiting these lights. At the time when she thus exhibited them she was proceeding at a speed which must be taken to have been not less than four to five knots. Both the courts below have held that she cannot properly be said to have been not under command at the time in question.

Construing the article as a whole, it is certain that a vessel may not be under command within the meaning of those words as used in the article, and yet be making way through the water; for it is provided that, if making way through the water, a vessel shall carry the ordinary side-lights as well as the three red lights at her masthead. At the same time I desire to say that I do not think that because the rule contemplates that a vessel not under command may be justified in making way through the water, it therefore implies that a vessel in so disabled a condition is always justified in continuing so to make way. This must depend upon the circumstances, and in my opinion a vessel which cannot show that they were such as to justify her in taking this course, must be held to blame for not acting in a reasonable and seamanlike manner, even though she had complied with the statutory regulations. It never was intended that under all circumstances a vessel should be entitled to proceed at a considerable speed through the water, throwing upon other vessels, out of whose way she would ordinarily have had to get, the obligation to get out of her way, though the circumstances might no doubt be such as to justify that course. For example, it might be necessary, in order to avoid some danger which would otherwise be imminent. Or, again, if she were very near port, it might be reasonable and prudent to pursue her course.

With these preliminary observations I proceed to consider the construction of art. 5. In the Court of Appeal the Master of the Rolls expressed himself as follows:

“Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part, her not being under command so that she cannot keep out of the way—taking those two together, it seems to me that the real construction of the rules is that she must, through some accident, be in such a position that she is not under command in this sense, that she could not keep out of the way of another vessel coming near her. But if she can be steered, and can be stopped, and can go ahead—which is necessary in order that she may be steered—then she is under command, and the apprehension of her being likely (however well founded) to be in a few moments out of command does not show that she is out of command at the moment spoken of”;

and the other learned judges concurred in this view.



**A** I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that, if an occasion for doing so should arise, she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and  
**B** unusual delay. I am not satisfied that in either of these cases she might not be properly described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point, as it has no application to the present case; but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the court below.

**C** Again, suppose that, owing to a breakdown of the machinery, its ceasing to be capable of propelling the vessel is reasonably regarded as imminent and likely to occur at any moment, I am not satisfied that in this case a vessel may not properly be said, within the meaning of the rule, not to be under command. If she were to allow other vessels to continue their course and to manœuvre on the assumption that she would get out of their way, she might prove unable to take any action at the very time when a change of direction on her part could alone enable  
**D** her to keep out of the way and thus avert disaster. It would certainly tend to safety if under such circumstances the rule required her to warn other vessels to keep out of her way, and I do not think any violence need be done to the language used to construe it as extending to such a case.

Even assuming, however, that the article will bear this construction, I am of opinion that the *P. Caland* cannot be said to have been out of command at the  
**E** time of the collision. She was able to proceed at a rate which I think cannot have been less than four to five knots an hour. This speed was maintained, after the damage to the machinery presented itself, and the three red lights were exhibited for half to three-quarters of an hour before the collision. The two vessels were a considerable time locked together, and after they were separated the *P. Caland* steamed for half an hour before she became stationary. Even then it would appear  
**F** that the machinery did not come to a standstill on account of its damaged condition, but was intentionally stopped for the purpose of repairing the damage. Under these circumstances, I cannot hold that, owing to the disablement of the machinery, the risk of its ceasing to work was so imminent that the vessel can be said not to have been under command within the meaning of the rule. I think, therefore, that she was not justified in exhibiting the three red lights at her masthead, and  
**G** must be held to have infringed the Collision Regulations. And it appears to me impossible to say that this breach of the regulations was in no way connected with the collision which occurred, and cannot be said to have at all contributed to it. In my opinion, therefore, it has been rightly held that the *P. Caland* was to blame.

**H** The question whether the *Glamorgan* was also to blame is, to my mind, one of much greater difficulty, and depends upon whether she saw, or ought to have seen, the *P. Caland's* side-lights. If she did, or could have seen the red side-light of that vessel, it is not disputed that she must be held to blame. The question is, did she or could she have seen that side-light? The evidence of those on board the *Glamorgan* is distinct that this light was not visible; whilst the evidence of those on board the *P. Caland* that the light was exhibited is equally unequivocal.  
**I** So far as regards their demeanour the learned judge before whom the action was tried saw no reason to give credence to one set of witnesses rather than to the other. Weighing all the probabilities, I confess I should myself be disposed to come to the conclusion that the red side-light was visible, and that those on board the *Glamorgan* having observed the three mast-head red lights, and being aware that they were approaching a disabled vessel, took it for granted that she was at a standstill, and their observations being directed, under this impression, to the mast-head lights, they failed to observe the red side-light, and accordingly bore down upon the *P. Caland* under the impression that she was stationary. But both

the courts below have on the balance of probability thought it more probable that the red side-light was not visible than that, being visible, it was either unseen or disregarded by the *Glamorgan*. A

I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the courts below. I can lay hold of nothing as turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the courts below that this House would be justified in reversing the judgment appealed from. B C

**LORD WATSON.**—Whether the *P. Caland* did or did not, from the time when she came in sight of the *Glamorgan* until the vessels collided, show her side-lights, as well as the three red lights specified in art. 5 of the Collision Regulations, which she admittedly carried, appears to me to be the cardinal question in this appeal. If the *P. Caland* did not, during that period of time, exhibit side-lights, then she was clearly to blame; because, while she was making about four knots an hour through the water, her three red lights conveyed a distinct intimation to approaching vessels that she was stationary. On that hypothesis, I can find no ground for imputing either breach of the regulations or negligent seamanship to the *Glamorgan*. On the assumption that the *P. Caland's* side-lights were visible, I think it would be impossible to acquit the *Glamorgan* of fault. In that case the evidence does not disclose any circumstance which could justify her in steering her course across the bows of the *P. Caland*. D E

It would, however, be necessary to consider whether the latter vessel was in a condition which warranted her being navigated under signals appropriate to a steamship not under command, and yet making way through the water; and, if not, whether her use of regulation signals, which she was not entitled to assume, was in any degree contributory to the collision. There might possibly be circumstances in which such a misuse of signals might tend to mislead another vessel, and so aid in producing a collision between them. But my present impression is, that the natural effect of a steamship under command masquerading as a ship not under command would be to induce other vessels to give her a wider berth than they would have allowed if she had carried her ordinary foremast light. These questions do not arise for decision in the view which I take upon the main question of fact. But I take this opportunity of stating my entire concurrence in the observations which have been made by the Lord Chancellor as to the construction of art. 5 of the Regulations. F G

Whether the *P. Caland* did or did not properly exhibit her side-lights is a pure question of fact, mainly depending for its solution upon probabilities which are more or less matter of speculation. The President of the Admiralty Division came to the conclusion that her side-lights were not shown; and his view of the fact was accepted by all the judges of the Court of Appeal. In my opinion, it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous. And the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability. I may add that the principle was recognised as governing the decisions of this House in the Scottish appeal of *Gray v. Turnbull* (1). That case commenced, not in the Sheriff Court, but in the Court of Session, so that their Lordships were not debarred by any statute from reviewing H I

**A** findings of fact as well as of law. If the question had come before me as judge of first instance, I am not prepared to affirm that I would have answered it in the same way as the learned judges of the Probate Division and the Court of Appeal. But this I can say, that, having done my best to weigh the probabilities of the case, I am unable to resist the impression that, whatever may be my own leaning, their decision is as likely to be right as a finding the other way. In these circumstances, I cannot disregard the rule of the House, and I therefore assent to the judgment proposed by the Lord Chancellor.

**LORD ASHBOURNE.**—I concur. I am myself strongly disposed to think that the red side-light was visible. But it is a question of inference and balance of probabilities, and I quite fail to find any clear fact on which I would be justified in arriving at a conclusion different from that of the courts below. It is manifest that your Lordships would be most reluctant to differ from such a conclusion without clear and strong reasons.

**LORD MORRIS.**—I concur.

**D** Solicitors: *Pritchard & Sons; Thomas Cooper & Co.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

**E**

**F**

## R. v. DYSON

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Hawkins, Mathew, Cave and Grantham, JJ.), April 21, 1894]

[Reported [1894] 2 Q.B. 176; 63 L.J.M.C. 124; 70 L.T. 877;  
58 J.P. 528; 42 W.R. 526; 10 T.L.R. 432; 38 Sol. Jo. 419;  
18 Cox, C.C. 1; 1 Mans. 283; 10 R. 230]

**G**

*Bankruptcy—Offence—Undischarged bankrupt obtaining credit without disclosure of bankruptcy—Intent to defraud not ingredient of offence—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 31.*

**H**

An intent to defraud is not an essential ingredient of the offence under s. 31 of the Bankruptcy Act, 1883 (now s. 155 (a) of the Bankruptcy Act, 1914) of obtaining credit to the extent of £20 or upwards without disclosing the fact of being an undischarged bankrupt.

**I**

**Notes.** Section 31 of the Bankruptcy Act, 1883, has been repealed and replaced by s. 155 (a) of the Bankruptcy Act, 1914. Section 155 (a) substitutes the sum of £10 for the sum of £20 laid down in s. 31 of the earlier Act, and contains no reference to the Debtors Act, 1869.

As to offences by debtors and other persons, see 2 HALSBURY'S LAWS (3rd Edn.) 626 et seq.; and for cases see 5 DIGEST (Repl.) 1119 et seq. For s. 155 (a) of the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 437.

Case referred to:

(1) *R. v. Peters* (1886), 16 Q.B.D. 636; 55 L.J.M.C. 173; 54 L.T. 545; 50 J.P. 631; 34 W.R. 399; 2 T.L.R. 359; 16 Cox, C.C. 36, C.C.R.; 5 Digest (Repl.) 1129, 9098.



**Case Stated** by West Riding of Yorkshire Quarter Sessions.

Alfred Dyson, an undischarged bankrupt, was indicted on two counts alleging that he obtained credit for amounts in excess of £20 whilst not disclosing that he was an undischarged bankrupt contrary to the Bankruptcy Act, 1883, s. 31. It was proved at the trial that the defendant had been adjudged bankrupt under the Bankruptcy Act, 1883, on April 30, 1885, at Huddersfield County Court, and that he had never obtained his discharge from such bankruptcy. It was also proved that the defendant had since his bankruptcy carried on business in Huddersfield, and that on May 16, 1892, and June 3, 1892, respectively, goods to the value of £103 13s. 11d. and £163 2s. 6d. respectively were purchased upon credit by the defendant from Isaac Naylor, at Bradford, and that such goods were on the said dates respectively delivered to the defendant upon credit, and kept by him without any payment being made therefor. It was also proved that the defendant did not on either of the said dates, or at any other time, inform the said Isaac Naylor that he, the defendant, was an undischarged bankrupt, and that the said Isaac Naylor was not at the time the said credits or either of them were obtained aware of such fact.

It was proposed by counsel for the defendant to put questions to the witnesses called on behalf of the prosecution with a view to show that, although the above-mentioned credits had been obtained by the defendant without any information having been given that he was an undischarged bankrupt, and without the said Isaac Naylor having been aware of the fact, such credits had been so obtained by the defendant without intent to defraud, and it was submitted on behalf of the defendant that, if he could show that although the said credits were obtained as aforesaid they were so obtained without intent to defraud, he was entitled to an acquittal. It was objected by counsel on behalf of the prosecution that an intent to defraud was not an ingredient of the offence charged under s. 31 of the Bankruptcy Act, 1883, and that an offence under the said section was proved upon proof that the defendant had obtained credit to the extent of £20 or upwards without giving the information specified in the section. The court was of opinion that for the purpose of determining whether or not an offence under the section had been committed it was immaterial to consider whether the credit had been obtained with or without an intent to defraud, and ruled that questions proposed to be put only with a view to show an absence of an intent to defraud could not be put, and directed the jury upon the question of fraudulent intent in accordance with the above opinion. At the request of counsel for the defendant the court consented to reserve this Case for the consideration of Her Majesty's judges in the event of the jury convicting the defendant. The jury convicted the defendant upon the two counts of the indictment, and he was sentenced by the court to six weeks imprisonment without hard labour. The question for the consideration of the court was whether the above-mentioned ruling and direction was right or wrong.

By s. 31 of the Bankruptcy Act, 1883 :

"Where an undischarged bankrupt under this Act obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour . . ."

*Harper* for the defendant.

*Lowenthal* for the prosecution.

**LORD COLERIDGE, C.J.**—This is an indictment under s. 31 of the Bankruptcy Act, 1883, a statute which says that where an undischarged bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869. The jury have found that this man did obtain credit to the extent of £103 13s. 11d. and £163 2s. 6d. from a person with whom he dealt without informing such person that he was an undischarged bankrupt. It appears

A to me, therefore, that the whole purpose of the statute was fulfilled, and that everything that was necessary was proved before the quarter sessions. The only distinction between this and *R. v. Peters* (1) is, that there it was a cash transaction, whereas here it was not a cash transaction. That case clearly lays down the rule that it is immaterial whether it was a cash transaction or not. The words of the statute are "obtaining credit," and it is found that here the prisoner obtained  
B goods on credit. The prisoner having obtained credit without giving the required information, I cannot entertain a doubt but that whether or not he had any intent to defraud he had done all that was necessary to bring him within the section, and that the conviction was perfectly right. It follows that the conviction must be sustained.

C **HAWKINS, J.**—I am of the same opinion, and cannot entertain any doubt on the subject when I read the words of the section, namely, that

"where an undischarged bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour."

D The reference at the end of the section to the Debtors Act, 1869, to which our attention has been drawn by the learned counsel for the prisoner, is relied upon as showing that an intent to defraud is an essential element in the offence created by the section. I have looked at that Act, however, and am very much struck by the fact that all the offences there are offences in the creation of which the words "with intent to defraud" are used, or the words "unless the jury is satisfied that  
E he had no intent to defraud." It can hardly therefore have been intended by the legislature in the present Act to have made this an offence only where there is an intent to defraud. I am quite satisfied that, if it had been so intended, we should have found those words in the statute. I am therefore of opinion that this conviction must be affirmed.

F **MATHEW, J.**—An ingenious attempt is made in this case to incorporate s. 18 of the Debtors Act, 1869, into s. 31 of the Bankruptcy Act, 1883, and to read the latter section as if there were found at the end of the section these words: "And when any person is charged with any such offence, any evidence tending to show that the act charged was not committed with a guilty intent shall be taken into consideration." Is that the usual way to interpret statutes? It seems to me  
G clear that it is not, because when you look at s. 18 of the earlier Act it is clear that it applies to proceedings before justices, and that its object is to enlarge the discretion of the justices under the general discretion conferred upon them by the Vexatious Indictments Act, 1859 [repealed]. In my opinion this conviction should be affirmed.

H **CAYE, J.**—I am of the same opinion. The question of intent does not arise in this case.

**GRANTHAM, J.**—I am of the same opinion.

*Conviction affirmed.*

I Solicitors: Solicitor to the Treasury; Van Sandau & Co., for Milnes & Marshall, of Huddersfield.

[Reported by B. CUNNINGHAM GLEN, Esq., Barrister-at-Law.]

## SOMERSET v. WADE

[QUEEN'S BENCH DIVISION (Mathew and Henn Collins, JJ.), February 16, 1894]

[Reported [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452;  
58 J.P. 231; 42 W.R. 399; 10 T.L.R. 313; 10 R. 105]

*Licensing—Offence—Permitting drunkenness—Need to prove knowledge by the licensee—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 13.*

The word "permits" in s. 13 of the Licensing Act, 1872 [now s. 136 (1) of the Licensing Act, 1953] means "knowingly permits," and in the absence of knowledge, connivance or carelessness on the part of the landlord of a public house or his agent, a landlord cannot be convicted of an offence under that section of permitting drunkenness on licensed premises.

*Somerset v. Hart* (1) (1884), 12 Q.B.D. 360, applied.

*Bond v. Evans* (2) (1888), 21 Q.B.D. 249, explained.

**Notes.** For the Licensing Act, 1872, s. 13, see now the Licensing Act, 1953, s. 136 (1). This case, however, should now be considered with regard to s. 136 (2) of the 1953 Act, which provides that the licensee must prove that he and his employees took all reasonable steps for preventing drunkenness in the premises. For ss. 14, 16 and 17 of the 1872 Act, see now ss. 139, 142 and 141 of the 1953 Act.

Referred to: *Ferguson v. Weaving*, [1951] 1 All E.R. 412; *James & Sons, Ltd. v. Smee, Green v. Burnett*, [1954] 3 All E.R. 273.

As to drunkenness on licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 680 et seq.; and for cases see 30 DIGEST (Repl.) 94 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142 et seq.

Cases referred to:

- (1) *Somerset v. Hart* (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 32 W.R. 594, D.C.; 25 Digest (Repl.) 461, 348.
- (2) *Bond v. Evans* (1888), 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411; 52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461, D.C.; 25 Digest (Repl.) 461, 349.
- (3) *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 30 Digest (Repl.) 96, 719.

Also referred to in argument:

*R. v. Bishop* (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox, C.C. 404, C.C.R.; 14 Digest (Repl.) 37, 77.

**Case Stated** by Chelmsford justices.

The appellant, a police inspector, laid an information against the respondent, the landlord of licensed premises in Chelmsford, for "permitting drunkenness" on the premises, contrary to the provisions of s. 13 of the Licensing Act, 1872. A police constable found a woman, R. L., drinking beer on the respondent's premises, with which she had been served by him or his barman. The constable had previously ordered the same R. L. out of other licensed premises on the ground that she was drunk, and after some conversation with her he ordered her off the respondent's premises. In the constable's opinion she was then drunk. The respondent gave evidence that there was nothing in R. L.'s appearance to show that she was drunk, and that he was quite unaware at the time that she was in that condition. The constable's evidence did not contradict the respondent's evidence as to the appearance of the woman. The justices believed the constable's statement that the woman was in fact drunk, but they also believed the respondent's evidence that he was ignorant of that fact when he served R. L. with drink, and they dismissed the information on that ground, but stated a Case at the request



**A** of the appellant. By the Licensing Act, 1872, s. 13 :

"If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable, etc."

*C. E. Jones* for the appellant.

**B** The respondent did not appear.

**MATHEW, J.**—In *Somerset v. Hart* (1) the court held that absence of knowledge, connivance, or carelessness on the part of the landlord of a public-house or his agent, upon an information against such landlord for "suffering gaming" upon his licensed premises, was a good ground upon which magistrates might dismiss such an information. "Suffering" is not to my mind distinguishable from "permitting." A licensee does not permit drunkenness if he does not know of its existence, or connives at it, or wilfully shuts his eyes to it. The magistrates here find on the evidence before them that the respondent did not "permit drunkenness." I see no ground for saying that there was no evidence to support such a finding. As to the wording of s. 14, which enacts that, if a publican "knowingly permits" **D** his premises to be the resort of prostitutes, he shall be guilty of an offence, the distinction is there inserted for an obvious reason. He must be shown to know the application of that term to the persons there resorting; otherwise there would be no offence in serving the women with beer, or permitting their presence on the premises.

I think this appeal must be dismissed on the ground that there was evidence **E** justifying the magistrates in dismissing the information, and I may add that I should probably have come to a similar conclusion on the evidence as stated to us.

**HENN COLLINS, J.**—I am of the same opinion. The terms of the earlier part of the section would, even without the decision of *Somerset v. Hart* (1) imply that, without knowledge, or connivance, or privity between the landlord and the agent, **I** who might have known of the offence being committed, there could be no "permitting." If it were otherwise the appellant's counsel must contend that, even if in the temporary absence of the landlord a quarrel took place in a public-house, the fact of such a quarrel having occurred would be sufficient to secure a conviction for "permitting quarrelsome or riotous conduct to take place on the premises." That cannot be so.

**G** In *Somerset v. Hart* (1) LORD COLERIDGE says that "suffering" without "knowing" is impossible. It is said that this decision was questioned in *Bond v. Evans* (2). It is obvious that, in this latter case, *Somerset v. Hart* (1) was not questioned on the point whether "suffering" would be possible without knowledge on the part of the landlord, but it was merely pointed out that, in *Somerset v. Hart* (1) there was something peculiar in the circumstances in that the servant **H** there was not in charge of the premises, and there had been no delegation of duty by the landlord. So understood *Bond v. Evans* (2) is not in conflict with the decision in *Somerset v. Hart* (1) at all. The court in *Bond v. Evans* (2) simply say that, given no delegation of authority to the person who commits or assists in the commission of the offences, they agree that there can be no "suffering" such an offence to be committed without "knowing" of its commission, and therefore it is equally **I** an authority with *Somerset v. Hart* (1) that a person cannot "permit" or "suffer" the commission of any of these licensing offences in s. 13 without "knowing" of their commission.

In *Cundy v. Le Cocq* (3), which turned on the last words of s. 13, the offence of "selling" intoxicating liquors to a drunken person was complete, because of the express words in the section defining the offence. But "permitting" in the other sections must imply "knowingly suffering." In the two other sections dealing with "permitting the premises to be the resort of prostitutes," or of "harbouring police constables when on duty," the appellant would have to contend that, without

the word "knowingly," as there inserted, the offence might be committed without knowing the character of the woman, or the fact of the man being a constable. That would clearly involve great hardship, and therefore "knowingly" is inserted, as applicable to the character of the persons designated, and not as extending the sense of "permitting" or "suffering."

*Appeal dismissed.*

Solicitor: *William Tanner.*

[*Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.*]

## DOWSE AND OTHERS *v.* GORTON AND OTHERS

[HOUSE OF LORDS (Lord Herschell, Lord Macnaghten and Lord Hannen), March 12, May 12, 1891]

[Reported [1891] A.C. 190; 60 L.J.Ch. 745; 64 L.T. 809;  
40 W.R. 17]

*Executor—Powers—Power to carry on business of testator—Business carried on—Right to indemnity—Extent—Rights of creditors of estate.*

Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business as either proper or improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper, they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon, and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the creditors must be satisfied first.

With regard to the extent of the executors' right to indemnity, there is no authority for limiting it to that part of the testator's estate which has been acquired by the executors since the death of the testator. They are entitled to a general indemnity out of the estate as against all persons claiming under the will. If a testator's business is carried on after his death in accordance with the provisions of the will, the indemnity of the executors is only limited by the amount of the assets which the testator has authorised the executors to employ in the business. If the business is carried on by the executors at the instance of the creditors without regard to the terms of the will, the executors have the ordinary rights of agents against their principals. But there is no reason in any case for limiting the indemnity to that portion of the assets which has come into existence or changed its form since the testator's death. An unsecured creditor has no right against a specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate.

**Notes.** Applied: *Re Owen, Frisby, Dyke & Co. v. Owen* (1892), ante p. 917; *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600. Distinguished: *Re Millard, Ex parte Yates* (1895), 72 L.T. 823. Considered: *Re Raybould, Raybould v. Turner*,

- A** [1900] 1 Ch. 199; *Jennings v. Mather*, [1901] 1 K.B. 108; *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; *Re Salmen, Salmen v. Bernstein* (1912), 107 L.T. 108; *Re East, London County and Westminster Banking Co. v. East* (1914), 111 L.T. 101. Distinguished: *Re Oxley, Hornby v. Oxley*, [1914-15] All E.R.Rep. 505. Referred to: *Re Bach, Walker v. Bach, Lloyds Bank v. Bach*, [1892] W.N. 108; *Re Kidd, Kidd v. Kidd* (1894), 42 W.R. 571; *Nutter v. Holland* (1894), 71 L.T. 508; *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Reynolds, Ex parte White*, [1915] 2 K.B. 186; *Re Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321.

As to the powers of an executor to carry on a business of the testator and his rights to indemnity, see 16 HALSBURY'S LAWS (3rd Edn.) 366-369; and for cases see 24 DIGEST (Repl.) 664, 665.

- C** Case referred to:

(1) *Abbott v. Parfitt* (1871), L.R. 6 Q.B. 346; 40 L.J.Q.B. 115; 24 L.T. 469; 19 W.R. 718; 24 DIGEST (Repl.) 778, 7668.

**Appeal** by the plaintiffs in the action from a decision of the Court of Appeal (COTTON, LINDLEY and LOPES, L.JJ.), reported 40 Ch.D. 536, varying an order made by the Vice-Chancellor of the County Palatine of Lancaster in an action brought by the appellants, the executors of Luke Turner, deceased, for the administration of the estate of John Gorton, deceased, of which estate the appellants were creditors.

*Sir Horace Davey, Q.C.*, and *Hopkinson* for the appellants.

*Cozens-Hardy, Q.C.*, *S. Hall, Q.C.*, and *Staffurth* for the respondents.

*Maberley* for Gorton's executors.

- E** Their Lordships took time for consideration.

May 12, 1891. The following opinions were read.

**LORD HERSCHELL.**—This is an administration action brought by the appellants, who are the executors of one Luke Turner, to have the estate of John Gorton, of whom they were creditors, administered. The defendants, Ann Elizabeth Gorton and James William Gorton, are the executors of John Gorton. The other defendants are persons who have become creditors of these executors in respect of goods supplied for the purpose of the businesses of the testator which were carried on by them after his death. The appellants, by an originating motion, claimed to have it determined whether the assets of the businesses carried on by the testator at the time of his death, and then due and owing in respect of the said businesses, or belonging to the same, ought to be applied in payment of the debts due by the testator at the time of his death in priority to any claim of his executors for indemnity.

The debt due to the appellants arose under an agreement made between their testator, Luke Turner, and the testator in the administration suit on Sept. 25, 1874.

- H** By this agreement Luke Turner agreed to sell his business of an elastic braid manufacturer to John Gorton and William Shemilt (who parted with his share to John Gorton and afterwards died), and his interest in the mill, machinery, and other effects, for £19,487, of which £2,000 was to be paid on the agreement being signed, and the balance, with interest, by annual instalments of £1,500 each, on every Sept. 26 until the whole of the purchase money was paid. In case of default
- I** in payment of either principal or interest the whole balance of purchase money was to become due immediately. The £2,000 was paid on the execution of the agreement, and John Gorton paid the annual instalments of £1,500 down to Sept. 26, 1880. But, at the time of his death, on Dec. 30, 1883, three of the annual instalments remained unpaid, although the interest on the unpaid purchase money had been paid to Sept. 12 previous. Besides the business purchased from Luke Turner, Gorton also carried on the business of a yarn polisher upon other premises. By his will he gave uncontrolled discretion to his executors to carry on his businesses for such periods as they should think desirable.



They accordingly continued the same until September, 1887, when they stopped payment and called the creditors together. Prior to this date they had paid all the debts of the testator, except the debt due to the appellants, and £4,000 owing to Mrs. Caldwell, a sister of the testator, but they had incurred other liabilities in respect of the carrying on of the testator's business. Shortly after the death of John Gorton the solicitor then acting for his executors produced to the appellants' solicitor a statement purporting to show the assets of the businesses as exceeding the liabilities. But in this statement the mill, works, and machinery were valued at their cost price. James William Gorton, one of the respondents, states in his affidavit that very shortly after Gorton's death, he saw the appellants Barrs and Hasleham, and explained to them the general position of the estate. He adds:

"I also pointed out to them that I and my co-executrix were then carrying on the said businesses as carried on by the testator at the time of his death, and they informed me that we had better continue to do so."

In an affidavit in answer to this statement, Barrs and Hasleham deny that they ever informed J. W. Gorton that he and his co-executrix had better continue the businesses of the testator. They say:

"The said J. W. Gorton represented to us that, if the Anvil Street business [the business sold by Turner] was continued, the interest on the debt owing by the said John Gorton at his decease to the executors of the said Luke Turner would be paid as usual, and that he hoped after a time to pay instalments to reduce the debt, and we made some suggestions as to reducing the expenses of the businesses, and he promised to reduce the expenditure accordingly."

Balance-sheets of the Anvil Street business for the years 1884, 1885, and 1886 were regularly submitted to the appellants in accordance with the provisions of the agreement of 1874, and an account of the stock-taking of the other business was also regularly furnished to them.

The Court of Appeal, by the judgment now under the consideration of your Lordships, made a declaration in these terms:

"That the executors of John Gorton are entitled, as against and in priority to the persons to whom he was indebted at the time of his death, to be indemnified out of such part of the estate as has been acquired by the executors since his death against debts or liabilities incurred by the said executors in carrying on his businesses to the full amount of such debts and liabilities, or, if the said executors be in default to the said John Gorton's estate, then to the full amount of such debts and liabilities after deducting the amount in respect of which the executors are so in default."

The right of the executors to an indemnity out of such part of the estate as has been acquired by them since the death of the testator, and the limitation of their indemnity to that part of the estate, appears to have been based, in the judgment of LINDLEY, L.J., upon the view that this after-acquired property was not an asset of the testator against which his creditors could have execution. He says:

"Now what is the right of the creditor of the deceased? He is a creditor, he has no equitable rights as distinguished from legal rights against the assets of the deceased. His right is to sue the executor at law, and get a judgment at law, *de bonis testatoris*, and under that to seize, under a *fi. fa.*, the assets of the deceased in the hands of the executors at the time of his death: but he has nothing to do with future-acquired property."

COTTON, L.J., I gather, took the same view, though he does not state the proposition definitely. After saying that the executors could not, so far as regards the original assets of the testator, claim an indemnity as against the creditors of the testator, he continues:

"Where there are liabilities undertaken under the direction of the testator's

- A** will, they are entitled to an indemnity in respect of them out of the assets acquired by the executors after the testator's death. The creditors of the testator say, there are assets of our testator, and he could not, by declaring a trust for you to perform, give you any right of indemnity as against the property. That is not correct."
- B** With all deference, I am unable to concur in the distinction drawn between the assets which come into the hands of the executors at the time of the death of the testator, and property which, in their capacity of executors, they afterwards acquire. *Abbott v. Parfitt* (1) appears to be a distinct authority that property so acquired is as much assets of the testator as that which was in his possession at the time of his death. It was there held that the price of goods sold to the defendant by the executors who had carried on their testator's business, no part of the materials of which had belonged to the testator, would, when recovered, be assets of the testator, and I do not think it is possible, on principle, to maintain the suggested distinction.
- C** Could an executor, having property in his hands to which his only title was that of executor, plead to an action by a creditor *plene administravit*? It seems to me that such a question admits of but one answer. I could, indeed, understand the view that, if the executors had come under liability in acquiring any assets in their hands, they would be entitled to an indemnity against such liability out of that asset before it could be made available for creditors. But this is not the effect of the declaration made by the court below. All after-acquired property, however acquired, even though it has been purchased with the proceeds of the sale of a part of the estate possessed by the testator at the time of his death, is treated as one subject-matter out of which the executors are entitled to their indemnity. I cannot think that the executors can be so entitled, if they cannot make good their claim to an indemnity generally against the whole of the testator's estate. I think it is clear that, where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will. But I take it to be equally clear that they could not, by reason only of such authority, maintain this right against the creditors of the testator. The executors would no doubt be entitled to carry on a business of the testator for such reasonable time as was necessary to enable them to sell his business property as a going concern, and would, even as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing. But, in the present case, the businesses were carried on for a period of three years; and it is obvious that this was not done merely for the purpose of effecting a sale. I agree with the contention of the learned counsel for the appellants that the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate.
- D** But, when all the circumstances of the case are considered, I do not think this is the true view of them. It is necessary to look somewhat closely at the position of affairs at the time of the testator's death, and at what took place afterwards. Three of the annual instalments of £1,500 each were then overdue; and, although a balance-sheet was exhibited to the appellants which disclosed a large surplus it was on the face of it shown to be arrived at by valuing all the business premises and machinery at cost price. Any business man must have known, not only that this would be wholly different from the breaking-up price, but that it did not afford any real measure of what could be obtained if the sale were of a going concern, to say nothing of the uncertainty of finding a purchaser for such a subject. I do not place any reliance upon the allegation, denied by the appellants, that they informed one of the executors that the business had better be continued. But, before referring to the statement which they admit they made, I must bring to your Lordships' notice some of the provisions in the agreement under which the debt was incurred. I have not hitherto adverted to them, but they appear to me
- E**
- F**
- G**
- H**
- I**

to have a material bearing upon the question to be determined. Luke Turner, when he sold his business and premises to the testator Gorton, was not content to rely merely on his general credit for payment of the purchase money. He required the purchasers to agree that they, and the survivor of them, would, until the whole of the purchase money was paid, carry on the business to the best of their skill and ability. The business was to be carried on subject to the supervision and inspection of William Barrs and John Wilkinson. The purchasers also undertook to keep proper books and accounts, and to furnish from time to time balance-sheets showing the state of the business; and the inspectors or other persons appointed by Luke Turner, or his executors, were authorised, if not satisfied with the carrying on of the business, or if it was discontinued, to enter upon the premises and dispossess the purchasers, and to take possession of the engine, machinery, and other effects assigned.

I agree with the Vice-Chancellor of the County Palatine that the agreement to carry on the business applied only to the purchasers, and did not extend to the executors of the survivor of them. Nevertheless, I think the provisions I have just recited throw considerable light upon the action of the appellants. They knew that, if the businesses were sold, there was a risk that the estate would not realise enough to pay their debts, and they knew too what powers they possessed as regards the Anvil Street business under the agreement of September, 1874. They were aware also that the testator's businesses were being carried on; they received from time to time balance-sheets showing the result of the trading; and they admit that, at the interview with J. W. Gorton shortly after Turner's death, he told them that, if the Anvil Street business were continued, he hoped after a time to pay instalments to reduce the debt, and that they made some suggestions as to reducing the expenses of the businesses. Under the circumstances, I think the proper inference is that the businesses were not merely continued for the benefit of those interested under the will, but that they were also carried on with the assent of the representatives of Luke Turner for the purpose of securing the payment of the debt due to them. If this be the true view, it can hardly be contested that the executors of Gorton are, as against the appellants, entitled to be indemnified out of their testator's estate against the liabilities which they have properly incurred. The declaration of the court below gives them a more limited remedy. The difference is probably in the present case not a practical one. But the declaration as it stands directs an unnecessary, and what may be an expensive, inquiry. I think, therefore, that the order ought to be varied by omitting the limitation upon the indemnity and the consequent inquiry.

Since writing my opinion I have had the advantage of reading the opinion prepared by LORD MACNAGHTEN. It is not necessary to determine in the present case what would be the proper order if the appellants had alleged and established that the businesses of the testator had, as against them, been carried on without lawful authority; but I am disposed to concur in the view which he has expressed as to the right of a creditor under such circumstances. I understood it to be stated at the Bar that it had been agreed that the costs of both parties should come out of the estate. This appears to have been the course taken in the litigation hitherto, and I do not advise your Lordships to interfere with the existing order as to costs. But I do not think your Lordships ought by your judgment to relieve the appellants in a suit of this nature from paying the costs of the appeal. The respondent executors should have the difference (if any) in the costs, taxed as between party and party, and taxed as between solicitor and client, out of the estate.

**LORD MACNAGHTEN**, after stating the facts: On the question as presented to your Lordships I have not been able to find so much assistance as I could have wished either in the judgment of the learned Vice-Chancellor, or in that of the Court of Appeal. The Vice-Chancellor treats the question before him as arising on a direct claim by the creditors of the businesses carried on by the executors to be paid out of the estate *pari passu* with the persons who were creditors of the



**A** testator at the time of his death. And the whole of his judgment from first to last is devoted to combating that claim and some very insufficient reasons on which it seems to have been founded. I need hardly remind your Lordships that no such claim was made at your Lordships' Bar. The persons with whom the executors dealt, who are still unpaid, did not claim to be creditors of the testator. Besides their right against the executors personally, the only right they asserted

**B** was the right to stand in the place of the executors against the assets, and to have the benefit of such indemnity as the executors might prove to be entitled to. I turn to the judgment of the Court of Appeal, but that is more disappointing still. The lords justices assume as a matter not open to controversy the only point which was really in contest here. Without explanation or comment, they take it for granted that the testator's businesses were continued for the benefit of his creditors.

**C** Under these circumstances it is, I think, necessary to begin at the beginning, and to examine the case made by the appellants, who were, as I have said, plaintiffs in the action and applicants on the summons. Your Lordships are familiar with the distinction between the usual administration order and an order founded on breach of trust, a distinction in principle which is not affected by the recent changes in practice and procedure. Keeping this distinction in view, I would

**D** ask your Lordships to observe that neither in the pleadings nor in the evidence are the executors charged with wilful default or any other misconduct. The writ in the action asks for the usual order, coupled with the appointment of a receiver and manager of the testator's businesses, and it asks for nothing more. No statement of claim was delivered, and no affidavits were filed in the action. The summons, on which alone affidavits were filed, also asks for the usual order. And

**E** indeed I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or injuries pointing to wilful default. Moreover, it will be observed that both the writ and the summons treat the two businesses in their then actual state and condition as part of the testator's estate. So far the case is perfectly consistent, and the proper relief is asked. I now come to what is, in my opinion,

**F** a startling inconsistency. Asking for the usual order, the summons also asks for a declaration that the executors are not entitled as against the testator's creditors to any indemnity in respect of liabilities incurred in carrying on the testator's businesses. In other words, the appellants adopt the action of the executors, and take the fruits of their exertions in specie, and at the same time, and for the very same action, they claim to visit them with the loss of all their expenditure,

**G** and that without raising any issue which the executors could meet—without any finding that the assets have been wasted—without even any allegation of misconduct.

On what ground, I ask, is this claim based? Is it merely on the ground that the executors have traded without authority and beyond the period required for getting in the assets? Then the claim must hold good whether the trading brings a profit or a loss. The result of the trading is immaterial. Is it on the ground

**H** that the trading has diminished the assets? There is no finding on the subject. There is no admission to that effect. There is no inquiry to ascertain the result of the trading. The penalty invoked is not intended to be measured by reference to loss or diminution of assets. There is not, I believe, a shadow of authority for such a claim as that put forward by the appellants. It is contrary to all principle.

**I** Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business as either proper or improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued, and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the

business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which those assets happen to be at the moment when they choose to intervene, and at the same time refuse the executors indemnity in respect of liabilities incurred in carrying on the business.

It is, I think, important to place this matter on its true footing; otherwise there may be great confusion in the administration of estates. This appeal is an illustration of the expense and delay which may be occasioned in a simple case by the disregard of elementary principles. Whether the testator's businesses were or were not continued properly, whether there has or has not been a dealing with the assets of which the creditors might have complained, the order which the appellants seek to restore is, I think, one which cannot stand. The appeal therefore, in my opinion, must fail.

[His Lordship referred to the evidence, and said that he could not doubt that the proper conclusion was that the testator's businesses were carried on by the executors under the power contained in the will, with the sanction of the appellants, for the benefit of the estate and in the interest of the creditors as well as in the interest of the beneficiaries, and, further, that the executors could not have been charged as on an admission, and continued:] One word as to the extent of the executors' indemnity. The order under appeal limits it to that part of the testator's estate which is described in the order as having been "acquired by the executors since the death of the testator." I am not aware of any authority for splitting the assets in that way. If a testator's business is carried on after his death in accordance with the provisions of the will, which, I think, is the true view in this case, the indemnity of the executors is only limited by the amount of the assets which the testator has authorised the executors to employ in the business. If the business is carried on by the executors at the instance of the creditors without regard to the terms of the will, the executors, I suppose, have the ordinary rights of agents against their principals. But I can see no reason in any case for limiting the indemnity to that portion of the assets which may have come into existence or changed its form since the testator's death. An unsecured creditor has no right against any specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate. His right is to see that the executors get in the estate and apply it in due course in payment of debts, and he may sue in equity, as the appellants have done, to enforce that right. It appears to me, therefore, that the order of the Court of Appeal should be varied by omitting the words which limit the indemnity of the executors and the inquiry consequential on that limitation.

**LORD HANNEN.**—I have had the advantage of reading the opinions which have just been delivered by my noble and learned friends who have preceded me, and I concur in the opinion that the judgment of the Court of Appeal, with the modifications suggested, should be affirmed.

*Order accordingly.*

Solicitors: *Rowcliffe, Rawle & Co.*, for *W. D. Welsh & Sons*, Manchester; *Rowley, Page & Rowley*; *Horne & Birkett*, for *Thomas Chorlton*, Manchester.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

A

## Re VINCE. Ex parte BAXTER

[QUEEN'S BENCH DIVISION (Vaughan Williams and Henn Collins, JJ.), February 15, 1892]

B

[Reported [1892] 1 Q.B. 587; 61 L.J.Q.B. 217; 66 L.T. 234;  
9 Morr. 222; 40 W.R. 428]

[COURT OF APPEAL (Lord Esher, M.R., Bowen and A. L. Smith, L.JJ.), June 24, 1892]

[Reported [1892] 2 Q.B. 478; 61 L.J.Q.B. 836; 67 L.T. 70;  
9 Morr. 228; 41 W.R. 138; 36 Sol. Jo. 610]

C

*Bankruptcy—Loan to trader—Interest varying with profits—Interest varying downwards from fixed rate—Contract too vague to be enforced—Bankruptcy of borrower—Right of lender to prove—Partnership Law Amendment Act, 1865 (28 & 29 Vict., c. 86), s. 1, s. 5.*

D

By the Partnership Law Amendment Act, 1865, s. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits . . . shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such." By s. 5: "In the event of any such trader . . . being adjudged bankrupt, the lender . . . shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

E

A loan was made to a trader at a fixed rate of interest payable half-yearly, but on the further terms that if, by reason of the deficiency of the profits, any portion of the half-yearly payments of interest could not be made, then an allowance was to be made to the trader in respect of the same in a fair and reasonable manner.

F

**Held** by the Divisional Court: under this agreement, the rate of interest was to vary with the profits within the meaning of ss. 1 and 5 of the Act of 1865, and, therefore, the lender's right to prove in the trader's bankruptcy must be postponed until the other creditors had been paid in full.

G

**Semble:** the Act applied wherever the rate of interest varied with the profits, whether such variation was to be upward or downward from a fixed standard rate.

H

**Held** by the Court of Appeal: the provision as to making an allowance in respect of the interest was so vague that it did not guide the court with any certainty to the mode of calculating the "due allowance", and, therefore, the whole agreement was void; as there was then no contract to receive a rate of interest varying with the profits, the lender could prove for the balance of the loan in the ordinary way and his rights were not postponed.

I

**Notes.** The Partnership Law Amendment Act, 1865, was repealed by the Partnership Act, 1890 (17 HALSBURY'S STATUTES (2nd Edn.) 579), s. 1 and s. 5 of the Act of 1865 being replaced in substantially the same terms by s. 2 (3) (d) and s. 3 of the Act of 1890.

Referred to: *Re Hildesheim, Ex parte Trustee*, [1893] 2 Q.B. 357; *H. C. & J. G. Ouston v. G. Scammell & Nephew, Ltd.*, [1940] 1 All E.R. 59; *Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822.

As to proof of debts in bankruptcy where there have been loans made for business purposes, see 2 HALSBURY'S LAWS (3rd Edn.) 494 et seq.; and for cases see 4 DIGEST (Repl.) 522 et seq.



Case referred to :

- (1) *Pearce v. Watts* (1875), L.R. 20 Eq. 492; 44 L.J.Ch. 492; 23 W.R. 771; 17 Digest (Repl.) 368, 1743.

Also referred to in argument :

- Re Tew, Ex parte Mills* (1873), 8 Ch. App. 569; 28 L.T. 606; 21 W.R. 557, L.J.; 4 Digest (Repl.) 524, 4571.

**Appeal** from the decision of the county court judge of Norwich reversing the decision of the trustee in bankruptcy of John Vince and admitting Dudley Baxter to prove for the sum of £2,399 18s. 3d. on an equality with all the other creditors of the debtor.

The loan, for which Baxter sought to prove against Vince's estate, had been made by him to Vince under the terms of an agreement, dated Oct. 28, 1889, and made between Baxter and Vince, which provided :

"An agreement made and entered into Oct. 28, 1889, between John Vince, of East Dereham, in the county of Norfolk, merchant, for himself, his heirs, executors, administrators, and assigns, of the one part, and Dudley Baxter, of Atherstone, in the county of Warwick, solicitor, for himself, his heirs, executors, administrators, and assigns, of the other part. Whereas, by a recent audit of the books of account of the trade and business of the said John Vince, there appears, according to the statement thereof signed by the said John Vince, that there is now due to him the said John Vince for credits £4,252 18s. 5d., and for liabilities owing by the said John Vince £2,698 6s. 9d. which he hereby agrees to discharge within three months, and there are no other debts or incumbrances in any way affecting the same, as the said John Vince doth hereby declare, which is hereby agreed shall be the basis of the proposal hereinafter made. And whereas the said John Vince has accordingly requested the said Dudley Baxter to lend and advance him the sum of £4,500 on his depositing with him the said Dudley Baxter the deeds and writings relating to a freehold house and premises at Dereham aforesaid called Beech Hurst, and freehold granaries there now owned by and in the occupation of the said John Vince, and also a policy of £200 in the Guardian Life Office, and of £100 in the Clerical and Medical Life Office, in part security for the same, which said sum the said Dudley Baxter has agreed to advance upon the terms and in the matter herein-after appearing. It is witnessed that, for the consideration aforesaid, and in consideration of the sum of £4,500 sterling to the said John Vince paid by the said Dudley Baxter, the receipt whereof the said John Vince doth hereby acknowledge, it is hereby mutually agreed by and between the said John Vince and the said Dudley Baxter, that the said John Vince shall and will discharge all his said debts within the time aforesaid, and that the said Dudley Baxter shall not call in any portion of the said sum of £4,500, or the said John Vince pay in any portion of the same for a term of ten years from the date hereof, but that the said John Vince shall and will punctually pay interest on the same to the said Dudley Baxter in the meantime by two regular half-yearly payments on April 28 and Oct. 28 in each year of £462 10s. for every half-year during the said term, and that if any interest shall not be so paid for one calendar month, then that the said principal sum of £4,500 may then be called in; and that in case the said John Vince should be unable to pay unto the said Dudley Baxter any portion of the half-yearly payments upon any part of the said sum of £4,500 by reason of the deficiency of the profits of the said John Vince, then and upon every such occasion a due allowance shall be made by the said Dudley Baxter to the said John Vince in respect of the same in a fair reasonable manner, and that the said John Vince for that purpose shall and will from time to time keep proper books of account relating to the said business and all transactions whatsoever, and send and transmit to the said Dudley Baxter a full and correct statement in writing of all matters and things whatsoever which in any way concern his said business, and which may have taken place during that time,

A which shall be audited by a professional accountant. Provided, nevertheless, and it is hereby agreed and declared by and between the said parties, that the said Dudley Baxter shall not thereby be considered in any way as a partner of the said John Vince. As witness, etc."

B A sum of £461 10s. had been paid by Vince as interest on the loan, when on Jan. 20 a receiving order was made against Vince, and he was adjudicated bankrupt. In May a proof was put in against the bankrupt's estate by Baxter for the sum of £2,399 18s. 3d., being the balance due to him on the loan made by him to the bankrupt. On June 17, the proof was rejected by the trustee under the provisions of s. 5 of the Partnership Law Amendment Act, 1865, for all purposes except for the purpose of receiving a dividend after all the other creditors had been paid in full, on the ground that

C "the advance was made by way of loan to a person engaged or about to engage in business, on a contract in writing with that person that the lender should receive a rate of interest varying with the profits."

D The county court judge reversed the decision of the trustee, and admitted Baxter to prove on an equality with all the other creditors. The trustee appealed.

*Muir Mackenzie* for the trustee.

*Cooper Willis, Q.C.*, and *Eversley* for the creditor Baxter.

E **VAUGHAN WILLIAMS, J.**—I am of opinion that the appeal must be allowed, that the learned county court judge was wrong in the conclusion at which he arrived, and that the contention of the respondent cannot be upheld. I think that the Partnership Law Amendment Act, 1865, applies where the rate of interest varies with the profits, whether it be upward or only downward from a fixed rate of interest mentioned in the agreement. I do not say that it is impossible an agreement might not be so framed that there might be a variation of interest downwards and yet not be within the Act, but to be outside the Act an agreement must be so framed as to exclude interest if payable out of the profits. In the present case, F it is obvious that the parties intended that the interest should be payable out of the profits; in such a case it makes no difference whether the rate of interest is a rate varying downwards only, or upwards and downwards. Let us look at the agreement from their point of view. Suppose it had said interest at 5 per cent, paid half-yearly—I have deliberately selected a rate of interest that is not an extravagant one—and it had said further "or at such other interest as may be G fair and reasonable, having regard to the profits." The moment you introduce the words "having regard to the profits" it is plain that the interest is payable out of the profits, or a reduction is to be made, having regard to the profits. It was very properly conceded by the respondent that such an agreement as the one I have suggested would be within the meaning of the Act of 1865, and, if that is so, H we must see how the present agreement varies from the suggested one. It only varies in that there is a condition introduced on the happening of which reduction of interest is to take place, that

I "in case the said John Vince should be unable to pay unto the said Dudley Baxter any portion of the half-yearly payments upon any part of the said sum of £4,500 by reason of the deficiency of the profits of the said John Vince, then and upon every such occasion a due allowance shall be made by the said Dudley Baxter to the said John Vince in respect of the same in a fair and reasonable manner."

This condition does not take the case out of the Act. Under the circumstances it seems to me that, starting with the premises that I do, the fact that the interest varies only one way is immaterial, if it is contemplated that it shall be paid out of profits. Nothing, therefore, remains but to see whether, if the rate of interest was not paid, the borrower could have compelled the lender to make a

reduction in the rate of interest. The question then is, if the court thinks that the nonpayment of interest was brought about by reason of the "deficiency of the profits," would it then fix a proper reduction; and, in order to decide this, one must ascertain the circumstances at the time the agreement was entered into, or the rate of profit that was expected to be made. I do not see why the court should not do this. This agreement was, in my opinion, an agreement under which the lender was to receive a rate of interest varying with the profits, and, therefore, the decision of the county court judge must be reversed.

**HENN COLLINS, J.**—It was said here that, because there was a maximum rate of interest fixed by this agreement, there could not be a "rate of interest varying with the profits." This argument cannot be sustained. Here the rate of interest was about 20 per cent., which is a normal rate for a business concern, and, that being so, what is the meaning of the agreement? It means that, when the prospective probabilities of the business are exhausted, the creditor has an interest in the concern. The interest he received, therefore, varied with the profits within the meaning of the Act. The difficulty I felt on the construction of the agreement has been partly removed by the argument of the respondent's counsel, neither of whom contended that the inability to pay the interest which brought the reduction clause into force was not an inability arising out of the profits. If it is admitted that the source from which the interest was to be paid was the profits, and that the inability to pay the interest was the ground upon which the reduction was to be let in under the clause in the agreement, viz.,

"in case the said John Vince should be unable to pay unto the said Dudley Baxter any portion of the half-yearly payments upon any part of the said sum of £4,500 by reason of the deficiency of the profits of the said John Vince, then and upon every such occasion a due allowance shall be made by the said Dudley Baxter to the said John Vince in respect of the same in a fair and reasonable manner,"

then, as the inability is merely an inability to pay out of the profits, we come to the Act of 1865. The idea of this agreement was to tie the lender to the fortunes of the partnership. I am of opinion that counsel were right in admitting that the source from which the interest was to be drawn was the profits received. The case comes within the Act, and the appeal must be allowed.

The creditor, Baxter, appealed to the Court of Appeal.

*Cooper Willis, Q.C.*, and *Eversley* for Baxter.

*Muir Mackenzie* for the trustee in bankruptcy.

**LORD ESHER, M.R.**—In this case the creditor, Baxter, lent to the bankrupt £4,500, and now desires to prove in the bankruptcy of the debtor for that loan, so as to get a dividend in the ordinary way upon that loan. The claim to so prove is resisted upon the ground that the lender had entered in an agreement with the bankrupt in such terms as to bring himself within s. 5 of the Partnership Law Amendment Act, 1865, and was, therefore, prevented, by the terms of that Act, from so proving for that sum.

That objection raises the question whether, upon the true construction of this agreement, the terms of it have brought the lender within the provisions of s. 5 of the Act of 1865. The court is bound to construe this agreement if possible, but before the court can construe it there must be reasonable stipulations to which a meaning can be given. On looking at the agreement and at the clause therein as to a due allowance being made in respect of the payment of interest upon a deficiency in profits, I am of opinion that the agreement in that respect is worded so artificially and mysteriously that I cannot tell what is the meaning of that stipulation. I cannot fix any definite meaning to what the parties have said in that clause. If, then, I cannot attach any definite meaning to that clause, I cannot hold that there was a contract that the rate of interest was to vary with the profits



A within the meaning of s. 5 of the Act of 1865. I cannot say what is the real meaning of that clause, and we must, therefore, treat this instrument as not binding in any respect.

B What, then, is the result? The creditor lent his money, and that money was to be repaid. From the terms of the agreement, we cannot tell how it was to be repaid. It must, therefore, be repaid in the ordinary way, and the creditor has a right to prove for his loan as for money lent, and to recover that sum in the ordinary way in which money is recovered in the Bankruptcy Court. This passage from LEAKE ON CONTRACTS (3rd Edn.), p. 591, seems to me to be a correct statement of the law in respect of such an agreement as this:

C "A promise must be reasonably certain, and if the parties have expressed the matter of their agreement in such uncertain or imperfect terms that it is impossible to ascertain any definite meaning, the agreement is necessarily void; for in every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties."

This appeal must be allowed.

D **BOWEN, L.J.**—I entirely agree, but, as we are differing from the judgment of the court below, I will add my own reasons. The question is whether this is a case of money lent under an agreement by which the rate of interest is to vary with the profits of the borrower's business. If it is, the Partnership Law Amendment Act, 1865, applies, and the appeal fails. If it is not, some relief must be granted to the creditor, Baxter. The answer to this question depends upon the consideration of the agreement made between the parties.

E There is no law applicable to this case except the rule which has been read by the Master of the Rolls. In my opinion, the entire agreement depends for its efficacy as to this case upon the clause as to the payment of interest, which is as follows:

F "And that in case . . . Vince should be unable to pay unto . . . Baxter any portion of the half-yearly payments upon any part of the said sum of £4,500 by reason of the deficiency of the profits of . . . Vince, then and upon every such occasion a due allowance shall be made by . . . Baxter to . . . Vince in respect of the same in a fair reasonable manner."

G If it were possible to collect from the rest of the agreement what measure of fairness, or what standard of allowance, was to be adopted, we might then have to decide whether this agreement was within the terms of the Act of 1865. It seems to me, however, impossible to find in this agreement, or in the circumstances of the case, any measure at all to guide us with any certainty to the mode of calculating the "due allowance." With what are we to compare the profits made when an allowance is said to be due? With the profits actually made in the business when the agreement was entered into? Or with the sum of £925, the yearly fixed interest? Or with the amount of the profits which the parties expected would be made after the loan and agreement? The trustee in bankruptcy, indeed, asserted that the last was the proper measure. I myself cannot see to which view the agreement itself can guide us. If the last mentioned was the measure intended by the agreement, it is so uncertain what it would be as to make the operation of the clause a mere matter of chance. *Pearce v. Watts* (1) is an illustration of a stipulation being so uncertain as to make a contract incapable of being enforced. This agreement is, in my opinion, incapable of receiving any certain construction.

I The effect of that upon the agreement is not that we can cut adrift from the agreement that part which is so uncertain, but that the agreement is entirely ineffectual. Even if we could cut adrift that part of the agreement, it is the only part which can possibly sustain the respondent's contention. That cannot be done, however, and the agreement cannot be enforced. What is the result? Justice

and good sense demand that the lender shall be able to get his money back, for the Act of 1865 does not apply at all when there is no agreement which can be enforced, as is the case here; he can prove for his principal and 5 per cent. interest in the ordinary way. The reasons upon which the judgment of the court below seems to have proceeded were, that the interest was to be paid out of profits, and that the rate was to vary by comparing the actual profits with the expected profits. That is far too uncertain to be enforced. That judgment was wrong, and this appeal must be allowed.

**A. L. SMITH, L.J.**—If the agreement had clearly given some mode of measuring the allowance to be made, I think that the judgment of the court below would have been right, and the case within s. 5 of the Partnership Law Amendment Act, 1865. When, however, the question as to how the “due allowance” is to be ascertained under the agreement comes to be argued, it becomes more and more uncertain. The judges in the court below did not agree as to that. The measure suggested, namely, the amount of the profits expected to be earned when the agreement was made, is far too vague, and cannot be worked out, or be enforced. This part of the agreement cannot be separated from the rest of the agreement, and the entire agreement falls to the ground. There was, therefore, no agreement within the Act of 1865, and this appeal must be allowed.

*Appeal allowed.*

Solicitors: *F. J. & G. J. Braikenridge*, for *Nevill & Atkins*, Tamworth; *Crowders & Vizard*, for *Mills & Reeve*, Norwich.

[Reported by **WALTER B. BATES, Esq.**, and **J. H. WILLIAMS, Esq.**,  
*Barristers-at-Law.*]

## Re STANDARD MANUFACTURING CO.

[COURT OF APPEAL (Lord Halsbury, L.C., Bowen and Fry, L.JJ.), October 30,  
31, November 1, 1890, February 10, 1891]

[Reported [1891] 1 Ch. 627; 60 L.J.Ch. 292; 64 L.T. 487;  
39 W.R. 369; 7 T.L.R. 282; 2 Meg. 418]

*Company—Debenture—Floating charge on property of company—Need of registration as bill of sale—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 4—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict., c. 43), s. 17.*

*Company—Charge on property—Registration—Bill of sale—Charge registrable under Companies Acts not registrable as a bill of sale.*

A joint-stock company, registered under the Companies Acts, issued debentures creating a floating charge over all its undertaking and property. The company was wound-up, and execution creditors of the company claimed that the charge was void as the debentures had not been registered under the Bills of Sale Acts, 1878 and 1882.

**Held:** on the true construction of s. 4 of the Bills of Sale Act, 1878, charges on the property of an incorporated company, for the registration of which statutory provision had already been made by the Companies Acts, were not bills of sale within the scope of the section; the words “other incorporated company” in the exempting provision in s. 17 of the Bills of Sale Act (1878)

**A** Amendment Act, 1882, were not to be limited by being construed ejusdem generis with the preceding words "any mortgage [or] loan [company]," (and, in any case, a company which was authorised to raise money on loan or mortgage would be ejusdem generis with a "mortgage or loan" company); and, therefore, the debentures need not have been registered as bills of sale and were valid without registration.

**B** *Jenkinson v. Brandley Mining Co.* (1) (1887), 19 Q.B.D. 568, overruled.  
*Read v. Joannon* (2) (1890), 25 Q.B.D. 300, approved.

**Notes.** The Companies Acts, 1862 and 1867, have been repealed, and are now replaced by the Companies Act, 1948. The provisions as to registration of charges under this Act are contained in Part III, ss. 95–106.

**C** Distinguished: *Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187. Followed: *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212. Considered: *Clark v. Balm, Hill & Co.*, [1908] 1 K.B. 667. Referred to: *Jarvis v. Jarvis* (1893), 69 L.T. 412; *Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, [1895–99] All E.R.Rep. 530; *Davey v. Williamson*, [1898] 2 Q.B. 194; *Duck v. Tower Galvanizing Co.*, [1901] 2 K.B. 314; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Re North Wales Produce and Supply Society*, [1922] All E.R.Rep. 730; *National Provincial Bank of England v. Charnley* (1923), 93 L.J.K.B. 241.

**D** As to loan capital of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 42 et seq.; as to debentures, see *ibid.* pp. 466–476, and *ibid.* vol. 3, pp. 272–273. For cases see 7 DIGEST (Repl.) 31 et seq. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 558. For the Bills of Sale (1878) Amendment Act, 1882, s. 17, see *ibid.* at p. 583. For the Companies Act, 1948, ss. 95–106, see 3 HALSBURY'S STATUTES (2nd Edn.) 533–542.

**E** Cases referred to:

- F** (1) *Jenkinson v. Brandley Mining Co.* (1887), 19 Q.B.D. 568; 35 W.R. 834; 3 T.L.R. 882, D.C.; 7 Digest (Repl.) 33, 168.  
 (2) *Read v. Joannon* (1890), 25 Q.B.D. 300; 59 L.J.Q.B. 544; 63 L.T. 387; 38 W.R. 734; 2 Meg. 275; sub nom. *Reid v. Joannon*, 6 T.L.R. 407; 7 Digest (Repl.) 32, 161.  
**G** (3) *Stradling v. Morgan* (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, 376.  
 (4) *Cox v. Hakes* (1890), 15 App. Cas. 506; 54 J.P. 820; 6 T.L.R. 465; sub nom. *Bell-Cox v. Hakes*, 60 L.J.Q.B. 89; 63 L.T. 392; 39 W.R. 145; 17 Cox, C.C. 158, H.L.; 42 Digest 633, 367.  
 (5) *Welsted & Co., Ltd. v. Swansea Bank, Ltd.* (1889), 5 T.L.R. 332; 7 Digest (Repl.) 32, 156.  
 (6) *Edmonds v. Blaina Furnaces Co.*, *Beesley v. Blaina Furnaces Co.* (1887), 36 Ch.D. 215; 56 L.J.Ch. 815; 57 L.T. 139; 35 W.R. 798; 7 Digest (Repl.) 33, 169.  
**H** (7) *Levy v. Abercorris Slate and Slab Co.* (1887), 37 Ch.D. 260; 57 L.J.Ch. 202; 58 L.T. 218; 36 W.R. 411; 4 T.L.R. 34; 7 Digest (Repl.) 33, 170.

Also referred to in argument:

- I** *Re Henry Pound, Son, & Hutchins* (1889), 42 Ch.D. 402; 58 L.J.Ch. 792; 62 L.T. 137; 38 W.R. 18; 5 T.L.R. 720; 1 Meg. 363, C.A.; 10 Digest (Repl.) 844, 5568.  
*Ross v. Army and Navy Hotel Co.* (1886), 34 Ch.D. 43; 55 L.J.Ch. 697; 55 L.T. 472; 35 W.R. 40; 2 T.L.R. 907, C.A.; 7 Digest (Repl.) 33, 167.  
*Topham v. Greenside Glazed Fire-brick Co.* (1887), 37 Ch.D. 281; 57 L.J.Ch. 583; 58 L.T. 274; 36 W.R. 464; 7 Digest (Repl.) 33, 171.  
*Re Cunningham & Co., Ltd., Attenborough's Case* (1885), 28 Ch.D. 682; 54 L.J.Ch. 448; 52 L.T. 214; 33 W.R. 387; 1 T.L.R. 227; 7 Digest (Repl.) 32, 159.



- Wheatley v. Silkstone and Haigh Moor Coal Co.* (1885), 29 Ch.D. 715; 54 L.J.Ch. 778; 52 L.T. 798; 33 W.R. 797; 10 Digest (Repl.) 770, 5009.
- Moor v. Anglo-Italian Bank* (1879), 10 Ch.D. 681; 40 L.T. 620; 27 W.R. 652; 10 Digest (Repl.) 983, 6768.
- Engelback v. Nixon* (1875), L.R. 10 C.P. 645; 44 L.J.C.P. 398; sub nom. *Engleback v. Nixon*, 32 L.T. 831; 5 Digest (Repl.) 792, 6714.
- Re O'Brien, Ex parte Montagu* (1876), 1 Ch.D. 554; 34 L.T. 197; 24 W.R. 309, C.A.; 7 Digest (Repl.) 26, 122.
- Re Steele, Ex parte Conning* (1873), L.R. 16 Eq. 414; 42 L.J.Bey. 74; 38 J.P. 86; 21 W.R. 784; 7 Digest (Repl.) 25, 118.
- Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest (Repl.) 124, 722.
- Re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335; 48 L.J.Ch. 417; 27 W.R. 433, C.A.; 7 Digest (Repl.) 15, 61.
- Re Jeavons, Ex parte Mackay, Ex parte Brown* (1873), 8 Ch.App. 643; 42 L.J.Bey. 68; 28 L.T. 828; 37 J.P. 644; 21 W.R. 664, L.J.J.; 7 Digest (Repl.) 25, 117.
- Edwards v. Edwards* (1876), 2 Ch.D. 291; 45 L.J.Ch. 391; 34 L.T. 472; 24 W.R. 713, C.A.; 7 Digest (Repl.) 25, 113.
- Re Marine Mansions Co.* (1867), L.R. 4 Eq. 601; 37 L.J.Ch. 113; 17 L.T. 50; 7 Digest (Repl.) 110, 660.
- Shears v. Jacob* (1866), L.R. 1 C.P. 513; Har. & Ruth. 492; 35 L.J.C.P. 241; 14 L.T. 286; 12 Jur.N.S. 785; 14 W.R. 609; 7 Digest (Repl.) 97, 560.
- Deffell v. White* (1866), L.R. 2 C.P. 144; 36 L.J.C.P. 25; 15 L.T. 211; 12 Jur.N.S. 902; 15 W.R. 68; 7 Digest (Repl.) 86, 493.
- Willmott v. London Celluloid Co.* (1886), 34 Ch.D. 147; 56 L.J.Ch. 89; 55 L.T. 696; 35 W.R. 145; 3 T.L.R. 121, C.A.; 10 Digest (Repl.) 775, 5037.
- Re Asphaltic Wood Pavement Co., Ltd.* (1883), 49 L.T. 159; 32 W.R. 16; 7 Digest (Repl.) 31, 155.

**Appeal** by the holders of debentures issued by the Standard Manufacturing Co., Ltd., from a decision of the Vice-Chancellor of the Duchy of Lancaster holding that the debentures were registrable under the Bills of Sale Acts.

The Standard Manufacturing Co. was registered under the Companies Acts, 1862 and 1867, for the purpose of manufacturing frillings, etc. In 1888 the company issued debentures under its borrowing powers. In February, 1889, several creditors of the company recovered judgments against the company, and writs of execution were issued. On May 13, 1889, a debenture holder's action was commenced by James Lowe against the company. On May 20, 1889, possession of the property comprised in a second series of debentures was taken by Mr. Gillibrand on behalf of the Realisation and Debenture Corpn. of Scotland. On May 27 a petition was presented in the Palatine Court of the Duchy of Lancaster for the winding-up of the company and an order for winding-up was made on Aug. 7, 1889.

A summons was then taken out to determine whether the debentures were void as against the execution creditors. James Lowe's debenture was to secure £50 with interest at 6 per cent., and was in form a charge by the company "on its undertaking and all its property present and future." The debenture was issued subject to conditions endorsed thereon. The third of such conditions was as follows:

"The charge created by this debenture shall be a floating security, and accordingly the company may in the course of its business and for the purpose of carrying on the same deal with the property hereby charged in such manner as the company may think fit, and in particular may sell the same, may pay and receive money, and may declare and pay dividends out of profits."

The second series of debentures were granted in November, 1888, to the Realisation and Debenture Corpn. of Scotland, Ltd. The debentures issued in this

A instance, after providing for payment of principal and interest, provided as follows :

B "And the company doth hereby as beneficial owners charge with such payments all its present and future stock, goods, chattels, and effects, and all its real property and interest in lands, and also all its present and future plant, machinery, stock (manufactured and unmanufactured), book and other debts, goodwill, and assets, and generally all the present and future property, real and personal, and undertaking of the company, all of which premises of every kind above specified are intended to be included in the term property whenever used herein, and the company will forthwith, if and when required by the corporation, at the cost of the company, execute and do all such assurances and things for further or more perfectly assuring the property to the corporation or to such persons as the corporation shall nominate as trustees for it, as shall by the corporation from time to time be required."

C The third condition endorsed on these debentures was as follows :

D "The debentures of this series shall rank *pari passu* as a first charge upon the property as within defined, and without any preference or priority one over another, and shall be a floating security, but no part of the property shall at any time hereafter and before payment in full of the whole of this issue of debentures be in any way charged or mortgaged by the company so as to rank *pari passu* with or in priority to the charge hereby created, nor shall any part of the real or leasehold property of the company be sold, transferred, alienated, or otherwise dealt with in any manner without the consent in writing of the corporation first obtained, nor shall any part of the property of the company other than the said real or leasehold property be sold, transferred, alienated, or otherwise dealt with in any manner except in the ordinary course of the business of the company."

E Condition 6 provided that the principal moneys secured should become payable immediately if any execution was sued out against the company. Condition 7 provided for the appointment of a receiver. These debentures were also secured by a trust deed dated Dec. 3, 1888.

F The summons was heard by the Vice-Chancellor of the Duchy of Lancaster, who held, upon the authority of *Jenkinson v. Brandley Mining Co.* (1), that the debentures required registration under the Bills of Sale Acts, and that in consequence of the want of registration the execution creditors had priority. The debenture holders appealed.

G By the Bills of Sale Act, 1878, s. 4 :

H "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. . . ."

By the Bills of Sale Act (1878) Amendment Act, 1882, s. 17 :

"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

*Rigby, Q.C.*, and *Astbury* for the debenture holders.

*R. Neville, Q.C.*, and *Radford* for the execution creditors.

*E. S. Ford* for the liquidator of the company.

*Cur. adv. vult.*

Feb. 10, 1891. **BOWEN, L.J.**, read the following judgment of the court: The question we have to decide is, whether both or either of the debentures before us, which are debentures of a joint-stock company limited, and create a charge on the floating real and personal property of the company, are void for non-registration under the Bills of Sale Act, 1878, or the Bills of Sale Act (1878) Amendment Act, 1882, or either of such Acts.

So far as the Bills of Sale Act (1878) Amendment Act, 1882, is concerned, it seems to us that such debentures are expressly excepted from its operation by s. 17. We do not agree with *Grove, J.*, and *Huddleston, B.*, in *Jenkinson v. Brandley Mining Co.* (1), that the words "or other incorporated company" are limited to companies ejusdem generis with mortgage or loan companies, whatever these last-mentioned companies may be; but even if it were otherwise, we think that any incorporated company which is authorised to raise money on loan or mortgage would be for the purposes of this section ejusdem generis with a "mortgage or loan company." We see no reason for doubting that the Standard Manufacturing Co., Ltd., is an incorporated company within that section.

The next question to be solved is, whether these debentures, or either of them, are bills of sale within s. 4, and bills of sale to which s. 3 of the Bills of Sale Act, 1878, applies. That these debentures are agreements by which a right in equity to a charge or security on personal chattels is conferred appears to be clear. But we are of opinion, nevertheless, that, on the true construction of the Act of 1878, the mortgages or charges of any incorporated company, for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not bills of sale within the scope of the Bills of Sale Act, 1878.

It is impossible to follow chronologically the legislation about bills of sale without observing that, until the passing of the Act of 1882, the scope of which embraces larger objects, the express and avowed design of the legislature had been to strike at the frauds perpetrated upon creditors by secret bills of sale. The title of the Bills of Sale Act, 1854, so states, and the preamble of that Act is as follows :

"Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors, for remedy whereof," etc.

Such corporate bodies as were at this time in existence were not bodies in the habit of committing frauds of this sort; and since corporations were not subject to the law of bankruptcy, that portion, at all events, of s. 1 of the Act of 1854, which was for the protection of assignees in bankruptcy, could not be applicable to corporations. Indeed, the definition of "apparent possession," which is of the essence of the Act of 1854, is so framed as to show that corporations were not actively, at all events, present to the mind of the draftsman who drafted



A the statute. Prior to the Act of 1854 the legislature had passed, in 1845, the Companies Clauses Act, 1845, which provided, in the case of mortgages and bonds of companies authorised by their special Act to borrow, for a register to be kept of such mortgages and bonds, and enacted that such register might be perused at all reasonable times by any of the shareholders or any mortgage or bond creditor of the company, or by any person interested in such mortgage or bond, without fee or reward. Between the Bills of Sale Act, 1854, and the Bills of Sale Act, 1878, the Companies Act, 1862, was passed, which, by s. 43, provides for the registration by companies of the mortgages and charges specifically affecting their property.

B At the date of the Bills of Sale Act, 1878, debentures which charged the property of such companies were well known in the commercial world. Having regard to the provisions already made by statute for their registration, such documents could hardly be described as secret or as belonging to the class of documents by which frauds were perpetrated upon creditors by secret bills of sale. They are not really, therefore, within the mischief of the Act of 1878. We cannot think that the legislature could have intended in the Bills of Sale Act, 1878, to have interfered by merely general words with such well-known commercial instruments, and it seems to us that the canon of construction laid down in *Stradling v. Morgan* (3), and cited by the Lord Chancellor in *Cox v. Hakes* (4), may be invoked with regard to the present controversy (1 Plowd. at p. 205a):

E "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

G Neither the cause nor necessity for the Bills of Sale Acts, 1854 and 1878, nor a comparison of the various sections, drive us to the interpretation that such documents are included. We have said that a comparison of the various sections of the Act of 1878 does not lead to any other conclusion. We may even say that such a comparison fortifies the opinion at which we have arrived. Without going so far as to decide that no corporation can be under any circumstances within the Bills of Sale Act, 1878, we may point out that the language of ss. 4, 10, and 12 shows that the Bills of Sale Act, 1878, was not dealing specifically with corporations, although it may be that the language of s. 3 is wide enough to include the bills of sale of a corporation, a view which has tacitly, as we are aware, been assumed in many decided cases to be correct. The language employed in these other sections is certainly not felicitous language to be applied in the case of corporations, and warrants, we think, the observation that the debentures of companies I were not actively present to the mind of the draftsman of the Act.

The view that debentures like the present are not within the Bills of Sale Act, 1878, was that adopted by POLLOCK, B., in *Welsted & Co., Ltd. v. Swansea Bank, Ltd.* (5), and by the Lord Chief Justice and WILLS, J., in *Read v. Joannon* (2); see also *Edmonds v. Blaina Furnaces Co.* (6), and *Levy v. Abercorris Slate and Slab Co.* (7). We agree with this view, and we think that this appeal should be allowed, with costs both here and below, on the ground that the mortgages or charges of any incorporated company, for the registration of which other provisions

have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878.

*Appeal allowed.*

Solicitors: *Linklater & Co.*, for *Boote & Edgar*, Manchester; *Chester, Mayhew & Co.*, for *Bullock & Worthington*, Manchester; *Phelps, Sidgwick & Biddle*, for *Sale, Seddon & Co.*, Manchester.

[Reported by A. J. SPENCER, ESQ., Barrister-at-Law.]

## Re MARTINDALE

[CHANCERY DIVISION (North, J.), June 23, August 8, 1894]

[Reported [1894] 3 Ch. 193; 64 L.J.Ch. 9; 71 L.T. 468;  
43 W.R. 53; 10 T.L.R. 670; 8 R. 729]

*Contempt of Court—Committal—Proceedings in camera—Ward of court—Publication in newspaper.*

On June 1, 1894, an injunction was granted in the Chancery Division restraining H. from having any communication with M., a female infant who had been made a ward of court, and directing H. to appear before the court on June 6. On that day H. appeared, and it was then proved that he and M. had been married some weeks before. The judge being satisfied that the marriage was valid, stayed the operation of his former order. H. on leaving the court concocted with a friend a paragraph purporting to be an account of what had taken place in private before the judge, but which was chiefly a puff of H.'s novels, and contained no statement of any fact which came out before the judge, except that H. and M. were married. This paragraph appeared in the "Star" of the same date. A paragraph to the same effect appeared the next day in the "Morning," and was copied in the "Pall Mall Gazette," and the "People." In the last three papers, however, it did not appear that the matter had been heard in private, and the editors stated that they did not know it was so heard. Motions were made to commit the publishers of all four papers, H., and his friend the author of the paragraph in the "Star."

**Held:** it was contempt of court to publish an account of any proceedings which a judge had ordered to be heard in private; however in the case of the publication in the "Star" the contempt was not premeditated or intentional and not of a serious character, and, apologies having been made, the justice of the case would be met by ordering H. and the publishers to pay the costs of the motions against them. The other four motions were frivolous and vexatious and would be dismissed with costs.

*Contempt of Court—Attachment—Defence to motion—Truth of matter alleged to be contemptuous.*

It is no defence to a motion to commit for contempt of court in publishing an account of proceedings held in camera that the matter published was true.

**Notes.** Considered: *Scott v. Scott*, [1911-13] All E.R.Rep. 1. Explained: *Re De Beaujeu's Application*, [1949] 1 All E.R. 439.

As to contempt, see 8 HALSBURY'S LAWS (3rd Edn.) 3 et seq.; and for cases see 16 DIGEST (Repl.) 40 et seq.

**A** Cases referred to :

- (1) *Andrew v. Raeburn* (1874), 9 Ch. App. 522; 31 L.T. 73; 22 W.R. 564, L.C. & L.J.J.; 16 Digest (Repl.) 147, 298.
- (2) *Mellor v. Thompson* (1885), 31 Ch.D. 55; 55 L.J.Ch. 942; 54 L.T. 219, C.A.; 16 Digest (Repl.) 148, 303.
- (3) *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch.D. 156; 52 L.J.Ch. 704; 48 L.T. 822; 31 W.R. 913; 16 Digest (Repl.) 16, 308.
- (4) *Malan v. Young* (1889), 53 J.P. 822; 6 T.L.R. 38; 16 Digest (Repl.) 146, 283.
- (5) *Ogle v. Brandling* (1831), 2 Russ. & M. 688; 39 E.R. 557, L.C.; 16 Digest (Repl.) 146, 278.
- (6) *Lawrence v. Ambery* (1891), 91 L.T.Jo. 230; 16 Digest (Repl.) 40, 338.
- (7) *Plating Co. v. Farquharson* (1881), 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 29 W.R. 510, C.A.; 16 Digest (Repl.) 34, 284.
- (8) *Hunt v. Clarke* (1889), 58 L.J.Q.B. 490; sub nom. *Re O'Malley, Hunt v. Clarke*, 61 L.T. 343; 37 W.R. 724; 5 T.L.R. 650, C.A.; 16 Digest (Repl.) 29, 224.

Also referred to in argument :

- D** *Re Potter* (1869), L.R. 7 Eq. 484; 20 L.T. 355; 17 W.R. 347; 28 Digest (Repl.) 560, 758.
- Re Sampson and Wall* (1884), 25 Ch.D. 482; 53 L.J.Ch. 457; 32 W.R. 617; sub nom. *Re Wall*, 50 L.T. 435, C.A.; 28 Digest (Repl.) 560, 765.

**E** **Motions** by the next friend of a female ward of court to commit the publishers of four newspapers, a contributor to one of them, and the ward's husband, for contempt of court in respect of matter published in the newspapers relating to legal proceedings *in camera*.

The ward having been forbidden by her parents to have any communication with the respondent Hueffer, suddenly left her home early in April, 1894. Her parents took proceedings to have her made a ward of court, and their solicitor wrote to the respondent Hueffer saying she had been made a ward. This was not accurate, for she was not actually made a ward until after the date of his letter. On June 1, 1894, NORTH, J., made an order restraining Hueffer from having any communication with the ward, and requiring him to appear before the judge on June 6. He attended on that day and NORTH, J., heard the matter in his private room. An affidavit by the respondent was produced in which he stated that he did not know, and had no reason to believe, that the young woman was a ward of court. This statement was false, as the solicitors to the ward's father had informed the respondent by letter of the fact and the respondent had acknowledged the receipt of the letter in writing. The respondent's solicitors then stated that the parties had been married two or three weeks previously. NORTH, J., agreed to stay the operation of his order if proper evidence of the marriage was produced and the hearing was adjourned for this to be done. When the matter again came before the judge on June 9 and the marriage certificate was produced, he declared himself satisfied that false statements made to the registrar as to the ward's age did not affect the validity of the marriage, although the respondent had laid himself open to criminal proceedings. He stayed the operation of the order, and declined to entertain any application to commit the respondent for contempt.

**I** In the meantime, on June 6, the following paragraph appeared in the "Star" newspaper :

"A Poet's Love Affair.—A Chancery Court Chapter of 'The Queen who Flew.'—In Chancery Court No. 2 to-day a rarely romantic story was unrolled before Mr. Justice NORTH, who sat in private to hear the action innocently set down as *In re Martindale*. The action was one to forbid a Miss Martindale, said to be a ward in Chancery, from perpetrating matrimony, the danger arising in connection with the attentions of a young poet and novelist who has already



achieved a certain measure of distinction by 'The Shifting of the Fire' and other of his books—to wit, Mr. Ford H. Madox Hueffer, of Brook Green, W. Mr. Hueffer is well known as son of the late Dr. Hueffer, the once champion of Wagner in England and musical critic of "The Times," and as grandson of Mr. Ford Madox Brown. His intimate connection with the Pre-Raphaelite Brotherhood is also marked by the fact that his just-published novel 'The Queen who Flew' (significant title) is illustrated by Sir Edward Burne-Jones. The proceedings to-day might have been comparatively tame but for the fact that it turned out that there was no longer any Miss Martindale to protect. That lady became Mrs. Madox Hueffer some three weeks ago. The case stands adjourned for the present."

On the next morning, June 7, the following paragraph was published by the "Morning" newspaper:

"A Young Novelist's Romance.—A romance which has excited much interest in certain literary and artistic circles in London became more widely known yesterday as forming the subject of an action in Chancery Court No. 2 before Mr. Justice NORTH. The cause was *In re Martindale*, and the action taken to prevent the marriage of a Miss Martindale, a minor and a ward in Chancery. When the case came on it was found out that there was no longer a Miss Martindale to be protected, and an adjournment had to be made. In fact the lady had three weeks before been married to the lover whom it was sought to bar—Mr. Ford Madox Hueffer. Mr. Hueffer has already made a certain mark in fiction. He has also published a book of verse, and his last book, 'The Queen who Flew,' is illustrated by Sir E. Burne-Jones. Mr. Hueffer is son of the late Dr. Hueffer, the champion of Wagner and the well-known musical critic, and grandson of the late Ford Madox Brown."

This paragraph was copied into the "Pall Mall Gazette" of June 7, and the "People" newspaper of June 8.

On June 16 the court was moved on behalf of the ward's parents to commit the publishers of these four papers for contempt in publishing matters heard by the court in private. It appeared from the affidavits filed for the "Star" that the paragraph in that paper was in fact written by Mr. Perris, a contributor, from materials supplied to him immediately after the hearing on June 6 by Hueffer himself, and notices of motion to commit Hueffer and Perris also were then given. All the motions came on to be heard on June 23, 1894.

*Swinfen Eady, Q.C.*, and *G. Henderson* for the motions.

*S. Hall, Q.C.*, and *G. Lawrence* for the publishers of the "Morning."—Motions to commit ought not to be made unless there is some serious ground for committing the person moved against. The "Morning" published this paragraph in good faith, and the editor was wholly ignorant that the matter was heard in private at all. If there has been any contempt he apologises, but we submit there has been none. It has never been laid down that it is contempt to publish anything that has been heard in private so long as the publication does not extend to the facts on account of which a private hearing was ordered. Except these facts everything which passes in a court of justice is public property and may be published. This publication could not interfere with the course of justice.

*S. Hall, Q.C.*, and *Vernon Smith* for the "Pall Mall Gazette."

*Butcher* for the publishers of the "People."—There can be no contempt of court in publishing the result of proceedings in court, even if the proceedings were in camera. It cannot be contempt to publish information which is accessible from other sources. The only fact which is really disclosed by this paragraph is that two young people were married, and this marriage had been announced in "The Times" weeks before.

**A** Boome for the "Star" and for Perris. The court will not exercise its jurisdiction to commit for contempt against the editor of a newspaper, unless there is a wilful intention to prejudice a trial or interfere with the course of justice. The "Star" published this paragraph in good faith, and it could not possibly interfere with the course of justice.

*Job Bradford* for Mrs. Hueffer and the respondent Hueffer.

**B** All the respondents' counsel tendered full apologies from their clients in case the court thought any contempt had been committed.

Aug. 8, 1893. **NORTH, J.**, read a judgment in which he stated the facts and continued: The material parts of the paragraph in the "Star" may be condensed into this: that on the day in question a rarely romantic story was unrolled before a judge in Chancery sitting in private with reference to a female ward, which proceedings might have been comparatively tame but for the fact that it turned out that the lady had been married to the respondent three weeks before.

**C** It was contended before me that the publication of this paragraph did not interfere with or tend to obstruct the course of justice. In this I agree. But this does not conclude the question whether it was a contempt or not. Articles have often been held to be in contempt of court on the ground that they had been published while litigation was pending, which would not have been in contempt if only published after the litigation had been closed. But there may be, and are, publications which amount to contempts of court, although they do not interfere with the course of justice and have been published when all proceedings are at an end—for instance, it would be idle to suppose that matters occurring with respect to a ward, which could not be published without contempt while the ward was an infant, could be published with impunity so soon as the ward had attained the age of twenty-one years.

**E** It was also with great energy contended before me that all proceedings in a court of justice ought to be public, and that there could not be any contempt in publishing what took place in court; but in that I do not agree. The general rule is an excellent one, that legal proceedings should be in public; and if it were departed from the great weight which legal decisions carry with them in this country would be deservedly diminished. But with this rule certain exceptions are proper and necessary. One ground of exception is that a public hearing would have the effect of disclosing what it is the whole object of the action to keep concealed, as in *Andrew v. Raeburn* (1); *Mellor v. Thompson* (2); or of making known to the world a secret process, as in *Badische Anilin und Soda Fabrik v. Levinstein* (3). The hearing in private wholly or in part of cases in which public decency and morality require it to be done are also familiar, not only in the Divorce Court but also in the ordinary criminal and civil courts, an instance of the latter being *Malan v. Young* (4) [but see *Scott v. Scott*, [1911-13] All E.R.Rep. 1]. So also cases relating to lunatics are constantly heard in private; and cases as to wards: see *Ogle v. Brandling* (5) in order that the lunatic or ward may not be prejudiced; and I cannot conceive a clearer contempt of court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the court had deliberately, in the exercise of its discretion, decided ought not to be published.

**H** It was said that *Lawrence v. Ambery* (6) was a decision to the contrary. In that case proceedings for a divorce on the ground of nullity had been heard in camera, and a newspaper published the result, viz., that a decree for dissolution had been pronounced. It was decided that such publication was not a contempt, as, of course, it was not, any more than the publication of the marriage, in the present case, in the marriage column of "The Times." But the case, if the very meagre report of it can be trusted, negatives the conclusion sought to be drawn from it; for, as I read it, if what had been published had been any part of what transpired when the court was sitting in camera, the result would have been different.

**I**

In the present case I do not believe that any contempt of court was intended, though this in itself would be no excuse for contempt actually committed. The paragraph inserted in the "Star" was so inserted without premeditation, having been concocted and handed in by the respondent Hueffer and his friend Perris merely as an advertisement for the former. Its vulgarity and bad taste are enhanced by the reference to the Court of Chancery and the sitting being in private—references obviously made without any regard to the credit of the lady for the purpose of attracting the attention of readers to a puff, which, if not thus embellished, would have been passed by unnoticed. The paragraph, so far as I have quoted it above, was intended to appear to be, and would be understood, as a concise statement of what took place in my private room; and the disclosure is held out as an inducement to the public to read the whole paragraph.

It was said that, as the statement that the marriage had taken place was quite true, it could not be a contempt to state that; but, if the question of contempt depended upon the truth or untruth of the matter published, it would result in this—that there would be no contempt in an accurate disclosure of what passed in camera, although there would be if the account was a fictitious one, which is absurd. If the element of untruth were necessary, it would be found here in the statement that a rarely romantic story was unrolled. The story was a sad and very commonplace one; and on the day referred to it was not opened or gone into at all. But, as I have already said, there was no contempt in announcing the fact that the ward had become the wife of the said respondent; the contempt was in purporting to give the public information, though meagre, of what the judge had decided ought not to be disclosed by determining to hear the case in private and excluding the public.

I do not regard the contempt as a serious one. At the same time it was not mitigated by the line of defence which counsel adopted, the boldness of which cannot be appreciated by anyone who did not hear it. At the same time, however, a proper apology was expressed if the court should be of opinion that a contempt had been committed. Looking at all the circumstances, I think that justice will be met by ordering the printer of the "Star" to pay the costs of the motion to commit him. The respondent Hueffer, who went from the court to his journalist friend and instigated him to write the paragraph in question and procure its insertion in the "Star," is equally responsible for the publication of the advertisement, and he also must pay the costs of the motion against him.

With regard to the other motions, I am much surprised that they have been made at all. I consider them vexatious and an abuse of the process of the court. In *Plating Co. v. Farquharson* (7) the court pointed out that motions to commit where there was no real ground for committing the party were mere waste of time and ought to be discouraged: see also the observations of the Court of Appeal in *Hunt v. Clarke* (8) to the same effect. I should certainly not hesitate to commit where a real ground for committal is shown, as in the case of a deliberate contempt; but these four motions seem to me puerile. As regards the respondent Perris, the composer of the paragraph in question, I do not suggest for a moment that the part he has taken in the transaction might not have been sufficient to render him liable to committal, if the contempt had been a flagrant one. But I think that, if action was necessary, the proceeding against the "Star" and the respondent Hueffer would have answered every purpose; and that it was not only unnecessary but vexatious to proceed against the writer. I, therefore, dismiss that motion with costs.

The other three motions were against Mr. Hosker, the publisher of a paper called "Morning;" Mr. Hurst, the publisher of the "Pall Mall Gazette;" and Mr. Gray, the publisher of a paper called the "People." The article in the "Morning" of June 7 does not show, and Mr. Hosker swears that he did not know, that the proceedings referred to were not in open court; the article in the "Pall Mall Gazette" of the same day states on its face that they were in open court; and that in the "People" of June 10 also was simply copied from that in



A the "Morning," and they were inserted without any knowledge or means of knowledge that the proceedings had been in private. I dismiss these motions with costs.

I have hesitated somewhat about the costs because of the line of defence adopted on behalf of the respondents; but, disapproving as I do of these motions having been launched at all, I think the costs should follow the result. I may add  
B this, however, for the guidance of the respondents in the future, that if they really had done what their counsel asserted their right to do with impunity, I should certainly have committed every one of them.

Solicitors: *Wilson & Son; Lewis & Lewis; Harrison & Davis; Sutton, Ommanney & Co.; Rollit & Sons; Shaen, Roscoe & Co.*

C [Reported by J. R. BROOKE, Esq., Barrister-at-Law.]

D

E BRYANT, POWIS AND BRYANT, LTD. v. LA BANQUE DU  
PEUPLE.

BRYANT, POWIS AND BRYANT, LTD. v. QUEBEC BANK

[PRIVY COUNCIL (Lord Hobhouse, Lord Macnaghten, Lord Hannen, Lord Shand, and Sir Richard Couch), December 9, 10, 12, 1892, March 4, 1893]

F

[Reported [1893] A.C. 170; 62 L.J.P.C. 68; 68 L.T. 546;  
41 W.R. 600; 9 T.L.R. 322; 1 R. 336]

*Power of Attorney—Scope of authority—Strict construction—Authority conferred in express terms or by necessary implication—Borrowing of money on behalf of principal.*

G

Powers of attorney must be construed strictly, and, if a question is raised as to the authority conferred by the power, it must be shown that, on a fair construction of the whole instrument, the authority in question is conferred in express terms or by necessary implication. There is no distinction in this respect between the law of Canada and the law of England.

H

Where a power of attorney authorised the agent to enter into contracts (i) for the purchase or sale of goods; (ii) the chartering of ships; (iii) the employment of agents or servants, and, as incidental thereto, to do certain specified acts and other acts of the same kind, "and to do execute and perform any other act matter or thing whatsoever which ought to be done executed or performed or which in the opinion of the said agent ought to have been done executed or performed in or about the business affairs of the" principal,

I

**Held:** the agent was not authorised to borrow money on behalf of the principal or to bind the principal by a contract of loan.

*Bill of Exchange—Promissory note—Acceptance—Endorsement—"Per pro"—Notice of limited authority.*

Any person who takes a bill of exchange or promissory note accepted or endorsed "per pro" has express notice that the acceptor or endorser has only a limited authority, and is bound at his peril to inquire into the extent of the authority.

*Bill of Exchange—Forgery—Signature without authority—Abuse of authority by agent—Position of bona fide holder for value.* A

Where a power of attorney in terms authorises the agent to endorse bills of exchange the fact that he has abused his authority cannot affect bona fide holders for value of negotiable instruments endorsed by him apparently in accordance with his authority.

**Notes.** Considered: *Jacobs v. Morris*, [1901] 1 Ch. 261. Applied: *Hambro & Son v. Burnand*, [1904] 2 K.B. 10. Considered: *Underwood v. Bank of Liverpool and Martins*, *Same v. Barclays Bank*, [1924] All E.R.Rep. 230; *Reckitt v. Barnett, Pembroke and Slater, Ltd.*, [1928] 2 K.B. 244. Referred to: *Gompertz v. Cook* (1903), 20 T.L.R. 106; *Baker v. Barclays Bank, Ltd.*, [1955] 2 All E.R. 571. B

As to the authority of an agent generally, see 1 HALSBURY'S LAWS (3rd Edn.) 160 et seq.; and as to his authority in regard to bills of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 173-175. For cases see 1 DIGEST (Rep.) 350, and 6 DIGEST (Repl.) 104-105. C

Cases referred to:

- (1) *Stagg v. Elliott* (1862), 12 C.B.N.S. 373; 31 L.J.C.P. 260; 6 L.T. 433; 9 Jur.N.S. 158; 10 W.R. 647; 142 E.R. 1187; 6 Digest (Repl.) 103, 793. D
- (2) *President, etc., of Westfield Bank v. Cornen*, 37 N.Y.R. (Tiff.) 322.

Also referred to in argument:

*Castle v. Baby*, 5 Low. Can. Rep. 411.

*Churchill v. Mackay*, 20 Sup. Ct. Rep. 472.

*Jonmenjoy Coondoo v. Watson* (1884), 9 App. Cas. 561; 50 L.T. 411, P.C.; 1 Digest (Repl.) 351, 310. E

*Lewis v. Ramsdale* (1886), 55 L.T. 179; 35 W.R. 8; 2 T.L.R. 691; 1 Digest (Repl.) 347, 267.

**Appeals** by Bryant, Powis and Bryant, Ltd., from decisions of the Court of Queen's Bench for Lower Canada. In the first case that court (CROSS, BABY and ROUTHIER, JJ., BOSSÉ and DOHERTY, JJ., dissenting) reversed a decision of the Superior Court (ANDREWS, J.); in the second case the court (CROSS, BABY, BOSSÉ and LA RUE, JJ.) unanimously affirmed the judgment of ANDREWS, J., in the Superior Court. F

Charles Griffiths Davies was appointed the agent of the appellants by a power of attorney which gave him authority to enter into contracts or engagements for three specified purposes: (i) the purchase or sale of goods, (ii) the chartering of vessels, and (iii) the employment of agents and servants, and, as incidental thereto, to do certain specified acts and other acts of the same kind, G

"and to do execute and perform any other act matter or thing whatsoever which ought to be done executed or performed or which in the opinion of the said agent ought to have been done executed or performed in or about the business affairs of the [appellants]." H

In the first case, Davies borrowed money for his own purposes, but, in the name of the appellants and professedly on their behalf, he gave as security promissory notes drawn in favour of the appellants and endorsed by him in the name of the appellants "per pro C. G. Davies." In the second case, he endorsed two bills of exchange in the name of the appellants "per pro C. G. Davies," which were discounted by the Quebec Bank in the ordinary course of business. I

*Hall, Q.C.* (of the Canadian Bar), and *Hollams* for the appellants.

*Fullarton, Q.C.*, and the *Attorney-General for Quebec (Chase Casgrain, Q.C.)*, of the Canadian Bar) for the respondents in the first appeal.

*Stuart, Q.C.* (of the Canadian Bar), and *J. V. Fitzgerald* for the respondents in the second appeal.

**A** Mar. 4, 1893. **LORD MACNAGHTEN.**—The appellant in these appeals is a company, incorporated with limited liability under the statute of the United Kingdom known as the Companies Act, 1862. It was formed in 1885 for the purpose of taking over the business of the firm of Messrs. Bryant, Powis and Bryant, of London, Quebec, and Montreal, lumber merchants. On Jan. 1, 1888, the company discontinued the business of buying and shipping timber, which up to that time it had carried on in Quebec in succession to the firm of Bryant, Powis and Bryant, and thenceforth the company restricted its business in Quebec to making advances on the security of lumber and timber, principally if not solely in connection with the operations of a firm of lumber merchants trading as "Smith, Wade & Co."

**C** On the formation of the company one Charles Griffiths Davies, of Quebec, who had been agent and attorney for the firm of Bryant, Powis and Bryant, was appointed the agent and attorney of the company in Canada. The appointment was contained in a power of attorney, dated Nov. 25, 1885. Davies remained in the regular employment of the company at a fixed salary up to Jan. 1, 1888. He then went into business on his own account, and carried on business as broker and general commission and shipping agent, under the style of "C. G. Davies & Co."

**D** But he still acted for the company when occasion required, receiving a commission for his services. His power of attorney was not revoked or withdrawn, and the company continued to hold him out as their agent. In February, 1890, Davies left Quebec under the pressure of pecuniary difficulties. It was then discovered that he had taken advantage of his position as agent and attorney for the company to procure money on the credit of the company for his own private purposes.

**E** The company in consequence found itself exposed to heavy and unexpected demands, and there was a good deal of litigation, in the course of which various points were raised depending on the special circumstances of the particular case. That litigation has given rise to these two appeals which their Lordships will now proceed to consider separately.

**BRYANT, POWIS AND BRYANT, LTD. v. LA BANQUE DU PEUPLE**

**F** In this appeal the question is whether the company is to be charged with moneys obtained by Davies for his own purposes, but borrowed by him in the name of the company and professedly on their behalf.

The facts are not in dispute. On Oct. 1, 1889, Davies went to the bank, who had been at one time, but were not then, the bankers of the company, and asked the manager, M. Dumoulin, for a loan of \$25,000 on account of the company, saying that it was required for the purpose of a remittance to be made by him on that day to the head office in London. The manager consented to make the advance on what is termed a "short loan." Davies drew a cheque on the bank in the name of the company, "per pro C. G. Davies," for \$25,000. The cheque was paid as an overdraft, and as collateral security for its repayment Davies deposited with the bank three promissory notes, amounting together to \$40,000 drawn by Smith, Wade & Co., in favour of Bryant, Powis and Bryant, Ltd., and endorsed in their name, "per pro C. G. Davies." On Oct. 5 Davies went to the bank again, and told the manager that he found that the sum of \$25,000 more was required, and thereupon he obtained a further loan to that amount. The transaction was carried out in precisely the same manner as the former loan, and by way of collateral security Davies endorsed and deposited three further promissory notes of Smith, Wade & Co., amounting together to \$35,000. Before Dec. 4, 1889, Davies paid the bank out of his own moneys \$10,000 in reduction of the loan. On that day the six promissory notes, which then had become due, but had not been presented for payment, were returned to Davies, who gave in exchange two other promissory notes for \$25,000 each, dated Sept. 28, 1889, and made by Smith, Wade & Co., to the order of the company, and endorsed in the name of the company, "per pro C. G. Davies." For these notes Davies took the following receipt:

"Quebec, Dec. 4, 1889. Received of Messrs. Bryant, Powis and Bryant, Ltd.,



through their agent here the following bills payable as collateral security for the payment of (\$37,000) thirty-seven thousand dollars with interest at 7 per cent., viz.: S. W. & Co. p. note due Mar. 31 \$25,000 dollars; S. W. & Co. p. note due Mar. 31 \$25,000;—\$50,000.—p. Auguste Labardie, pro manager Banque du Peuple, Quebec."

Before the two notes became due the company forbade Smith, Wade & Co. to pay the bank, and they also gave notice to the bank disclaiming liability, and calling upon the bank to hand over the notes to them. When the notes fell due the bank brought this action upon them against Smith, Wade & Co. and the company. Smith, Wade & Co. submitted themselves to the judgment of the court. The company disputed their liability on various grounds, and they also filed an incidental demand, claiming the promissory notes in question as their property.

The case came on to be heard before ANDREWS, J. The learned judge in an able and elaborate judgment decided in favour of the company, on the ground that the bank had notice that Davies was acting under a limited authority, and that the power of attorney of Nov. 25, 1885, from which alone Davies derived his authority, did not authorise him to borrow money in the name of the company. The other grounds upon which the company resisted the claim of the bank were rejected by the learned judge. As the arguments before their Lordships were substantially confined to the question of authority, it is not necessary to allude to them, beyond saying that in the course of the discussion the learned counsel for the appellant very properly disclaimed in express and unqualified terms any imputation of want of good faith on the part of the bank or on the part of M. Dumoulin.

On appeal, the Court of Queen's Bench for Lower Canada, by a majority of three to two, reversed the decision of ANDREWS, J., and condemned the company to pay to the bank the sum of \$37,000 with interest from Mar. 31, 1890, and costs of suit. The learned judges who formed the minority in the Court of Appeal adopted and relied upon the judgment of ANDREWS, J. The views of the majority are expressed in the formal judgment pronounced by CROSS, J. That judgment proceeds upon the ground that the "specific powers" granted to Davies by the power of attorney

"did not necessarily imply the negation of the powers of general agency granted to and exercised by the said Charles G. Davies under the said power of attorney,"

and that the words used in the concluding part of the power of attorney,

"refer not specially to said special powers but to the business generally of the respondents [i.e. Bryant, Powis and Bryant, Ltd.] and by their terms give the said Charles G. Davies a discretion to do, execute, and perform any matter or thing which in the opinion of the said Charles G. Davies ought to have been done, executed, or performed in or about business of the respondents, therefore outside and beyond what had been otherwise provided for by the said power of attorney,"

and consequently that Davies had power to bind the company

"and did so bind them by his endorsement in their name of the said promissory notes and drawing the money advanced thereon."

On the appeal before this Board the learned counsel for the appellant did not seriously dispute the proposition that the words "per pro" in the acceptance or endorsement of a bill of exchange or promissory note amount to an express statement that the party so accepting or endorsing the bill or note has only a special and limited authority, and, therefore, that a person who takes a bill or note so accepted or endorsed is bound at his peril to inquire into the extent of the agent's authority: see *Stagg v. Elliott* (1), per BYLES, J. Nor was it disputed that powers of attorney are to be construed strictly; that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the

A authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shown that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their Lordships, appear to be in harmony with English law and English authorities.

B In the result, the argument was reduced to a consideration of the true construction and effect of the power of attorney of Nov. 25, 1885. It will, therefore, be necessary to state its provisions somewhat in detail. That instrument begins by reciting the formation of the company, to

D "undertake and carry on as successors to Messrs. W. Bryant, F. C. Bryant, and H. W. Powis. who were the founders of the company, the trade and business of wood and timber importers, brokers, merchants, and dealers then carried on by them in partnership together at London, Quebec, Montreal, and elsewhere, under the name or style of Bryant, Powis and Bryant, and for other purposes more particularly mentioned in the memorandum of association of the company."

It then recites the provisions of the articles of association authorising the appointment of an attorney, and proceeds as follows :

E "And whereas the directors deem it desirable in the interest of the company to appoint an agent and attorney to represent the company in Canada aforesaid, now know ye that the company doth hereby appoint Charles Griffiths Davies, of Desprairie Street, in the city of Quebec, Canada aforesaid, to be the true and lawful attorney of the company, for and in the name and on behalf of the company to enter into any contract or engagement for the purchase or sale of goods and merchandise of whatever nature or kind, and for the charter and recharter of any ships or vessels, and for the engagement of all such agents, F clerks and servants as may be necessary for carrying on and conducting the business of the said company, and to draw and sign cheques on the bankers for the time being of the said company and to draw, accept, and endorse bills of exchange, promissory notes, bills of lading, delivery orders, dock warrants, coupons, bought and sold notes, contract notes, charterparties, accounts, current G accounts, sales, and other documents which shall in the opinion of the said attorney require the signature or endorsement of the company and also"

H to sue for and recover debts, to demand and obtain delivery of goods belonging to the company, and generally to act for the company in and about the recovery of debts and the delivery of goods in all respects as fully and effectually as the company could itself do, to give receipts, to bring and defend and compromise actions;

I "also to enter into, make, sign, seal, execute, deliver, acknowledge and perform any contract, agreement, deed, writing or thing that may in the opinion of the said agent or attorney be necessary or proper to be entered into, made, signed, sealed, executed, delivered, acknowledged or performed for effectuating the purposes aforesaid or any of them, and for all or any of the purposes aforesaid to use the name of the company"

then follow the words quoted in the judgment of the Court of Appeal

"and to do execute and perform any other act matter or thing whatsoever which ought to be done executed or performed or which in the opinion of the said agent or attorney ought to have been done executed or performed in or about the business affairs of the company."

To put it shortly, the power of attorney authorised Davies to enter into contracts or engagements for three specified purposes: (i) the purchase or sale of goods; (ii) the chartering of vessels; and (iii) the employment of agents and servants; and as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified. A

If the instrument be read fairly, it does not, in their Lordships' opinion, authorise the attorney to borrow money on behalf of the company, or to bind the company by a contract of loan. It appears to their Lordships that the words quoted in the judgment of the Court of Queen's Bench are to be read in connection with the introductory words of the sentence to which they belong, "for all or any of the purposes aforesaid." So read, the words in question do not confer upon the agent powers at large, but only such powers as may be necessary, in addition to those previously specified, to carry into effect the declared purposes of the power of attorney. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, and the judgment of ANDREWS, J., restored. The respondents will pay the costs of the appeal to the Court of Queen's Bench and the costs of this appeal. B

### BRYANT, POWIS AND BRYANT, LTD. v. QUEBEC BANK D

The question raised in the appeal of *Bryant, Powis and Bryant, Ltd. v. Quebec Bank* may be disposed of very shortly. The appeal is from a decision of the Court of Queen's Bench for Lower Canada affirming the decision of ANDREWS, J., who held the company liable to the bank in respect of two bills of exchange endorsed in the name of the company, "per pro C. G. Davies," and discounted by the bank in the ordinary course of business. In the discussion at the Bar it was conceded by counsel for the appellant that the bank were bona fide holders for value, and the argument, as in the previous case, was substantially confined to the question of Davies' authority. The authority of Davies as the agent and attorney of the company was derived from the power of attorney of Nov. 25, 1885, which has been fully stated already. That instrument in terms authorises the attorney to endorse bills of exchange. Their Lordships agree with ANDREWS, J., that the fact that Davies abused his authority and betrayed his trust cannot affect bona fide holders for value of negotiable instruments endorsed by him apparently in accordance with his authority. The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President, etc., of Westfield Bank v. Cornen* (2), cited by ANDREWS, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: E

"Whenever the very act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority." F

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed with costs. H

*Appeals dismissed.* I

Solicitors: *Wilson, Bristows & Carpmal; Bompas, Bischoff & Co.; Ashurst, Morris, Crisp & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]



A

## EDWARDS v. CARTER

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Halsbury, Lord Macnaghten, Lord Morris and Lord Shand), June 2, 1893]

[Reported [1893] A.C. 360; 63 L.J.Ch. 100; 69 L.T. 153;  
58 J.P. 4; 1 R. 218]

B

*Infant—Settlement—Repudiation—Reasonable time after majority—Right to wait until receipt of sum to which covenant applicable—Ignorance of contents of settlement irrelevant.*

C

An infant, by a marriage settlement dated Oct. 16, 1883, covenanted to settle after-acquired property. He came of age on Nov. 19, 1883. On May 14, 1887, his father died, and he became entitled under his will to a large sum of money, to which the covenant applied. On July 31, 1888, he repudiated the settlement. In an action by the trustees of the settlement against the infant, the infant said in evidence that he did not know, or did not remember, or that it was not present to his mind, that there was this covenant in the settlement to settle after-acquired property.

D

**Held:** as an infant he was entitled to repudiate the settlement if he did so within a reasonable time of attaining his majority; in measuring what was a reasonable time he was not entitled to wait until an actual sum of money had come to him to which the covenant would apply, and, further, it was wholly immaterial that he did not remember or had not acquainted himself with the nature of the obligations which he had undertaken; on the facts the repudiation had not been made within a reasonable time; and, therefore, the covenant was binding.

E

**Notes.** Considered: *Clements v. London and North Western Railway*, [1894] 2 Q.B. 482; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Viditz v. O'Hagan*, [1900] 2 Ch. 87. Applied: *Carnell v. Harrison*, [1916-17] All E.R.Rep. 827; *Davies v. Beynon-Harris* (1931), 47 T.L.R. 424. Referred to: *Davenport v. Marshall* (1901), 85 L.T. 340.

F

As to settlements by infants, see 21 HALSBURY'S LAWS (3rd Edn.) 180-184; and for cases see 28 DIGEST (Repl.) 502-504.

Cases referred to in argument:

G

*Codrington v. Codrington* (1875), L.R. 7 H.L. 854; 45 L.J.Ch. 660; 34 L.T. 221; 24 W.R. 648, H.L.; 20 Digest (Repl.) 428, 1490.

*Smith v. Lucas* (1881), 18 Ch.D. 531; 45 L.T. 460; 30 W.R. 451; 28 Digest (Repl.) 553, 682.

*Zouch d. Abbot and Hallet v. Parsons* (1765), 3 Burr. 1794; 1 Wm. Bl. 575; 97 E.R. 1103; 28 Digest (Repl.) 486, 28.

*Holmes v. Blogg* (1818), 8 Taunt. 508; 2 Moore, C.P. 552; 129 E.R. 481; 28 Digest (Repl.) 508, 211.

H

*Corhead v. Mullis* (1878), 3 C.P.D. 439; 47 L.J.Q.B. 761; 39 L.T. 349; 42 J.P. 808; 27 W.R. 136; 28 Digest (Repl.) 504, 200.

*Ditcham v. Worrall* (1880), 5 C.P.D. 410; 49 L.J.Q.B. 688; 43 L.T. 286; 44 J.P. 799; 29 W.R. 59; 28 Digest (Repl.) 504, 201.

*Dublin and Wicklow Rail. Co. v. Black* (1852), 8 Exch. 181; 7 Ry. & Can. Cas. 434; 22 L.J.Ex. 94; 20 L.T.O.S. 70; 155 E.R. 1310; 10 Digest (Repl.) 1205, 8425.

I

*Re Vardon's Trusts* (1885), 31 Ch.D. 275; 55 L.J.Ch. 259; 53 L.T. 895; 34 W.R. 185; 2 T.L.R. 204, C.A.; 28 Digest (Repl.) 554, 703.

*Earl Beauchamp v. Winn* (1873), L.R. 6 H.L. 223; 22 W.R. 193, H.L.; 38 Digest (Repl.) 783, 12.

**Appeal** from a decision of the Court of Appeal (LINDLEY, BOWEN and KAY, L.JJ.), reported sub nom. *Carter v. Silber*, [1892] 2 Ch. 278, reversing a decision of ROMER, J., reported [1891] 3 Ch. 553.

On Oct. 16, 1883, a settlement was executed in contemplation of a marriage between Martin Albert Silber and Lady Lucy Vaughan. At the time of the execution Martin Albert Silber, the intending bridegroom was an infant; he did not come of age until Nov. 19, 1883, just over a month afterwards. By the deed his father Albert Marcius Silber covenanted to pay the trustees of the settlement £1,500 a year,

"during the life of Lady Lucy Vaughan and during such further period (if any) as there should be living any child or grandchild of the intended marriage."

The trustees were to pay the yearly sum of £1,500 to Martin Albert Silber during his life, or until he should become bankrupt. The other provisions were for the most part such as commonly found in settlements of this description. By the settlement it was further agreed and declared that if Martin Albert Silber then was, or if he or the trustees for the time being should become, entitled to any property under any settlement executed or to be executed by Albert Marcius Silber or under any appointment made or to be made in exercise of any power in any such settlement, contained, or to be contained, or under or by virtue of the will of Albert Marcius Silber, or the will of Amelia Silber his wife, or any codicil thereto or by virtue of the intestacy of either of them, then unless such settlement or appointment or will or codicil, should otherwise direct, such property if not thereby given to the trustees should be vested in them upon such trusts, for sale or conversion as might be necessary or expedient, and subject thereto upon the trusts, and with and subject to the powers contained with respect to the moneys assured by, or to become payable under the policy of insurance, except that the ultimate trust should be in favour of Martin Albert Silber instead of Albert Marcius Silber (his father)

"and the amount or value of all property so acquired by the trustees, should be deemed to fall within the operation of the clause or provision lastly thereinbefore contained, and be applicable, accordingly by way of satisfaction pro tanto at the rate aforesaid of the yearly sum so covenanted to be paid by Albert Marcius Silber;"

The effect of this provision was that if any money was left by will to Martin Albert Silber that money was to pass to the trustees of the settlement and be held by them upon the trusts of the settlement, and if it came under the will of Albert Marcius Silber the father, to the extent to which it was sufficient to do so it was to be held by the trustees in lieu of the obligation and covenant to pay the £1,500 a year. The settlement having been executed, the infant having come of age on Nov. 19, 1883, the father made a will leaving his son residuary legatee. The father died on May 14, 1887, and his will and codicil were proved in July, 1887. There was nothing which could be regarded as a repudiation by Martin Albert Silber until July, 1888.

*Sir Horace Davey, Q.C., Haldane, Q.C., and Ingpen* for the appellants.

*Farwell, Q.C., Hornell and Maidlow* for the respondents, the trustees of the settlement, and for the persons interested under it.

*Chadwyck-Healey, Q.C., and F. Thompson* for the respondent, the executrix and trustee under the will of the testator.

**LORD HERSCHELL, L.C.**, stated the facts and continued: It is not disputed that this contract executed and entered into by Martin Albert Silber was not absolutely void, but was voidable only—that is to say, that after he came of age it was as binding as if he had been of age at the time when he executed it, subject only to this, that the law enabled him to avoid his obligations provided he did so within a reasonable time. I did not understand the learned counsel for the appellants to dispute the proposition that the repudiation in order that the obligations may be got rid of must be within a reasonable time after the minor ceases to be

A a minor. The controversy has been as to what elements may be taken into account in determining whether more than a reasonable time has elapsed. In the present case, as I have shown your Lordships, there was no repudiation at all during the lifetime of the father. Down to the death of the father nothing had been done by the son; and it is impossible not to see that, if the son had repudiated in the lifetime of the father, it is in the highest degree probable that the disposition  
B made by the father would have been different from what it was, as it is certain that the position of those taking, or at all events one of those taking, under the will of the father was altered for the worse by reason of this repudiation, if the repudiation was effective.

The first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made  
C the repudiation. I think that is a proposition which it is absolutely impossible to regard seriously—that this covenant being binding unless he repudiates it within a reasonable time he is entitled to wait to see how in respect of any particular sum of money the covenant will operate, and when he has made up his mind whether with regard to that sum of money it will be beneficial to him or not, he can then, and not till then, be said to have his proper opportunity  
D of making the determination.

Then it is said that in considering whether a reasonable time has elapsed you must take into account the fact that he did not know what were the terms of the settlement and that it contained this particular covenant. He knew that he had executed a deed—he must be taken to have known that that deed though binding upon him could be repudiated when he came of age, and it seems to me  
E that in measuring a reasonable time whether in point of fact he had or had not acquainted himself with the nature of the obligations which he had undertaken is wholly immaterial—the time must be measured in precisely the same way whether he had so made himself acquainted or not. I do not say that he was under any obligation to make himself acquainted with the nature of the deed, which, having executed it as an infant, he might or might not at his pleasure  
F repudiate when he came of age—all I say is this, that he cannot maintain that the reasonable time when measured must be a longer time because he has chosen not to make himself acquainted with the nature of the deed which he has executed.

Having put aside those two contentions the only question comes to be, has a reasonable time been exceeded? The learned judges in the court below expressed their opinion that the period which elapsed, a period between four and five years,  
G was more than a reasonable time. It is not at all necessary for your Lordships to lay down what would have been a reasonable time in this case—it is enough to say that, in my opinion, it is impossible to hold that the learned judges in the court below in saying that more than a reasonable time had elapsed have in any way erred. I, therefore, move your Lordships that this appeal be dismissed with costs.

H **LORD WATSON.**—This is, in my opinion, a very plain case, so plain that I shall not feel justified in detaining the House by any comments upon either the fact or the law. The law gave this appellant the privilege of repudiating the obligations which he had undertaken during his minority within a reasonable time after he came of age. The law laid no obligation upon him; it merely  
I conferred upon him a privilege of which he might or might not avail himself as he chose. If he chooses to be inactive his opportunity passes away; if he chooses to be active the law comes to his assistance. In this case it humbly appears to me that the period of four years and eight months which he permitted to elapse before he took any steps in the matter cannot possibly be regarded as a reasonable time.

**LORD HALSBURY.**—I am of the same opinion. I should only like to add that I adopt the words of LINDLEY, L.J., who said in the court below :



"Whether the defendant could have repudiated the deed in five, or six, or nine months after he came of age I do not care to discuss; but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding." A

**LORD MACNAGHTEN.**—I agree. It seems to me that everyone who is of sufficient age and entitled to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument which he executes whether that instrument be voidable or not; and therefore I think it is immaterial to inquire whether Mr. Martin Silber knew or did not know the particular covenant in question. I do not think he is entitled to any indulgence on the ground that he was not in fact aware of the obligation which he undertook. If Mr. Silber is not entitled to any special indulgence on account of ignorance of his own deed there is an end of the case, because no one would seriously contend, apart from special circumstances, that a period of more than four years is a reasonable time for a man to consider whether he will repudiate a deed or not. B C

**LORD MORRIS.**—I concur. D

**LORD SHAND.**—I am also of the same opinion, and I shall only add a few words to what has been said by your Lordships. I think it is reasonable to require of a minor that immediately after attaining his majority he should make himself acquainted with the terms and effect of such deeds as he has executed in minority, and that if he fails to do so and the rights of others have in the meantime been affected he must thereby be held to have lost his right of repudiation. I think that KAY, L.J., has put the point which I desire to emphasise as applicable to the present case very clearly in these words: E

"The appellant knew that he had executed a settlement; he says now 'I did not know' or 'I did not remember' or 'It was not present to my mind,' which probably would be a more correct way of stating the result of his evidence, 'that there was in this settlement a covenant by me to settle after-acquired property.' But he knew he had executed the settlement; he knew he was receiving the benefits under the settlement; and if he did not choose to look into the settlement and see to what extent it bound him and any property that might come to him, that cannot be taken as an excuse, in my opinion, for his not having exercised his right of disaffirmance some years at least before he attempted to do so." F G

I think the importance of laying down the rule as it has been stated by your Lordships, is very clearly illustrated in this case by the circumstance that if the appellant had intimated, shortly after he reached majority, that he declined to be bound by the stipulation in this marriage contract of which he now complains, I am satisfied his father would have made an entirely different settlement from that which he left to regulate the distribution of his estate at the time of his death. H

*Appeal dismissed.*

Solicitors: Hicks, Arnold & Mozley; Gadsden & Treherne; Simpson & Cullingford; Arnold & Henry White. I

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

## THORNELOE v. HILL

[CHANCERY DIVISION (Romer, J.), January 12, 13, 15, 16, 22, 1894]

[Reported [1894] 1 Ch. 569; 63 L.J.Ch. 331; 70 L.T. 124;  
42 W.R. 397; 10 T.L.R. 209; 38 Sol. Jo. 201; 8 R. 718]

*Passing Off—Trade name—Assignment—Assignment of name for seven years—  
Right of assignor to use or assign name after expiration of seven years—  
Assignment in gross.*

John Forrest, a London watchmaker, inscribed the words "John Forrest, London" on the goods made by him. On his death in 1871 his executrix assigned his business and goodwill to C. & Co. who continued to use the name "John Forrest" on some of their watches. In 1874 C. & Co. granted to S. & Co. for seven years the sole right to use the name of "John Forrest" on watches made by them, and C. & Co. ceased to use the name for that period. After the expiration of the licence C. & Co. used the name on few, if any, of their watches. In 1890 they assigned all their estate and effects for the benefit of creditors, and in 1891 the trustee under the assignment assigned the business and goodwill to one Clemence. At the same time the trustee purported to assign to the plaintiff the name, title and goodwill of "John Forrest." The plaintiff claimed the sole right to make and sell watches with that name inscribed on them, and, in an action by him to restrain the defendant from selling watches so inscribed,

**Held:** (i) assuming that C. & Co. had acquired in 1871 the right to mark their goods with the name of "John Forrest," they had ceased to use the name for the period of the licence to S. & Co., and had never regained their right to it; (ii) as the assignment to the plaintiff in 1891 was not an assignment of the business of C. and Co., but merely of the right to use the name of "John Forrest"; it was, consequently, a mere assignment in gross, and as such was invalid; and, therefore, the action failed.

**Notes.** As to assignment of name, see 38 HALSBURY'S LAWS (3rd Edn.) 599, 600; and for cases see 43 DIGEST 270.

Case referred to:

(1) *Re Wood's Trade Mark*, *Wood v. Lambert and Butler* (1886), 32 Ch.D. 247; 55 L.J.Ch. 377; 54 L.T. 314; 2 T.L.R. 232; 3 R.P.C. 81, C.A.; 43 Digest (Repl.) 145, 71.

Also referred to in argument:

*Pinto v. Badman* (1891), 7 T.L.R. 317; 8 R.P.C. 181, C.A.; 43 Digest 209, 561.

*Potter v. Inland Revenue Comrs.* (1854), 10 Exch. 147; 23 L.J.Ex. 345; 18 Jur. 778; 2 W.R. 561; 156 E.R. 392; sub nom. *Re Stamp Duty on Potters' Deed*, 2 C.L.R. 1131; sub nom. *A.-G. v. Potter*, 23 L.T.O.S. 269; 43 Digest 79, 832.

*Churton v. Douglas* (1859), John. 174; 28 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur. N.S. 887; 7 W.R. 365; 70 E.R. 385; 43 Digest 78, 823.

*Llewellyn v. Rutherford* (1875), L.R. 10 C.P. 456; 44 L.J.C.P. 281; 32 L.T. 610; 43 Digest 90, 949.

*Dent v. Turpin*, *Tucker v. Turpin* (1861), 2 John. & H. 139; 30 L.J.Ch. 495; 4 L.T. 637; 7 Jur.N.S. 673; 9 W.R. 548; 70 E.R. 1003; 43 Digest 328, 1481.

*Ford v. Foster* (1872), 7 Ch. App. 611; 41 L.J.Ch. 682; 27 L.T. 219; 20 W.R. 818, L.J.J.; 43 Digest 231, 747.

**Action** by Richard Thorneloe, a watchmaker at Coventry, to restrain the defendant, Charles John Hill, another watchmaker at Coventry, from putting the name of "John Forrest" upon his watches.

From the year 1851 onwards a man called John Forrest carried on business A  
as a watch and chronometer maker at Clerkenwell, London, and stamped on the  
face of his watches "John Forrest, London," and on the back "John Forrest,  
chronometer maker to the Admiralty, London, E.C." On Feb. 15, 1871, John  
Forrest died, and by an indenture of June 12, 1871, his administratrix, Georgiana  
Leitch, assigned to persons trading under the name of Carley & Co., at 30, Ely  
Place, London, B

"all that the trade and goodwill and other the interest of the said [adminis-  
tratrix] in the business of a watchmaker carried on by the said John Forrest,  
deceased, and all the benefit and advantage thereof. . . ."

Carley & Co. never carried on business under the name of "John Forrest" or  
at any house or in any street where John Forrest ever carried on business. They C  
used the name up to February, 1874, by placing it on some watches which they  
sold to James Edey, of Peebles. On Feb. 7, 1874, Carley & Co. purported to  
grant to Henry Stuart & Co., Ltd., of Liverpool, the sole right to make watches  
with the name of "John Forrest" thereon for the term of seven years from that  
date. Accordingly, during these years Henry Stuart & Co., in the course of  
their watchmaking business, manufactured and sold watches with the above- D  
mentioned inscriptions thereon; and Carley & Co. ceased to put the name "John  
Forrest" on any of their watches. After the expiration of the seven years, and  
until their failure, Carley & Co. only put the name "John Forrest" on a few  
watches, so that there was no substantial sale of them.

About the year 1888 the plaintiff marked watches made by himself with the  
name "John Forrest, chronometer maker to the Admiralty, London, E.C." E  
On Aug. 14, 1890, Carley & Co. assigned the whole of their estate and effects to  
George Norton Read for the benefit of their creditors. On Feb. 28, 1891, Read  
assigned to one Clemence the business carried on by Carley & Co., and the goodwill,  
and the lease and premises at which Carley & Co. had carried on their business.  
Immediately afterwards, on the same Feb. 28, 1891, Read purported to assign,  
so far as he lawfully could, to the plaintiff, for a sum of £20, the name, title, and F  
goodwill of the business of John Forrest, trading under the style or title of "John  
Forrest, chronometer maker to the Admiralty, London, E.C." On the same day,  
the plaintiff issued a circular setting out that he had bought the name, title, and  
goodwill of "John Forrest," and that no authority existed in any other person than  
himself to register or use the said name. On the back of this circular was printed  
the address, G

"15, Northampton Square, Clerkenwell, London, E.C. Bought of John Forrest,  
wholesale watch manufacturer and chronometer maker to the Admiralty,  
established a century."

The plaintiff did not claim to be chronometer maker to the Admiralty. The  
defendant also sold watches at Coventry, stamped with "Forrest," "John Forrest," H  
and "John Forrest, London," and by advertisements and invoices represented  
that he was the said John Forrest, or his successor in business. The plaintiff  
claimed an injunction to restrain the defendant from so doing.

*Sir Richard Webster, Q.C., and Sebastian for the plaintiff.*

*Fletcher Moulton, Q.C., and Willis Bund for the defendant.*

*Cur. adv. vult.* I

January 22, 1894. **ROMER, J.**, read a judgment in which he stated the  
facts, found on the evidence that there was a wholly unsubstantial sale of "John  
Forrest" watches by Carley & Co. after the termination of the seven years' licence,  
and he continued: Assuming that the assignment to the plaintiff could be said to  
pass anything, having regard to the prior assignment to Clemence, it is clear  
that it could only pass the right to use the name "John Forrest" as a thing in  
gross, wholly unconnected with any real or substantial business. It is under this



**A** assignment that the plaintiff claims. No doubt the plaintiff, who was and is a watch manufacturer at Coventry, ventured this small sum of £20 for such right to the name of John Forrest as Read might be able to assign, because he had some experience in the name of John Forrest. That experience was derived from the fact that prior to the failure of Carley & Co., and without any leave either sought or given, he had made for four different customers watches with the words **B** "John Forrest, London," put upon them by their directions. The plaintiff never has carried on business in London, or under the name "John Forrest," nor has he, since the so-called assignment to him, ever used the name except by placing it upon some of his watches.

Under these circumstances, has the plaintiff the right contended for by him? I think not, and for the following reasons. Carley & Co. undoubtedly bought **C** the goodwill of John Forrest's business. Speaking generally, a purchaser of a business, if he continues it, has the right to use the trade name and trade marks of the business in any way he pleases which is not calculated to deceive. In particular, as a rule, the purchaser may mark goods made by him in the course of that business with the name of the vendor, although the vendor, or his workmen, did not make or assist in making such goods, and by so marking the goods **D** the purchaser would not be considered as doing that which was calculated to deceive his customers or the public. The reason of that is, that in most cases, and especially where the purchaser is continuing the business in the vendor's name, the mark might fairly be held to be only a representation that the goods were manufactured in the course of the business without any representation as to the persons by whom that business was being carried on, and there would be no substantial risk of deception. But in cases where deception would arise, or would probably **E** arise, from the marking of the vendor's name, or from the way in which it was marked, then the marking would be fraudulent, and the purchaser could not be heard to say, after a course of such fraudulent marking, that thereby his goods so marked had come to represent goods made by him as the vendor's successor in business. For instance, when the goods sold in a business are of an artistic **F** character, and during the vendor's time acquired their reputation and depended for their value upon his personal skill, then, if his retirement from the business were kept secret, a purchaser of his business would not be entitled to sell the goods not made by the vendor marked with his name.

I will assume in the present case, in favour of the plaintiff, that until Feb. 7, 1874, the watches made by Carley & Co., and marked by them with John Forrest's name, **G** were rightly so marked, and that up to that date they could honestly say that watches so marked represented goods made either by John Forrest or by his successors in business. I say I will assume this, as I wish to guard myself from the supposition that I so decide having regard to the facts, and in particular to the fact that Carley & Co. marked their watches not only with the words "John Forrest, London," but also with the description "John Forrest, chronometer **H** maker to the Admiralty." I think that description was marked in order to set forth the personal qualification of the maker and as a matter of importance, and in order to impress those into whose hands the watches should come with the idea that the watches were made by or under the supervision of one holding the responsible position of chronometer maker to the Admiralty. Even if Carley & Co. could justify their marking of the name of John Forrest on the ground **I** that it only meant themselves as the successors of John Forrest, I do not see how they could at the same time with propriety identify themselves with the description of chronometer makers to the Admiralty when they were nothing of the kind.

But, passing this over, and on the assumption I have mentioned, how did matters stand on the expiration of the seven years' licence? During these seven years Henry Stuart & Co., Ltd., were expressly authorised by Carley & Co. to manufacture and sell watches stamped with the name of "John Forrest, London." That company, who carried on business in their own name, were not John Forrest

or successors in the business of John Forrest, and were carrying on business in Liverpool, and not in London, and this to the knowledge of Carley & Co. How, after that, could Carley & Co. be heard to assert that the name of "John Forrest, London," on watches, still represented and meant that the watches were made either by John Forrest or by his successors in business? So to assert would be to admit that they had authorised the Liverpool company to commit a fraud on the public. The deed of Feb. 7, 1874, did not assign or purport to assign any business or any part of the business of Carley & Co. to the Liverpool company. It was a mere grant of a licence to use the name of John Forrest, and I need scarcely say that, apart from the other objections to the licence purported to be granted, a trade name or mark cannot validly be assigned in gross. When the licence expired, Carley & Co., who had ceased during the seven years to use the name "John Forrest" in any way whatever in their business, had, in my opinion, lost any right they might previously have had to say that, any person marking watches "John Forrest" thereby represented that they were watches manufactured by them or in the course of their business: *Re Wood's Trade-mark, Wood v. Lambert and Butler* (1), and in particular the observations of LINDLEY, L.J. (32 Ch.D. at p. 260).

This being the position of affairs at the end of the licence, certainly Carley & Co. did not by the time of their failure regain any right, even if they could possibly have done so, for, as I have pointed out, there was in the meantime no substantial manufacture or sale by them of watches marked. And if Carley & Co. at the date of their failure had no such right, they could not assign it to Read, nor could Read assign it to the plaintiff. And if Carley & Co. had no such right at the time of their failure, they could not have then obtained an injunction against the defendant for stamping watches with the name "John Forrest," nor could the plaintiff acquire through them the right to such an injunction, even if he had acquired all their business, for all that the defendant is doing that can be complained of by the plaintiff is marking his watches with John Forrest's name. That is, in my opinion, a very improper proceeding, because it is a fraud on the public, but it does not enable the plaintiff to support this action. To entitle the plaintiff to an injunction he must have been able to establish (there being no question of trade mark) that such marking by the defendant was calculated to deceive the public or customers into the belief that the goods so marked were goods made in the course of the business belonging to the plaintiff. And this he could not do for the reasons I have pointed out.

But the matter does not stop there. Even assuming that Carley & Co., or Read as their trustee, could, if no assignment had been made, have restrained the defendant, the plaintiff, who, in my opinion, can only claim to be a mere assignee in gross of the right to the name "John Forrest," cannot sue the defendant. The plaintiff is in no real or true sense an assignee of the business of Carley & Co. or of any severed or severable part of it. The wording of the so-called assignment to him is relied on by him, and in particular the use of the word "goodwill." But the words used meant nothing more than that Read purposed to transfer, if and so far as he could, to the plaintiff, the right to the mere name "John Forrest," and such advantages, if any, as could be said to attach to such a right. As I have before pointed out, the right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public, nor can any advantages whatever as against the public attach to any attempted assignment of the sort.

Lastly, I should point out that, ever since the death of John Forrest, Carley & Co. and those claiming through them have never used the name "John Forrest" except by stamping it on goods—that is to say, as a trade mark. They could not insist that it was or is a trade mark or claim rights on that ground for many reasons, one of which is, that they have never registered or applied it under the Trade Marks Acts; and, not being able to do this, still less could or can they do what in substance the plaintiff is seeking to do in this action—namely, treat a

- A name as being property in itself which gives a right of action against any person using the name without their permission, wholly irrespective of any other consideration. I need not deal with further defences raised by the defendant. I have stated sufficient to show why, in my judgment, the action should be dismissed, and I accordingly dismiss it. But, having regard to the conduct, or rather misconduct, of the defendant in relation to his use of the name "John Forrest,"
- B I dismiss the action without costs.

Solicitors: *A. H. Arnould & Son*, for *Buller & Cross*, Birmingham; *Crowders & Vizard*, for Messrs. *Browetts*, Coventry.

[Reported by G. MACAN, Esq., Barrister-at-Law.]

C

D

## Re BADHAM. Ex Parte PALMER

[QUEEN'S BENCH DIVISION (Vaughan Williams, J.), August 8, 9, 1893]

[Reported 69 L.T. 356; 9 T.L.R. 646; 37 Sol. Jo. 720;  
10 Morr. 252; 5 R. 521]

- E Bankruptcy—Fraudulent preference—Payment to creditor after petition—Protected transaction—Creditor without notice of act of bankruptcy—Transaction contrary to policy of bankruptcy law—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 48, s. 49.

- F A payment to a creditor by a debtor after the presentation of a petition against the debtor is not a fraudulent preference within s. 48 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 44], the section only applying where a petition is presented after the payment in question. In such a case, where there has been a disposition of money which prima facie belonged, not to the bankrupt, but to the trustee, the transaction, although the creditor has had no notice of any act of bankruptcy, is contrary to the policy of the bankruptcy law and the court will not give protection to it under s. 49 of the Act of 1883
- G [now s. 45 of the Act of 1914].

**Notes.** The Bankruptcy Act, 1883, was repealed by the Bankruptcy Act, 1914, s. 8 of the 1883 Act corresponding with s. 44 of the 1914 Act, and s. 49 of the 1883 Act corresponding with s. 45 of the 1914 Act.

- H Distinguished: *Re Dunkley, Ex parte Waller*, [1905] 2 K.B. 683. Not Followed: *Re Seymour, Trustee v. Barclays Bank, Ltd*, [1937] 3 All E.R. 499. Referred to: *Re Hirth, Ex parte Official Receiver* (1899), 68 L.J.Q.B. 287; *Re Rooker, Ex parte Rooker*, [1916] W.N. 298.

As to avoidance of preference, see 2 HALSBURY'S LAWS (3rd Edn.) 553 et seq.; and for cases see 5 DIGEST (Repl.) 916. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

- I Case referred to in argument:

*Butcher v. Stead* (1875), L.R. 7 H.L. 839; 44 L.J.Bey. 129; 33 L.T. 541; 24 W.R. 463, H.L.; 5 Digest (Repl.) 963, 7810.

**Motion** for a declaration that two payments by a bankrupt of £50 each to Wilson, Pease & Co. constituted fraudulent preferences and for an order that the sums should be paid back to the trustee in bankruptcy.

On Aug. 5, 1892, a petition was presented against the debtor, on which, on Sept. 5, 1892, a receiving order was made. On Aug. 13 and Sept. 13 the debtor



made two payments of £50 each to Wilson, Pease & Co., of Middlesbrough, with whom the debtor had had for many years business transactions. A

By s. 48 of the Bankruptcy Act, 1883 :

"Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy." B C

By s. 49 of the Bankruptcy Act, 1883 :

"Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy (a) any payment by the bankrupt to any of his creditors . . . provided that both the following conditions are complied with, namely, (i) the payment . . . takes place before the date of the receiving order; and (ii) the person (other than the debtor) to . . . whom the payment . . . was made . . . has not at the time of the payment . . . notice of any available act of bankruptcy committed by the bankrupt before that time." D

*Macaskie* for the trustee.

*Yate Lee* for Wilson, Pease & Co. E

*Cur. adv. vult.*

Aug. 9, 1893. **VAUGHAN WILLIAMS, J.**, read the following judgment. This was a motion for a declaration that two payments of £50 each, made by the bankrupt on Aug. 13 and Sept. 5 to Wilson, Pease & Co. constituted a fraudulent preference by the bankrupt of Wilson, Pease & Co. over his other creditors, and for an order that Wilson, Pease & Co. should forthwith pay over the two sums of £50 to the trustee in bankruptcy. I am going to make the order asked for in this case, but not quite upon the ground asked for in the notice of motion, for I consider that I may, without doing an injustice, treat the notice of motion as amended. All parties have come here to try the question whether Wilson, Pease & Co. are entitled to retain these two sums of £50, and I am going to decide that they are not so entitled. F G

The motion is based on what is known as the fraudulent preference section, i.e., s. 48 of the Bankruptcy Act, 1883. The facts are really not in dispute. There is no doubt that the bankrupt was unable to pay his debts and made these payments to prefer Wilson, Pease & Co. It was, however, said that s. 48 did not apply, as the closing words of the section make it only apply where a bankruptcy petition is presented within three months after the payments in question, and it was said that, as the payments in question were made after the presentation of the petition it was quite impossible for the section to apply; in other words, the section has no application, except to cases where the petition is subsequent in date to the payments sought to be set aside, and here it was prior in date. I quite agree. I should have liked to have found a way out of it, but I cannot do so, and, therefore, so far as s. 48 is concerned, this is not a fraudulent preference. H I

Let us look, however, at the state of things here. The trustee's title relates back to the petition, these payments were made after the petition, and, therefore, they were prima facie payments by the bankrupt to the creditors out of the moneys belonging to the trustee, and not out of his own moneys. In answer to this it was said that the transaction was covered by s. 49, which is known as the protective section. It was said that this payment was made before the receiving

**A** order, and no one alleges that Wilson, Pease & Co. had notice of any act of bankruptcy. I agree; at the same time I am going to hold that Wilson, Pease & Co. are not entitled to the benefit of s. 49. I should first point out that an argument was addressed to me based on s. 95 of the Bankruptcy Act, 1869, which provided that:

**B** “(1) any . . . payment of money . . . made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication,”

**C** was protected. My attention was called to the fact of the omission of the words “good faith” from s. 49 of the Act of 1883, and I was told that, therefore, protection was to be given to payments made in bad faith. I shall not hold so, and do not adopt the argument. To return, then, to what I was saying. Section 48, which is the fraudulent preference section, tells us under what circumstances the law will avoid a fraudulent preference, and I agree with counsel for Wilson, Pease & Co. that I have no right to avoid a payment as a fraudulent preference under other circumstances than those defined in the section.

**D** I am not now asked to avoid a payment as a fraudulent preference; what has happened is, that there has been a disposition of money which *prima facie* did not belong to the bankrupt, but to his trustee, and I am asked to protect that transaction. I deny that, because s. 48 defines the circumstances under which I can avoid payments as fraudulent preferences, that, therefore, I am to give protection to all cases outside the section; that is to say, that to every case which does not come within s. 48 I am bound to give the benefit of the protection afforded by s. 49. I am never bound to give the benefit of the protective section to any transaction which is contrary to the policy of the bankruptcy law, and this transaction was one of that kind. LORD MANSFIELD one hundred years ago laid down the law as to fraudulent preference, but because the law as to fraudulent preference was subsequently embodied in a section of the Bankruptcy Act, 1869, this does not do away with the fact that the present transaction was a common law fraud. I am, therefore, not bound to give the benefit of the protective section to any such transaction. In my opinion, these moneys were the property of the trustee, and s. 49 does not enable Wilson, Pease & Co. to keep them.

**G** *Application allowed.*

Solicitors: *McKenna & Co.; Hollams, Son, Coward & Hawksley.*

[*Reported by W. B. YATES, Esq., Barrister-at-Law.*]

## SWYNY v. HARLAND

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Davey, L.JJ.), February 12, 1894]

[Reported [1894] 1 Q.B. 707; 63 L.J.Q.B. 415; 70 L.T. 227; 42 W.R. 297; 10 T.L.R. 276; 38 Sol. Jo. 256; 9 R. 210]

*Solicitor—Undertaking—Enforcement—Stay of execution upon terms—Payment of costs to solicitor upon undertaking to repay if appeal successful—Appeal successful, but execution stayed pending further appeal.*

In an action before an official referee the plaintiff was successful and the defendant appealed to the Divisional Court. A stay of execution pending the appeal was granted upon the terms that the defendant would pay into court the amount for which judgment had been given against him, and also would pay the costs to the plaintiff's solicitor upon his personal undertaking to repay the same if the appeal was successful. The appeal before the Divisional Court was successful, but execution was stayed pending an appeal by the plaintiff to the Court of Appeal. The defendant applied to the Court of Appeal for an order that the plaintiff's solicitor should pay the costs in accordance with his undertaking.

**Held:** as the appeal to the Divisional Court had been successful, the event had happened which made the undertaking enforceable, and the fact that a stay of execution had been granted by the Divisional Court did not affect the undertaking.

**Notes.** As to terms on which a stay of execution is granted, see 16 HALSBURY'S LAWS (3rd Edn.) 34, 35; and for cases see 21 DIGEST (Repl.) 540, 541.

Cases referred to:

- (1) *Re Hilliard, Ex parte Smith* (1845), 1 New Pract. Cas. 185; 2 Dow. & L. 919; 14 L.J.Q.B. 225; 5 L.T.O.S. 58, 59; 9 Jur. 664; 42 Digest 330, 3726.
- (2) *Re Woodfin and Wray* (1882), 51 L.J.Ch. 427; 30 W.R. 422; 42 Digest 336, 3795.

**Application** by the defendant that the plaintiff's solicitor might be ordered to comply with an undertaking he had given for the repayment of costs pursuant to an order of the Court of Appeal.

The action was tried before an official referee, who gave judgment for the plaintiff for a large amount, and for the plaintiff upon the defendant's counterclaim. The defendant asked for a stay of execution pending an appeal to a Divisional Court, which was refused both by the official referee and by the Divisional Court. The defendant appealed to the Court of Appeal, where an order was made that execution should be stayed pending the appeal to the Divisional Court, upon payment into court of the amount for which judgment had been given, and payment of the costs, as soon as taxed, to the plaintiff's solicitor upon his personal undertaking to repay the same if the appeal proved successful. The defendant complied with these terms. Upon the hearing of the appeal in the Divisional Court, the judgment of the official referee in favour of the plaintiff was set aside, and judgment entered for the defendant upon the claim and counterclaim. Upon the application of the plaintiff, the Divisional Court granted a stay of execution pending an appeal to the Court of Appeal. The defendant applied to the Court of Appeal for an order upon the plaintiff's solicitor to repay to the defendant the costs which had been paid to him upon the above undertaking.

*Joseph Walton, Q.C.*, for the defendant.

*Bigham, Q.C.*, for the plaintiff.

**LORD ESHER, M.R.**—The undertaking given by the plaintiff's solicitor in this case was given to the court. The solicitor could not have been obliged to give this



**A** undertaking, but he elected to give it for the good reason that by giving it he got the amount of his costs paid over to him by the defendant. The only question then is: What is the effect of this undertaking? The order applied only to the appeal which was then pending before the Divisional Court. In that appeal the defendant was successful. The mere fact that there has been a stay of execution upon the judgment of the Divisional Court upon the appeal before them does not make it an imperfect judgment in favour of the defendant upon that appeal. I think that the order asked for must be made.

**LOPES, L.J.**—I am of the same opinion. Applications to stay proceedings are frequently made to us in this court, and are often granted upon the terms as to costs that they shall be paid by the appellant to the respondent's solicitor upon his personal undertaking to repay such costs if the appeal is successful. The solicitor is not obliged in such a case to give the undertaking; if he does, it is a voluntary act upon his part, and he gives the undertaking in order to obtain payment of the costs. If he does give the undertaking, he is an officer of the court who voluntarily gives an undertaking, and on the faith of that undertaking execution is stayed upon those terms, and the application is granted. That undertaking is given in the face of the court, and is equivalent to an undertaking given to the court. What then are the consequences? If the undertaking is given to the court, the party in whose favour it is given may, if he has succeeded in his appeal, apply to the court to commit or attach the solicitor if he does not comply with the terms of his undertaking. In this case the application is not to commit or attach, but that the solicitor may be ordered to repay these costs. The appeal to the Divisional Court was successful. It is true that a stay of execution was granted by the Divisional Court, but the appeal was none the less successful. Therefore, the event has happened which makes this undertaking enforceable. The solicitor must repay these costs.

**DAVEY, L.J.**—I have no doubt whatever that, when a solicitor in a cause gives an undertaking in his character as a solicitor, the court will enforce such an undertaking by committal or attachment. There is no distinction between an undertaking as to damages, and an undertaking to repay money paid over to him. The court has, in my opinion, jurisdiction to enforce such an undertaking in a summary way. It is so stated in CHITTY'S ARCHBOLD'S PRACTICE (14th Edn.) p. 119:

**G** "Where a solicitor in an action gives an undertaking in his character of a solicitor, the court or a judge will enforce such undertaking or punish the breach of it in a summary way."

*Re Hilliard, Ex parte Smith* (1) is an authority for that statement, and so also is *Re Woodfin and Wray* (2), in which an undertaking by solicitors to pay an agreed sum for costs as a condition of obtaining the release of their client from prison, was enforced by the court in a summary way, and an order made upon the solicitors to pay the costs which they had undertaken to pay. I am of opinion, therefore, that this application must be granted.

*Application granted.*

Solicitors: *Downing, Holman & Co.; Day & Russell.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

## FLEGG v. PRENTIS

[CHANCERY DIVISION (Stirling, J.), April 28, 1892]

[Reported [1892] 2 Ch. 428; 61 L.J.Ch. 705; 67 L.T. 107]

*Execution—Charging order—Reversionary and contingent interest in personality.*

The court has no jurisdiction upon the application of a judgment creditor, who has obtained an order appointing him receiver of the debtor's reversionary and contingent interests in personality, to make a declaration of charge in his favour upon such interests.

**Notes.** Followed: *De Peyrecave v. Nicholson* (1894), 71 L.T. 255. Referred to: *Re Potts, Ex parte Taylor*, [1893] 1 Q.B. 648; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Re No. 39, Carr Lane, Acomb, Stevens v. Hutchinson*, [1953] 1 All E.R. 699.

As to equitable execution, see 16 HALSBURY'S LAWS (3rd Edn.) 104 et seq.; and for cases see 21 DIGEST (Repl.) 772 et seq.

Case referred to:

- (1) *Westhead v. Riley* (1883), 25 Ch.D. 413; 53 L.J.Ch. 1153; 49 L.T. 776; 32 W.R. 273; 21 Digest (Repl.) 773, 2587.

Also referred to in argument:

*Thomas v. Cross* (1865), 2 Drew. & Sm. 423; 6 New Rep. 18; 34 L.J.Ch. 580; 12 L.T. 293; 11 Jur.N.S. 384; 13 W.R. 647; 62 E.R. 682; 21 Digest (Repl.) 769, 2546.

*Fuggle v. Bland* (1883), 11 Q.B.D. 711, D.C.; 21 Digest (Repl.) 776, 2615.

*Levasseur v. Mason and Barry*, [1891] 2 Q.B. 73; 60 L.J.Q.B. 659; 64 L.T. 761; 39 W.R. 596; 7 T.L.R. 436, C.A.; 21 Digest (Repl.) 772, 2581.

*Re Shephard, Atkins v. Shephard* (1889), 43 Ch.D. 131; 59 L.J.Ch. 83; 62 L.T. 337; 38 W.R. 133; 6 T.L.R. 55, C.A.; 21 Digest (Repl.) 772, 2580.

**Action** for a declaration that the plaintiff was entitled to a charge on certain property and interests belonging to the defendant.

Cyrus Legg, who died on Sept. 19, 1889, by his will, dated June 5, 1886, devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell and convert, and to invest the proceeds thereof, upon trust for the benefit of the children of his late sister, Mary Ann Prentice, in the events and under the circumstances therein mentioned. On the death of the testator, the defendant, as one of the children of M. A. Prentice, became entitled to certain reversionary and contingent interests under the will. On Sept. 5, 1890, the plaintiff recovered judgment against the defendant for £85 8s. 4d. in an action in the Queen's Bench Division, and was subsequently appointed receiver of the defendant's interests under the will. Those interests being of a contingent and reversionary nature, the plaintiff had been unable to obtain payment of his judgment debt. He, therefore, brought the present action, claiming a declaration that under and by virtue of his judgment and of the receivership order he had a charge upon the defendant's shares and interests under the will for the sum of £85 8s. 4d., with interest and costs; that that charge might be enforced by the sale of such shares and interests; and that the proceeds of the sale might be applied in payment thereof.

*Greig* for the plaintiff.

*J. Henderson* for the defendant.

**STIRLING, J.**—This is an action without precedent. The plaintiff is a judgment creditor, who has issued execution against the defendant, has been unable to recover, and has obtained an order appointing himself receiver of the defendant's interests under a will. Those interests are reversionary and contingent interests in real and personal estate given upon trust for sale and conversion. Therefore, in the eye of

**A** the court, the fund of which the plaintiff has been appointed receiver is personal estate. It is admitted that s. 13 of the Judgments Act, 1888 [rep. Law of Property Act, 1925: see now Administration of Justice Act, 1956, ss. 34, 35, 36], does not apply, as it is confined to land, and the plaintiff accordingly has no remedy by petition under the Judgments Act, 1864 [rep. Administration of Justice Act, 1956] and cannot get a sale. Under these circumstances he seeks to realise the property

**B** by obtaining a declaration that he has a charge upon it, and that it ought to be sold and the proceeds applied in payment of his debt.

I cannot see my way to assist the plaintiff, although I would willingly do so if I could. He has got a receivership order, under which, when the property falls into possession, he will be entitled to receive both income and capital on the footing of equitable execution, and further than that he cannot go at present. Previously

**C** to the Supreme Court of Judicature Act, 1873, in order to obtain the appointment of a receiver it was necessary for the judgment creditor to institute a fresh action; now it can be obtained in the same action as that in which judgment is recovered, but no case has been produced in which the court has gone on to declare a charge. Indeed, in *Westhead v. Riley* (1), CHITTY, J., declined to make any declaration of a charge, though asked to do so, thinking no doubt that he had no power. By s. 13

**D** of the Judgments Act, 1888, a charge upon the real estate of a judgment debtor was for the first time created, and it was to take effect in favour of a judgment creditor who had entered judgment. But there is no corresponding enactment applicable to personal estate. I cannot see my way to give judgment in the plaintiff's favour, for I am of opinion that I should be exceeding the jurisdiction I possess if I were to declare and enforce a charge in this case. The law may be

**E** defective, but I cannot extend it. The action must be dismissed, but the defendant's costs will be set off against the debt due by him to the plaintiff.

Solicitors: *W. M. Flegg; A. A. Timbrell.*

[*Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.*]















